

Missouri Law Review

Volume 7
Issue 1 *January 1942*

Article 10

1942

Comments

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Comments, 7 MO. L. REV. (1942)

Available at: <https://scholarship.law.missouri.edu/mlr/vol7/iss1/10>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Comments

CRIMINAL LAW—DECISIONS BY THE MISSOURI SUPREME COURT DURING THE YEAR 1940*

LATNEY BARNES

During the year 1940 the Missouri Supreme Court handed down forty-eight decisions involving violations of the state's criminal code or related to the administration thereof. Two represented unsuccessful appeals by the state from judgments quashing informations charging violations of the "filled milk" statutes;¹ two were cases ousting a prosecuting attorney² and a sheriff³ from their respective offices for failure to perform their duties in enforcing the criminal laws; one was a *habeas corpus* proceeding limited to a denial of bail to one charged with murder in the first degree where the court concluded that from the evidence offered at the time of the hearing on the application for bail there was "proof evident and presumption great";⁴ one determined the proper judge to pass upon a motion to set aside a parole granted by a special judge after the regular judge had been sworn off of the bench;⁵ and one determined the chronological order in which a parolee whose parole had been revoked for the commission of a second crime should serve the sentences.⁶ The remaining forty-one cases represent appeals from convictions in felony cases. Only two were reversed outright—one on the evidence and one on the construction of the words of a statute—six were reversed and remanded, and the remaining thirty-three, or eighty per cent, were affirmed. Numerically the cases present a further decline in the number of cases decided yearly by the court. During the previous year, 1939, the court had decided forty-

*This comment should be read with the symposium on *The Work of the Missouri Supreme Court for the Year 1940* (1941) 6 Mo. L. Rev. 381.

1. *State v. Hershman*, 346 Mo. 892, 143 S. W. (2d) 1025 (1940), and *State v. Gilden*, 143 S. W. (2d) 1027 (Mo. 1940), holding defective the informations which failed to charge that the product sold was "in imitation or semblance of milk." While the offense charged was a misdemeanor, since the constitutional validity of the statutes involved were challenged, the jurisdiction to hear the appeal was in the supreme court.

2. *State ex Inf. McKittrick v. Graves*, 346 Mo. 990, 144 S. W. (2d) 91 (1940).

3. *State ex Inf. McKittrick v. Williams*, 346 Mo. 1003, 144 S. W. (2d) 98 (1940).

4. *Ex parte Johnson*, 142 S. W. (2d) 651 (Mo. 1940).

5. *State ex rel. Wilkerson v. Kelly*, 346 Mo. 416, 142 S. W. (2d) 27 (1940). See a further discussion of this case in the principal article.

6. *Herring v. Scott (habeas corpus)*, 142 S. W. (2d) 670 (Mo. 1940), also noted further in the principal article.

eight cases; but contrast this with the 164 cases decided in 1927 and the average of 89.2 for the ten year period from 1927 to 1936.⁷

I. THE APPEAL

A. *Jurisdiction of the supreme court on appeal*

Even though the offense charged be a misdemeanor, where the constitutionality of the statute is challenged, the appeal lies to the supreme court, and where the court can and does dispose of the case on other grounds, it need not pass on the constitutional question raised even though that be the only ground for its jurisdiction.⁸

B. *The application for an appeal*

Section 4130, Missouri Revised Statutes 1939,⁹ requires that a defendant desiring to appeal shall "file his written application for such appeal." In *State v. Wilson*,¹⁰ the defendant had filed an affidavit for an appeal conforming to the requirements of the code of *civil* procedure in relation to appeals, stating in part "Wilson . . . makes oath and says that the appeal prayed for in the above entitled cause is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the judgment and decision of the court." The attorney general contended that the affidavit filed did not constitute a "written application" required by the statute, did not purport to contain a prayer for an appeal, and that the language in the affidavit was phrased in the past tense as if at some previous stage a prayer or application for the appeal had been made. The court ruled, however, that the affidavit filed constituted a substantial compliance with the requirement of the criminal statute and overruled the state's motion to dismiss the appeal. A contrary ruling would have seemed unduly technical and oppressive.

C. *Questions presented for review*

In *State v. Cantrell*,¹¹ defendant appealed from his conviction but filed no bill of exceptions in the trial court. The clerk of the circuit court, however, sent to the supreme court what purported to be copies of the motion for new trial, instructions, and other papers said to have been on file in his office. The court ruled that it could consider only the record proper, and that the motion for new trial, instructions, etc., not having been properly preserved in a properly authenticated and filed bill of exceptions, did not constitute a part of the record proper and therefore were not subject to review.

7. See Hyde, *The Work of the Missouri Supreme Court for the Year 1938 (Court Organization)* (1939) 4 Mo. L. REV. 348.

8. See note 1, *supra*. See also Taylor v. Dimmitt, 336 Mo. 330, 78 S. W. (2d) 841 (1934).

9. MO. REV. STAT. (1929) § 3740.

10. 345 Mo. 862, 136 S. W. (2d) 993 (1940).

11. 346 Mo. 790, 142 S. W. (2d) 1057 (1940).

II. THE TRIAL

A. *The jury*

In examination of prospective jurors on the *voir dire* in *State v. Ring*,¹² a prosecution for homicide occurring at a tavern at which both the defendant and the deceased had been guests, one of the jurors replied that he was "just prejudiced against those kind of places" and "prejudiced against that sort of thing." The trial court denied the defendant's challenge for cause. The supreme court upheld the ruling, stating that the juror had never manifested any prejudice or antipathy toward the defendant personally—"only that hostility toward crime, as crime, and places where they think it has a tendency to be fostered, that is felt by all good men." Since both the defendant and the deceased had been guests at the night club, any feeling against one in attendance there would seemingly apply to all. The court ruled that the trial court had not abused its discretion in refusing to allow the challenge for cause.

In the trial of one charged with robbery it was not error for the court to sustain objections to questions put to the jury by the defendant's attorney, such as, "You are in a position to distinguish between assault and robbery, are you not?" and "You know the difference between assault and robbery?" Counsel may not implant in the jury's minds the idea that they should independently draw legal distinctions, for the jury must be guided by the court's instructions on such questions.¹³ The questions propounded were improper.

B. *The informations*

An information charging kidnapping and concluding "contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State, and contrary to Section No. 4020, R. S. 1929" was attacked on the ground that it did not comply with the requirement of Article VI, Section 38 of the Constitution of Missouri, requiring that all indictments shall conclude, "against the peace and dignity of the State."¹⁴ The offending words following "against the peace and dignity of the State" were rejected as surplusage, and the information held valid.

In *State v. Quinn*,¹⁵ an information charging burglary of property belonging to "Phillips 66 Oil Company, a Corp." was held not defective even though it was shown that the true name of the corporation was "Phillips Petroleum Company." The court ruled that there was no fatal variance between the charge and the proof, and that the information was sufficiently certain to bar any further prosecution for the same offense.

In *State v. Bowdry*,¹⁶ a prosecution for obtaining a check by false pretenses,

12. 346 Mo. 290, 141 S. W. (2d) 57 (1940).

13. *State v. Ford*, 346 Mo. 882, 143 S. W. (2d) 289 (1940).

14. *State v. Ashworth*, 346 Mo. 869, 143 S. W. (2d) 279, 283 (1940).

15. 345 Mo. 855, 136 S. W. (2d) 985 (1940).

16. *State v. Derrington*, 137 S. W. (2d) 468 (Mo. 1940).

1942]

the court held that a charge that one "was induced to turn over and deliver to" the defendant a certain check does not charge that the party *did deliver* the check to the defendant, but where, as in the instant case, the information also charges that by means of the false representations the defendant "*obtained*" the check it is sufficient in that particular. The court overruled *State v. Phelan*,¹⁷ insofar as it is out of harmony with the instant case. In the *Phelan* case the court's opinion was limited to holding bad the charge "were induced . . . to sell and deliver" without considering or passing upon the effect of the words "did obtain and receive, etc." According to the instant case these last words, had the question been raised in the *Phelan* case, should have been held equivalent to the charge "and did sell and deliver."

C. Evidence

An objection by a defendant to the testimony of a witness whose name had not been endorsed on the information until he was called was held not entitled to consideration where he did not file an affidavit of surprise or motion to quash the information, and did not demand that he be given a reasonable time within which to meet the testimony.¹⁸ And where a defendant is charged with knowingly having received numerous articles of stolen property and the evidence discloses that some of the articles were received on one day and some the following day, the defendant is called upon to file a motion requiring the state to elect, and if he does so, and the state does elect, the defendant is not prejudiced.¹⁹

*State v. York*²⁰ holds that an accused is not entitled to impeach the credibility of a *state's* witness by showing that the witness was in jail and *charged with*, although not convicted of, robbery. It is to be noted that in four of the five cases cited by the court as upholding this rule of law the situation arose in a different manner.²¹ In those cases the *state* was attempting to discredit witnesses *called by the defendant* which it had charged with but not yet convicted of crimes. In the instant case, however, the state has by its own act charged its own witness with crime. Shall it thereafter be heard to say that the charge brought by it is false and the witness' character and credibility unaffected thereby? It would seem that the defendant should have been allowed to assert this inconsistent position of the state in vouching for a witness by calling him to testify while at the same time charging him with crime. It would seem that the defendant should have been allowed to show the state's anomalous position with reference to the particular witness.

The court reaffirmed the old rules that conviction of statutory rape can be

17. 159 Mo. 122, 60 S. W. 71 (1900).

18. *State v. Derrington*, 137 S. W. (2d) 468 (Mo. 1940).

19. *Ibid.*

20. 142 S. W. (2d) 91 (Mo. 1940).

21. The fifth case cited by the court, *State v. Menz*, 341 Mo. 74, 106 S. W. (2d) 440 (1937), may also be distinguished from the instant case. There the state's witness was *charged with crime by another and different state* other than the state producing him as a witness.

sustained on the uncorroborated testimony of the prosecutrix;²² that conjecture, suspicion or surmise is not sufficient as a basis for a conviction of larceny;²³ and that the "utmost resistance" doctrine does not apply where the woman is put in fear of personal violence and her will thereby overcome—a consent induced by fear being no consent.²⁴

In *State v. Benson*,²⁵ a prosecution for homicide, where the defendant claimed self-defense and testified that the deceased had said to the defendant, "I didn't kill you the other time, I will now," and that he had in fact been shot once by the deceased several hours before the fatal shooting, it was error to admit testimony on the part of the state that the deceased had stated to a third person, not in the presence of the defendant, that the defendant had been shot while deceased and defendant were prowling in a garage, the testimony being hearsay, a mere narration of a past event, not part of the *res gestae* and not a dying declaration. No objection can be found with the ruling of the court.

Where insanity is interposed as a defense in a criminal prosecution, great latitude should be allowed by the trial court in an investigation of the subject, and evidence which would in any substantial way tend to show that the defendant's nervous organization was affected should be admitted, and even lay witnesses may express an opinion on insanity, based on facts ascertained from personal contact, conversation and the like, although such observations were not made for the purpose of forming an opinion as to the sanity of the person. But since Missouri does not recognize the defense of "volitional insanity" (which means that although the accused can distinguish between right and wrong, still he is unable to resist the impulse to commit the criminal act), a trial court did not err in excluding proffered testimony of a physician that he had treated the defendant 17 to 21 years before the trial, had never examined him since, but had seen the defendant off and on and had frequently passed the time of day with him, as to his opinion of defendant's mental condition, where the testimony was not offered to show that the defendant was insane, but only offered for the purpose of showing defendant was not a *normally minded person*, one of feeble intellect and weak intelligence.²⁶ The court further held that while there is a common-law presumption that an infant between the ages of 7 and 14 has no criminal capacity, there is no such presumption in favor of an adult of that *mental age*.

22. *State v. Lawson*, 136 S. W. (2d) 992 (Mo. 1940).

23. *State v. Wilson*, 345 Mo. 862, 136 S. W. (2d) 993 (1940). See also *State v. Schneiders*, 345 Mo. 899, 137 S. W. (2d) 439 (1940), holding evidence insufficient for a conviction of manslaughter arising from the death of a pedestrian struck by an automobile.

24. *State v. Moore*, 143 S. W. (2d) 288 (Mo. 1940).

25. 346 Mo. 497, 142 S. W. (2d) 52 (1940).

26. *State v. Jackson*, 346 Mo. 474, 142 S. W. (2d) 45 (1940). Note, however, that the Jackson case defines "volitional insanity" as meaning that although the accused can distinguish between right and wrong, still he is unable because of *mental disease* to resist, while *State v. West*, 346 Mo. 563, 142 S. W. (2d) 468 (1940), indicates that where the "irresistible impulse" is *due to a diseased mind*, it is, in effect, insanity.

D. *Instructions*

In view of the requirement of the statute²⁷ that the court, whether requested to do so or not, "must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict," it was error in a murder prosecution where there was evidence that the homicide was accidental to fail to instruct on accidental homicide even though such instruction was not requested by the defendant.²⁸ But an instruction given by the court which was correct as far as it went was good against a contention by a defendant that a broader instruction should have been given where the defendant did not request a broader instruction than the one given.²⁹ The court distinguished the case of *State v. Adler*,³⁰ where a broader instruction had been requested by the defendant but refused by the trial court. And in a murder prosecution where insanity was the sole defense, where there was nothing in the evidence that could be allowed to justify the "heat of passion" necessary to destroy the element of deliberation, the defendant was either guilty of murder in the first degree or not guilty by reason of insanity, and the trial court did not err in refusing to instruct on second degree murder.³¹ And it was held unnecessary to define the word "operate" in a prosecution for operating a motor vehicle while intoxicated, and where a defendant admitted on cross-examination two or three prior convictions the court was not called upon to instruct that such evidence should be considered only as affecting his credibility as a witness, absent such a request on the part of the defendant.³²

E. *The argument of counsel*

The failure of a co-indictee to testify after being produced and sworn by a defendant but not called to testify was held to be a legitimate matter for comment by the prosecuting attorney.³³ And it was held proper for a prosecuting attorney to state in argument that a witness for the defendant had deliberately stated a falsehood, the court appropriately remarking, "He cannot be expected to tell the jury that all of the defendant's witnesses were truthful."³⁴ But where the accused, *while under arrest*, answered only questions relating to his name, age

27. Mo. Rev. Stat. (1939) § 4070.

28. *State v. Crowley*, 345 Mo. 1177, 139 S. W. (2d) 473 (1940). Of course the point must properly be preserved in the motion for new trial. See *State v. Ray*, 225 S. W. 969, 973 (Mo. 1920).

29. *State v. Fultz*, 142 S. W. (2d) 39 (Mo. 1940). Defendant contended that an instruction on self-defense did not include his right to defend against *others* than the deceased and defendant had introduced evidence that two or three others followed deceased as deceased advanced upon defendant.

30. 146 Mo. 18, 47 S. W. 794, 796 (1898).

31. *State v. West*, 346 Mo. 563, 142 S. W. (2d) 468 (1940).

32. *State v. Davis*, 143 S. W. (2d) 244 (Mo. 1940).

33. *State v. Quinn*, 345 Mo. 855, 136 S. W. (2d) 985, 987 (1940). For a detailed discussion of the question see *State v. Greer*, 321 Mo. 589, 12 S. W. (2d) 87, 90 (1928).

34. *State v. Woods*, 346 Mo. 538, 142 S. W. (2d) 87 (1940).

and residence and thereafter refused to answer questions stating that he did not want to incriminate himself or someone else, his refusal to answer, being equivalent to silence, cannot be shown and the prosecuting attorney may not refer to it in his argument to the jury.³⁵ The court distinguished this situation from silence of an accused *when not under arrest*. Silence of an accused under such circumstances, when not under arrest, that only a guilty person would remain silent may be shown on the theory of an inferential admission against interest. After arrest, all duty to speak comes to an end.

In *State v. Willard*,³⁶ a prosecution for larceny, the attorney for the state, in the presence of the jury panel stated, "It doesn't make any difference who is taken off (the jury panel). We would as soon try the case before any twelve." Defendant moved to quash the jury panel on the theory that it was a violation of Section 23, Rule 35 of the Supreme Court, which says, "All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional, etc." It appeared, however, from an interrogation of the panel, that only two of them had fully heard and understood the statement (but these two were among the twelve jurors finally chosen), and that the statement had been made by the state's attorney when he had come from an anteroom, where he and two others had been engaged in making the challenges for the state, for the purpose of requesting the court for a little additional time; that when the judge directed him to go back and complete the challenges, saying he was too slow, the objectionable words were spoken. The supreme court held that the words could hardly be regarded as flattery justifying a quashal of the whole panel, "because it would be obvious to the twelve jurors chosen, even if the remark had not been made, that counsel were willing to submit the case to them. The only jurors that could be offended would be those stricken from the list by the adversary litigant; and, of course, they would not sit in the case." But the jurors chosen might just as well have concluded that they were all objectionable to the defendant, but not objectionable to the degree or extent of those struck off by the defendant. The ruling of the court allows the state to assume the role of the lily-pure whose case is so open and above-board, forthright and honest, that there is no necessity for it to pick and choose among men in the selection of a jury, and if the defendant does not do likewise he is placed in the position of inferentially admitting that his case might not be acceptable to all. It is difficult to conceive what the court would hold flattering enough to a jury to require a reversal if the words here do not.

The state also called a witness to the stand for the avowed purpose of proving the defendant's reputation, the defendant not having put his own reputation in issue. Over the defendant's objection the attorney for the state was permitted to ask the question inquiring as to the defendant's general reputation in the community *as a law abiding citizen*. The court promptly sustained the objection, in-

35. *State v. Bowdry*, 346 Mo. 1090, 145 S. W. (2d) 127 (1940).

36. 346 Mo. 773, 142 S. W. (2d) 1046 (1940).

structed the jury to disregard it, and rebuked the counsel, stating in the presence of the jury that the law had been settled for 35 or 40 years that such reputation is admissible *only when the defendant has put his own reputation in issue*. The court held that no error had been committed; that until the words *as a law abiding citizen* were uttered, from aught that appeared the state might have been inquiring about the defendant's reputation for *truth and veracity*, a proper sphere of inquiry after the defendant had testified; and that the trial court's sustaining of the objection and rebuke to the counsel who had propounded the question kept out all error. It is true that the trial court valiantly attempted to prevent error. But even its rebuke to the state's attorney had embedded in it a drop of poison to prejudice the jury against the defendant in the statement of the judge that such evidence was admissible only when the defendant put his reputation in issue. Must not the jury have concluded that the defendant's reputation was bad, else why would he not put it in issue? It is suggested that taking into consideration the several remarks of counsel the case should have been remanded.³⁷

F. Parole matters

In *State ex rel. Wilkerson v. Kelly*,³⁸ one Smith pleaded guilty to a charge of embezzlement before a special judge, first having disqualified the regular judge of the court where he was indicted. The special judge who accepted the plea granted a parole upon the recommendation of eleven of the twelve grand jurors who had returned the indictment. Thereafter, the prosecuting attorney filed a motion to set aside the judgment granting the parole, alleging, among other things, that the defendant had practiced a fraud on the court by falsely representing to the grand jurors that the several shortages had been repaid and that the prosecuting attorney would consent to a parole for that reason. The defendant challenged the jurisdiction of the regular judge to sit on the hearing of the motion to set aside the judgment granting the parole inasmuch as he had been disqualified to sit as a judge in the case upon the merits. The regular judge overruled the motion challenging his jurisdiction, heard and sustained the motion to set aside the judgment granting the parole, and ordered the defendant committed to the penitentiary under his original sentence. The defendant procured a writ of *habeas corpus* from the Springfield Court of Appeals. That court ruled that the regular judge, having been disqualified, had no right to act in any way in connection with the case, except in calling a special judge to determine the matter, set aside the order of the regular judge revoking the parole, and remanded the cause, directing that it "be passed on by the Special Judge in the case, or by some other judge legally selected."³⁹ The prosecuting attorney then applied to the supreme

37. See *State v. Banton*, 342 Mo. 45, 111 S. W. (2d) 516 (1937), cited in the instant case, holding prejudicially erroneous a statement by a prosecuting attorney to a jury panel on their *voir dire* that defendant had taken a change of venue.

38. 346 Mo. 416, 142 S. W. (2d) 27 (1940).

39. *Ex parte Smith*, 232 Mo. App. 521, 119 S. W. (2d) 65 (1938).

court for a writ of prohibition to prohibit the regular judge from calling a special judge to sit on the hearing of the motion to set aside the judgment granting the parole. The supreme court granted the writ, holding that the motion was an independent action in equity, and that the regular judge was the proper one to pass on the motion *unless* he be (thereafter) disqualified by the defendant, under the statute.

In *Herring v. Scott*,⁴⁰ a *habeas corpus* proceeding, a prisoner had been paroled from a penitentiary sentence and while out on parole had committed and been convicted of a second offense and again sentenced and returned to the penitentiary. After serving part of his second sentence he was again paroled *from said second sentence* but was rearrested on the ground that the parole from the first sentence had been revoked. The court ruled that under the statute⁴¹ providing that if any convict, while under sentence, shall commit any crime, the sentence for such crime shall not commence to run until expiration of the sentence under which he may be held, the defendant was required to serve his first sentence first and before beginning on his second sentence, and since the total time served in the penitentiary exceeded the maximum time required to be served under the first sentence, the prisoner was entitled to be discharged, subject however to the conditions of his second parole.

III. THE HABITUAL CRIMINAL ACT

A prior six months' sentence in the city workhouse on a manslaughter conviction, imprisonment thereunder, and discharge upon compliance with the sentence, was a sufficient prior crime on which to base a conviction under the Habitual Criminal Act.⁴² The Second Offense Act, or Habitual Criminal Act, as it is more commonly known, requires a prior conviction of an offense *punishable by imprisonment in the penitentiary*. Defendant had been convicted of a graded felony and *could* have been punished by imprisonment in the penitentiary. The act does not require that punishment actually assessed must have been imprisonment. Apparently one *fined* upon a conviction of a charge, such as intoxicated driving, is thereafter subject to conviction under the Habitual Criminal Act since the crime is one for which he might have been sent to the penitentiary.⁴³

IV. ENTICING AWAY A CHILD

Of the cases decided by the court during the year 1940, none will find more interest among the bar generally than the case of *State v. Huhn*,⁴⁴ decided by the

40. 142 S. W. (2d) 670 (Mo. 1940).

41. MO. REV. STAT. (1929) § 12969.

42. *State v. York*, 142 S. W. (2d) 91 (Mo. 1940).

43. One convicted of an offense for which he might have been imprisoned in the penitentiary is convicted of a felony even though the punishment inflicted on him be only fine or jail sentence. *State v. Woodson*, 248 Mo. 705, 154 S. W. 705 (1913).

44. 346 Mo. 695, 142 S. W. (2d) 1064 (1940).

court *en banc*. The appellant and the prosecuting witness were husband and wife. They had lived together only a short while, and never for any length of time after the birth of their child. The child had always lived with its mother in Missouri, while the father resided in Kansas. Without the knowledge or consent of the mother, the father went to the home of the wife's parents, where the child had been left with the wife's sister and her husband. Over their objection, the father took the child and carried it to his home in Kansas. He was convicted in the circuit court of the felony of enticing away a child. Section 4416, Missouri Revised Statutes 1939, the section under which defendant was convicted, provides: "Every person who shall maliciously, forcibly or fraudulently lead, take or carry away any child under twelve years, with the intent to detain or conceal said child from its parent, guardian or other person *having the lawful charge of such child*, shall, upon conviction, be punished, etc." If under the terms of Section 1526, Missouri Revised Statutes 1939, the mother had *exclusive* custody and control, then the defendant was guilty. The construction to be given that section then became the issue in the case. That section provides: "The father and mother living apart are entitled to an adjudication of the circuit court as to their powers, rights and duties in respect to the custody and control and the services and earnings and management of the property of their unmarried minor children without any preference as between said father and mother, and neither the father nor the mother has any right paramount to that of the other in respect to the custody and control or the services and earnings or of the management of the property of their said unmarried minor children, *pending such adjudication the father or mother who actually has the custody and control of said unmarried minor children shall have the sole right to the custody and control . . . of said unmarried minor children.*" The court divided over the construction to be given the words *pending such adjudication*. The majority held that the words were limited to that period from the time a judicial or court proceeding was brought or commenced until an adjudication was rendered; and that there being no proceedings pending *in the courts* at the time the father took the child, the mother did not have *exclusive* right to the child, and the father was not therefore guilty of the charge, and reversed the conviction outright.

The minority opinion holds that the word *pending* should be given the meaning of "while awaiting" or "until" an adjudication; that to give it the construction contended for by the majority is to authorize the child to be shuttled back and forth between his parents, the very situation the legislature was attempting to avoid. We are of the opinion that the dissenting opinion of the minority is to be preferred, but at least the matter has been determined and attorneys may now advise their clients regarding their rights to the custody of their minor children with definiteness.

LATNEY BARNES⁴⁵

45. Attorney, Mexico, Mo., A.B., Westminster College, 1930; LL.B., University of Missouri, 1935. Prosecuting attorney, Audrain County, 1937-1941.

CONSTITUTIONAL LAW—LIMITATIONS ON TREATY-MAKING POWER IN UNITED STATES,
CANADA AND AUSTRALIA

The acceptance of membership in the International Labor Organization by the United States,¹ a recent decision of the Judicial Committee of the British Privy Council,² and another by the High Court of Australia³ seem to justify a reconsideration of the much weighed problem dealt with in *Missouri v. Holland*,⁴ namely the question of the extent to which the doctrine of the distribution of powers in a federal system of government imposes limitations upon the treaty-making power of the national government. Certainly the importance of the problem, at a time when the achievement of a lasting and just peace is the goal of every effort, can hardly be overstated.

With respect to the making of treaties the Constitution of the United States provides simply that: The President shall have the "power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . ."⁵ "This Constitution, and laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. . ."⁶ And "no state shall enter into any treaty, alliance or confederation."⁷

Does it follow that the treaty-making power of the Federal Government is unlimited? If not, what is the measure of the extent of that power? Or to put the matter more specifically, does the federal treaty-making power cut across the reserved power of the states?⁸

In partial answer to these questions it may be said that no federal treaty has ever been held unconstitutional by the Supreme Court of the United States. Moreover, there are a substantial number of early decisions upholding federal treaties in fields which would normally be beyond the jurisdiction of Congress. For example, treaty provisions regulating the tenure and descent of alien estates, and the personal rights of alien residents have been upheld in the face of inconsistent state legislation, though these fields have otherwise always been recognized as within the exclusive jurisdiction of the states.⁹

On the other hand, dicta in a number of other early decisions may be cited to the effect that there are limitations on the treaty-making power of the United States. Thus, for example: "treaties to be valid, must be made within the scope

1. International Labor Office Document, C. P. 38 (Aug. 20, 1934).

2. Attorney General for Canada v. Attorney General for Ontario, (1937) A. C. 326.

3. Rex v. Burgess, 55 C. L. R. 608 (1936).

4. 252 U. S. 416 (1920).

5. U. S. CONST. ART. II, § 2.

6. U. S. CONST. ART. VI.

7. U. S. CONST. ART. I, § 10.

8. U. S. CONST. ART. X.

9. Ware v. Hylton, 3 U. S. 199 (1796); Chirac v. Chirac, 15 U. S. 259 (1817); Hauenstein v. Lynhan, 100 U. S. 483 (1879); Geofroy v. Riggs, 133 U. S. 258 (1890).

1942]

of the same powers (vested in Congress by the Constitution); for there can be 'no authority of the United States', save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away one right of a State or any citizen of a State."¹⁰

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States."¹¹

"It need hardly be said that a treaty can not change the Constitution or be held valid if it be in violation of that instrument."¹²

"Whenever, therefore, an act of Congress would be unconstitutional, as invading the reserved rights of the states, a treaty to the same effect would be unconstitutional."¹³

The latest and leading decision on the problem is that rendered by the Supreme Court of the United States in the case of *Missouri v. Holland*.¹⁴ The background and facts of that case are as follows. Congressional legislation designed to protect the migratory birds of the United States had been held an unconstitutional violation of the reserved powers of the states in two lower federal courts.¹⁵ An appeal to the Supreme Court from these decisions was taken, but the matter was held up pending negotiation of a treaty between the United States and Great Britain for the protection of migratory birds in Canada and the United States. On December 8, 1916, such a treaty was proclaimed by the President. It provided that each of the parties thereto was to propose to its law-making body, legislation of a designated type for the protection of migratory birds. It is this ancillary legislation (the provisions of which were substantially the same as that which had been held invalid in the lower court decisions mentioned immediately above) which came before the court in *Missouri v. Holland*. The Supreme Court, speaking through Mr. Justice Holmes, upheld the legislation in question with the following remarks:

"It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act in pursuance of a treaty to regulate the killing of migratory birds within the United States has been held bad in the District Court. . . . The same argument is supposed to apply now with equal force. Whether the two cases cited were decided rightly or not, they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when they are made under the authority of the United States. It is open to question whether the authority of the United

10. The License Cases, 5 Howard 504, 613 (U. S. 1847).

11. *Doe v. Braden*, 16 Howard 635 (U. S. 1853).

12. *Cherokee Tobacco Case*, 11 Wallace 616, 620 (U. S. 1870).

13. *Prevost v. Greneaux*, 19 Howard 1 (U. S. 1856).

14. 252 U. S. 416 (1920).

15. *United States v. Shauver*, 214 Fed. 154 (E. D. Ark. 1914); *United States v. McCullagh*, 221 Fed. 288 (D. Kan. 1915).

States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."

These are the latest words of the Supreme Court directly relating to the problem here under consideration. But clearly the justices did not intend to go any further than was actually necessary to dispose of the question before them. For sixteen years the cryptic "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way" remained unelucidated. But recent dicta in a case, although itself not directly in point, seems to take up that remark and throw at least some light upon it, as follows:

"The two classes of powers (those in respect to foreign or external affairs and those in respect to domestic or internal affairs) are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to the powers that the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence 'the Representatives of the United States of America' declared the United (not the several) colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.'

"As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."¹⁶

On August 20, 1934, the United States accepted membership in the International Labor Organization. Article 405, ¶ 5, of the constitution of that organization provides that after a recommendation or draft convention has been adopted by the I. L. O., each member is bound to "bring (it) before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action."

Article 405, ¶ 9, provides that "in the case of a federal state, the power of which to enter into conventions on labor matters is subject to limitations, it shall

16. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

1942]

be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this article with respect to recommendations shall apply in such case."

The crucial question for present purposes is whether the United States is a "federal state, the power of which to enter into conventions on labor matters is subject to limitations." That is, may the United States treat a draft convention as a recommendation only and submit it to the several states for appropriate legislation? Or must a draft convention, whatever its subject matter, be brought before Congress "for the enactment of legislation or other action"? There is, of course, as yet no categorical answer.

Interestingly the Joint Resolution of Congress, approved by the President on June 19, 1934, which provided for our membership in the I. L. O., contained this clause:

"Whereas special provision has been made in the constitution of the International Labor Organization by which membership of the United States would not impose or be deemed to impose any obligation or agreement upon the United States to accept the proposals of that body as involving anything more than recommendations for its consideration. . . ."¹⁷

In September, 1935, the Secretary-General of the League of Nations transmitted to the Secretary of State of the United States five draft conventions and one recommendation which had been adopted by the Conference at its nineteenth session in June, 1935.¹⁸

In June, 1936, the President sent a message to Congress accompanied by copies of the said draft conventions and recommendation "to which the attention of the Congress was invited."¹⁹ It was apparently assumed that the entire matter was exclusively within the jurisdiction of the Federal Government, although the draft conventions concerned the employment of women in underground work, the hours of work in coal mines, the reduction of hours of work to forty a week, the maintenance of rights under invalidity, old-age and widows' insurance, and the reduction of hours of work in glass-bottle works. In any case the message and the accompanying conventions and recommendation were referred to appropriate committees in Congress and have not yet emerged.

In respect to the Government of Canada, the questions which have been raised herein are complicated by the fact that Canada is a part of the British Empire and yet for a number of years now has been attaining something in the nature of an independent international status. Nevertheless, the answers to our questions have been categorically stated in a series of judicial opinions.

The Canadian constitution, *i.e.*, the British North American Act, provides in Section 132 that:

"The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."

17. 78 CONG. REC. 12359, 11681, 12362 (1934).

18. United States Treaty Information, Bulletin No. 73, p. 15 (Oct. 1935).

19. 80 CONG. REC. 9925, 9999 (1936).

It has been held in unmistakable terms that Canadian, *i.e.*, federal, legislation enacted to effectuate the terms of an *Empire* treaty was valid and must supercede conflicting provincial legislation in a field in which the absence of such a treaty the provinces would have exclusive jurisdiction. See, for example, *The King v. Stuart*,²⁰ which sustained the validity of Canadian legislation enacted pursuant to the Migratory Birds Convention of 1916 between Great Britain and the United States.

But what of legislation enacted to effectuate treaties made by Canada independently of the Empire?

Canadian constitutional history on this point has been interesting. Although the matter was not squarely at issue in the *Aeronautics Case*,²¹ because an Empire treaty was involved, the opinion contained dicta to the effect that jurisdiction to legislate for the purpose of performing the obligations of any Canadian treaty resided exclusively in the Parliament of Canada.

In the *Radio Case*,²² a convention which had been entered into by Canada independently of the Empire was involved and the legislation passed pursuant to the terms thereof was upheld.

As a result of these two decisions it was felt in many quarters that the dicta in the earlier opinion constituted an accurate statement of the law.

This, however, proved to be incorrect. In the "depression" years the Canadian Parliament enacted into law a series of bills designed to put into effect some International Labor Organization Conventions to which Canada was a party independently of the Empire. The subject matter of the Conventions was clearly within the powers conferred by Section 92 of the British North American Act exclusively upon the Legislatures of the provinces.²³ In passing upon the validity of the legislation in question the Privy Council in the case of *Attorney General for Canada v. Attorney General for Ontario*,²⁴ brushed the *Aeronautics Case* aside on the ground the dicta therein was purely obiter and the *Radio Case* on the ground that the convention there involved a subject matter which was not included in the powers reserved by Section 92 exclusively to the provinces, but rather fell within the general residuary powers of the Federal Government. Not, therefore, being restrained by the doctrine of *stare decises* the Privy Council proceeded to hold the legislation invalid on the ground that:

"For the purposes of §§ 91 and 92, *i.e.*, the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. . . . It follows from what has been said that no further legislative competence is obtained by

20. (1925) 1 D. L. R. 12.

21. (1932) A. C. 54.

22. (1932) A. C. 304.

23. Section 92 provides in part: "In each province the legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated; that is to say, . . . (13) property and civil rights in the province."

24. (1937) A. C. 326.

1942]

the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. . . . In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth. . . .”

It is interesting that no reference whatsoever was made to *Missouri v. Holland*, either by the court or by counsel in their argument.

With respect to the Government of the Commonwealth of Australia the question here under discussion was raised and apparently settled in 1936 in the *Aviation Case*.²⁵ That case involved the validity of certain administrative regulations issued pursuant to a commonwealth statute, which, though intended to effect the purposes of the International Convention for the Regulation of Aerial Navigation of 1914, did not in fact accord precisely with the provisions of that Convention. The regulations being clearly beyond the ambit of the Commonwealth's jurisdiction in the absence of a Convention, the discussion by the members of the court in their decision could only have been predicated upon the assumption that, had the regulations and the statute upon which they were predicated in fact conformed with the Convention, they would have been valid. Three of the judges in their separate opinions were vague on the matter, but Evatt and McTieman, JJ., had this to say:

“It is true that such subject matters as air navigation, the manufacture of munitions, the suppression of the drug traffic and standard hours of work in industry are not made express or separate subject matters of Commonwealth legislative power. But there is, in our view, an undoubted capacity in His Majesty to enter into international conventions dealing with any of these subject matters and necessarily binding upon and in respect of the Commonwealth. In truth, the King's power to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise. And in our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement. Accordingly (to pursue the illustration) Australia is not ‘a federal State the power of which to enter into conventions on labour matters is subject to limitations.’ A contrary view has apparently governed the practice of the Commonwealth authorities in relation to the ratification of the draft conventions of the International Labour Office. In our opinion such view is wrong.”²⁶

In summary it may be said that of the three constitutions considered, only that of Canada contains an express provision in respect to the relationship between the treaty-making power of the federal government and the exclusive reserved powers of its constituent member states, but that provision relates only to Empire treaties. With respect to treaties to which Canada is a party independently of the Empire, no express constitutional provision has been made and the Judicial Committee of the Privy Council has held that Canada has no power to enact legislation to put into effect a treaty the subject matter of which is within the exclusive, reserved powers of the provinces.

25. *Rex. v. Burgess*, 55 C. L. R. 608 (1936).

26. *Id.* at 681.

On the other hand, in the absence of express constitutional provisions, the highest courts of the United States and Australia have rendered decisions which make it all but certain that the federal legislatures of those nations can legislate to carry out the provisions of any treaty to which they are parties, regardless of the subject matter involved.

The latter conclusion, it is submitted, is preferable to that reached with respect to Canada, because as a practical matter it would be extremely difficult in any of the three nations to secure uniform legislation in all of its constituent member states for the purpose of carrying out a federal treaty—the net result being that the treaty-making power of a federal government in which such member state concurrence was necessary would in practice be severely limited.

WALLACE MENDELSON²⁷

EVIDENCE—LAYMEN'S OPINIONS AS TO SANITY OR INSANITY

The opinion rule, in its American development, is an offspring of the rule requiring that a witness speak from first hand knowledge. The early cases excluding "mere opinion" meant a belief by a witness who had no personal knowledge of the subject about which he was called to speak. When an ordinary witness came properly equipped with facts gained through personal observation the early judges did not exclude the opinion and inferences he drew therefrom. It was only opinion based on guess or a belief without observation which was rejected. The "mere opinion" of an expert witness who had no personal knowledge was admitted as a necessary exception because the jury could really be aided by the expert's opinion. The test for the skilled witness was whether the jury could be aided by a person of skill in the particular subject. In the United States this test was extended to the lay witness who came equipped with personal knowledge of the facts, since it could be argued that the jury now in possession of the facts were as able as the witness to draw the inferences. This extension is an American doctrine and apparently has not taken place in England.¹

The later and changed theory is, then, that of exclusion of superfluous evidence.² Wigmore says that "the opinion rule, in its simplest form, is this: Where the data observed can be exactly and fully reproduced by the witness so that the jury can equally well draw any inference from them, the witness' opinion is not wanted, and will be excluded."³ Conversely, the opinion is received whenever the facts cannot be so detailed as to make the jury as able as the witness to draw the inference. It is often said, however, that a witness must testify to facts of which he

27. Instructor in Political Science, University of Illinois. B.A. 1933, Ph.D., 1940, University of Wisconsin; LL.B. 1936, Harvard.

1. 7 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1917, 1918.

2. *Ibid.*

3. WIGMORE, EVIDENCE (Students' ed. 1935) § 127, p. 156.

has knowledge and cannot give his opinion thereon. That is, the opinion rule is sometimes based upon the supposition that there exists a clear distinction between "fact" and "opinion." This is unsound in principle and unworkable in practice. Every verbal description has in it a large measure of inference beyond the mere statement of sense impressions, and the difference between fact and opinion is one of degree. That which is admitted by courts is not always "fact" but often "opinion." The attempt to draw such a distinction causes much quibbling and waste of time.

The purpose of this comment is to discuss the admissibility of lay opinions as to sanity or insanity. There was never any question as to the admissibility of such evidence in England,⁴ but the question was argued in almost every court in the United States.⁵ However, it is now held in all but a few jurisdictions that such lay opinions are admissible, "subject to local qualifications and quibbles."⁶

In *Lee v. Ullery*,⁷ a will contest, the contestant called lay witnesses who were permitted to testify that they had known the testator over a period of years; that they had seen him frequently during the last few years of his life; that during the last few months of his life, and prior to the execution of the will, they had noticed a change in his mental condition. These witnesses testified that, in their opinion, the testator was insane at and before the date of the execution of the will. Some of them stated no facts as a basis for their opinion and others stated facts after expressing an opinion that the testator was insane. The Supreme Court of Missouri held that the trial court committed reversible error in permitting the lay witnesses to give their opinions that the testator was insane without first detailing the facts on which they were based. The opinion in this case declares that the supreme court has consistently made two specific requirements as a condition precedent to the admission of lay opinions as to the insanity or mental incompetency of a person whose mental condition is under consideration. "They are (1) that the witness has had an opportunity to observe, and know the mental condition of such person, (the extent of such opportunity, except for sufficient acquaintance to qualify, going to the weight and value of the witness' testimony), and, (2) that the witness shall first state the facts upon which such opinion is based, and unless such facts as stated by the witness are inconsistent with sanity and mental competency, the witness shall not give such opinion."⁸

The first requirement laid down by the court is merely a recognition of an otherwise established general principle of testimonial qualification that a witness, to be competent at all, must have had opportunity to use his senses in personal observation of the matter about which he testifies.⁹ This requirement eliminates

4. 7 WIGMORE, EVIDENCE § 1933.

5. See cases in note 16, *infra*.

6. 7 WIGMORE, EVIDENCE § 1938.

7. 346 Mo. 236, 140 S. W. (2d) 5 (1940).

8. 346 Mo. 236, 248, 140 S. W. (2d) 5, 12 (1940).

9. 2 WIGMORE, EVIDENCE § 657.

testimony based on guess, hearsay, and imagination. All courts agree that a non-expert is confined to opinions on facts within his own knowledge.¹⁰

The second requirement is difficult to justify and did not exist under the original orthodox practice. As has been stated, the original objection to opinion was that "mere opinion" lacked the support of personal knowledge. Thus all that should be required before the opinion of a non-expert is received is a showing that the witness had an opportunity to observe and did observe the person whose sanity is in question. This view has been taken by some courts.¹¹ In a number of jurisdictions,¹² however, the modern doctrine¹³ has been confused with the earlier one, and it has been laid down as a fixed rule that the observed facts must accompany or precede the opinion. *Lee v. Ullery*¹⁴ holds that the statement of facts must precede the opinion.

The Supreme Court of Missouri has held that a lay witness who has observed the conduct, demeanor or appearance of a person may describe the same in general terms without first detailing the facts upon which it is based. Thus he may give his opinion as to the ability of a person to do manual labor; he may testify as to the existence of emotions, such as anger and hate; or his opinion may relate to the apparent health of a person, or to changes in a person's appearance and activity. When the opinion rule has been urged as an objection to such testimony the supreme court has said that the testimony is received because the facts, which constitute the cause from which the opinion proceeds as an effect, cannot themselves be adequately communicated to the jurors, so as to impart to them the knowledge which the witness actually possesses. These Missouri decisions are sound and reflect

10. The opinion of an expert witness may be based upon hypothetical data alone; it is immaterial whether he has ever observed the data upon which his opinion is to be based. Of course an expert may also base his opinion on facts within his personal knowledge. 2 WIGMORE, EVIDENCE §§ 677, 678. The subject of expert witnesses is beyond the scope of this discussion.

11. *Brown v. Commonwealth*, 14 Bush (77 Ky.) 398 (1878); *Wood v. State*, 58 Miss. 74 (1881); *Territory v. Hart*, 7 Mont. 489, 17 Pac. 718 (1888) *semble*; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241 (1889), citing *Baldwin v. State*, 12 Mo. 223 (1848); *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132 (1889) *semble*; *Chicago Union Traction Co. v. Lawrence*, 211 Ill. 373, 71 N. E. 1024 (1904) *semble*; *State v. Rumble*, 81 Kan. 16, 105 Pac. 1 (1909); *Mays v. Mays*, 263 Ky. 546, 92 S. W. (2d) 827 (1936) *semble* (but the court says the opinion will have little weight unless the witness states the facts observed); see also *Clary v. Clary*, 2 Iredell (N. C.) 62 (1841); *Garrison v. Blanton*, 48 Tex. 299 (1877); *Strickland v. State*, 137 Ga. 115, 72 S. E. 922 (1911).

California has a statute which provides that only intimate acquaintances of the person in question can give an opinion as to sanity. Under this statute the California court has held that it is not necessary that the witness state facts before giving an opinion as to insanity. This court says that the existence of a sound factual basis for the opinion is adequately tested by cross-examination and is not a matter of qualifying the witness to give his opinion. *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073 (1896); *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177 (1904).

12. 7 WIGMORE, EVIDENCE §§ 1935, 1938. See WEIHOFFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933) p. 233.

13. Notes 2 and 3, *supra*.

14. Note 7, *supra*.

an understanding of the true theory of the opinion rule. In *Lee v. Ullery* the supreme court cited these decisions with apparent approval¹⁵ but said that they do not support the view that a lay witness to insanity need not state the facts upon which his opinion rests. This may be questioned because the reason for receiving lay opinions as to insanity and mental incompetency is precisely the same as that for receiving lay opinions as to observed physical conditions, emotions, and the like, namely, that the observed data cannot be so detailed as to make the jurors as able as the witness to draw the inferences.¹⁶

The argument is thus stated by the Supreme Court of Alabama: "Does not even a casual observer of mental phenomena fully recognize the impossibility

15. 346 Mo. 236, 140 S. W. (2d) 5, 12 (1940).

16. One of the better reasoned early cases that admitted such lay opinions was *Clary v. Clary*, 2 Iredell (N. C.) 62 (1841). It is impossible, says this court, for a witness to relate the facts on which his opinion is based with sufficient clarity and detail to enable the jury to form its own opinion with reasonable assurance of correctness. It is impossible even to state facts without giving some opinion. The one requirement for such opinion is that the witness must have had sufficient opportunity to observe. It is thus expressed by the court (p. 65), "Mere opinion as such is not admissible. But where it is shown that the witness has had an opportunity of observing . . . , then his judgment or belief, *framed on such observation*, is evidence for the consideration of the jury; and it is for them to give to this evidence that weight, which the intelligence of the witness, his means of observation, and all the other circumstances attending his testimony, may in their judgment deserve."

In *Boardman v. Woodman*, 47 N. H. 120 (1841), the court rejected such lay opinion but *Doe, J.*, dissented on the ground that it was impossible for the witness to give an *adequate* picture of the situation by merely stating facts that he had observed. He compares this to cases of identity, handwriting, age, form, size, weight, measure, strength, speed, time, distance, heat, cold, quality, quantity, number, etc. He says that the witness should state enough facts to show that he had means of forming an opinion but indicates that opportunity for observing is enough to qualify the witness and whether he should state all of the observed facts before he gives his opinion should be within the discretion of the trial court. *Doe, J.*, again dissented in *State v. Pike*, 49 N. H. 399, 412 (1870), where he argued that a lay opinion as to insanity is admissible and that the general circumstances under which it was formed and the facts observed go to its weight. The logic of Judge *Doe's* argument prevailed and in the case of *Hardy v. Merrill*, 56 N. H. 227 (1875), the Supreme Court of New Hampshire admitted lay opinion on insanity. See also *State v. Hause*, 82 N. H. 133, 130 Atl. 743 (1925), which says that if the witness has such knowledge that his opinion will be helpful to the jury, that opinion may properly be admitted in evidence and no requirements as to facts preceding the opinion are made.

Other early cases admit such opinions for the same reason. *Norris v. State*, 16 Ala. 775, 780 (1849); *Kelly v. McGuire*, 15 Ark. 555, 601 (1855); *Beaubien v. Cicotte*, 12 Mich. 459, 503 (1864); *Clark v. State*, 12 Ohio 483 (1843); *Wood v. State*, 58 Miss. 741 (1881); *Brown v. Commonwealth*, 14 Bush (77 Ky.) 398, 405 (1878). Thus we see that because the witness is unable adequately to state the facts that show insanity, the courts in the early cases received lay opinion as to insanity. However, in the general statement of this rule the courts have often said that the witness must first state the facts upon which his opinion is to be based. It is suggested that with many of these courts this is simply loose language. When these courts come to consider this precise point they often say that a recital by the witness of long and perhaps intimate association with the person under consideration is a sufficient statement of the facts. See also cases in note 11, *supra*.

of communicating to another the facts, and almost numberless minute circumstances, indicating a morbid action of the brain and consequent mental aberration, the main force of which may consist in some peculiar characteristic, which none but the observer can fully appreciate? . . . Must the prisoner lose the benefit of such testimony altogether, or shall the witness be required to furnish as well as he may, a pantomimic delineation of the wild look, the vacant stare, the unnatural gait, the distorted countenance, the idiotic laugh, as well as the numberless caprices and sudden and apparently causeless exhibitions of joy and sorrow? Were such the law, the force of the testimony would be made to depend upon the powers of the witness for imitation."¹⁷ The Supreme Court of Texas has said: "A witness may state, with much certainty, that one, with whom he has associated has become insane; and yet he cannot clearly explain to others, how it is, that he knows the individual in question to be insane."¹⁸

The Missouri cases hold that in order to testify that a person is sane the lay witness is not required to give the facts upon which the opinion is based.¹⁹ The reason for this distinction seems to be that sanity is the normal condition and does not attract special attention, whereas insanity is the unusual condition and the facts evidencing it stand out and can be described. But as stated, in many cases of insanity the facts evidencing the person's condition do not stand out so that they can be exactly and fully described. Some of the witnesses in *Lee v. Ullery*²⁰ testified that, in their opinion, the testator was insane, and that they could not better explain his condition, because that was the only way they knew of describing the change in the testator's condition. It seems inconsistent for a court to hold that the opinions of lay witnesses to insanity are admissible because the witnesses cannot give an adequate description of the observed appearances which indicate insanity and at the same time to hold that their opinions must be preceded by a recital of the data on which they are based—"thus in effect compelling the witness to do the very thing which it has just been assured they cannot do, and imposing on them the very difficulty, the necessity of obviating which, was made a ground, and the principal ground, of establishing this exception to the general rule of evidence."²¹

The leading authority on evidence says that justification for the requirement under discussion "seems never to have been attempted; it is simply an instance of traditions misunderstood."²² In *Lee v. Ullery*, however, the supreme court seems to rest the rule upon the theory that a witness' opinion is entitled to no greater

17. Chilton, J., in *Norris v. State*, 16 Ala. 775, 779 (1849).

18. Bell, J., in *Cooper v. State*, 23 Tex. 331, 338 (1859).

19. These cases are cited in *Lee v. Ullery*, 346 Mo. 236, 245, 140 S. W. (2d) 5, 10 (1940).

20. Note 7, *supra*.

21. Sargent, J., speaking for the majority in *Boardman v. Woodman*, 47 N. H. 120, 133 (1866). This argument was advanced to support the holding that lay opinions to insanity are inadmissible. But the dissenting opinions of Doe, J., finally prevailed in New Hampshire. See note 16, *supra*.

22. 7 WIGMORE, EVIDENCE § 1922, p. 20.

weight than the facts which form its basis. Hence the witness must state in detail what he saw that led him to the conclusion that the person was insane, and must satisfy the trial judge that the facts detailed afford a reasonable basis for the opinion. If the witness is unable to state any facts, or if the trial judge believes that the facts stated are not "inconsistent with sanity and mental competency," the witness will not be permitted to give his opinion. Further it is said that the purpose of this requirement is to provide a standard by which the value of an opinion may be tested by the trial judge.²³ It is believed that these expressions illustrate the fallacy of the rule.

If it has been shown that the lay witness had a reasonable opportunity to observe and did observe the person in question, the facts upon which his opinion is based are matters affecting its weight (as the court said) but seemingly have nothing to do with admissibility.²⁴ Questions concerning the admissibility of evidence are distinct from those which affect its weight.²⁵ In *Lee v. Ullery* the court says that evidence of sickness, old age, forgetfulness, eccentricities, inability to recognize friends, and the like, is not inconsistent with testamentary capacity, and argues that the requirement under discussion is necessary to protect the jurors against lay opinions based upon facts which have "no direct bearing" upon testamentary capacity. But most of the cases cited²⁶ in support of this argument merely hold that sickness, old age, and eccentricities, are not "sufficient in themselves" to overthrow a will on the ground of mental incapacity, but each of these may be taken into consideration with other facts in determining whether the testator had such mental capacity as the law requires. In these cases the court was not concerned with error in the admission of such evidence, but only its sufficiency when the question was raised by a demurrer to the evidence. Although sickness, old age, and eccentricities may not justify a conclusion that the person was mentally incompetent, the witness may have observed other facts which justify such a conclusion but which he cannot adequately describe. No doubt the facts should be given whenever possible, for the correct view is more likely to be obtained by the jury if all of the facts upon which the opinion is based are before the jury. It is believed, however, that no harm could be done by letting the witness give his opinion without first detailing the facts upon which it is based. When the opinion is admitted, it usually carries little weight unless it appears to be based on adequate data. The grounds of the opinion can be elicited on cross-examination to affect its weight.²⁷ If it appears on cross-examination that the witness' opinion is based

23. 346 Mo. 236, 245, 140 S. W. (2d) 5, 10 (1940). While the court said that this is the rule "in this type of case," the language of the opinion indicates that the requirement would be enforced in any case involving the mental competency of a person.

24. See cases in notes 11 and 16, *supra*.

25. 1 WIGMORE, EVIDENCE §§ 12, 29.

26. See 346 Mo. 236, 245, 140 S. W. (2d) 5, 10 (1940). See also *Proffer v. Proffer*, 342 Mo. 184, 114 S. W. (2d) 1035 (1938).

27. Chalmers, J., in *Wood v. State*, 58 Miss. 741, 743 (1881): "The qualification that the opinion of the non-expert must be accompanied by a statement of the facts upon which it is based, is not very important, since, whether the witness be

solely upon such data as sickness, old age or eccentricities, the court can direct a verdict if this is the only evidence offered to show testamentary incapacity.

The Missouri rule not only requires the witness to state in detail what he saw that led him to the conclusion that the witness was mentally incompetent, but he must also satisfy the trial judge that what he observed was "inconsistent with sanity and mental competency." This seems to mean that the trial judge must be satisfied that the witness observed "facts" from which reasonable men may, independent of the witness' opinion, infer mental incompetency. However, as we have seen, such opinions are admitted because the data observed by the witness cannot be portrayed so that the jury is put in an equal position with the witness to draw inferences. Since the jury is not asked to decide the question independent of the opinion of the witness, it is hard to see why the witness should be required to state facts from which mental incompetency may be inferred independent of his opinion. These objections to the rule under discussion have been pointed out by several courts.

The Supreme Court of Kentucky has said: "Exactly what is meant by the expression in some cases, when such evidence has been admitted, that 'the witness must detail the facts upon which the opinion is based', we do not find explained. If the admissibility of the opinion as evidence must depend upon the facts from which it is formed, it is manifest that there is a question for the court antecedent to its introduction, and that to promulgate a general rule, as to the amount and quality of the evidence that should satisfy the court in every case, would be impossible. . . . It is not intended that the admissibility of the evidence shall be made to depend upon the ability of the witness to state specific facts, from which the jury may, independent of the opinion of the witness, draw a conclusion of sanity or insanity, for it is the competency of the opinion of the witness that is the subject of inquiry. The ability of the witness to detail certain facts . . . of the mind, may add very greatly to the weight of the opinion given in evidence, but they will not of necessity affect the question of competency."²⁸

It may be noted that even if the witness states facts inconsistent with sanity and mental competency, the witness, whether expert or non-expert, will not be permitted to say whether the testator was "capable of understanding a business transaction" or whether he was "mentally competent to make a will," but only to say whether he was of sound or unsound mind.²⁹ The reason is that the determination of the existence of testamentary capacity involves the application of a legal definition to the factual data of mental condition and the witness' opinion expressed

expert or non-expert, the grounds of his belief may be elicited; . . ." See also cases in notes 11 and 16, *supra*.

28. Hines, J., in *Brown v. Commonwealth*, 14 Bush (77 Ky.) 398, 405 (1878), quoted in 7 WIGMORE, EVIDENCE § 1922, p. 20. See also remarks of Roberts, C. J., in *Garrison v. Blanton*, 48 Tex. 299, 303 (1877).

29. *Farrell's Adm'r v. Brennan's Adm'x*, 32 Mo. 328 (1862); *Post v. Bailey*, 254 S. W. 71 (Mo. 1923); *Fields v. Luck*, 327 Mo. 113, 44 S. W. (2d) 18 (1931); cf. *Heinbach v. Heinbach*, 274 Mo. 301, 202 S. W. 1123 (1918) (whether testator "had sufficient mind to comprehend who his children were," allowed).

in this form, leaves it uncertain whether he is applying his own, or the laws' standard of required capacity. A substantial number of courts have taken this view.³⁰ Such rulings seem to exclude the most useful answers and admit the least useful. The ordinary witness has no desire to state a legal definition. An opinion as to the mental capacity of a person to make a will or a deed or a contract is simply the witness' way of describing the persons' general capacity to take care of himself and his property, and when this is the case it would seem as if the opinion should be admitted.

There is apparently one exception where the facts upon which the opinion is based need not be given in testimony concerning insanity and that is the case of the attesting witness.³¹

It would seem that the law should require no more of the lay witness to insanity than of witnesses generally,³² namely, a preliminary showing that he has had a reasonable opportunity from observation to acquire first-hand knowledge. As indicated above, a number of courts have taken this view.³³ The opinion rule, as applied by the American courts, has been condemned by eminent judges.³⁴ Wigmore has predicted that it will some day be abolished by legislation. Certainly, the rules of evidence in this regard might be relaxed with advantage.

FRED L. HOWARD

INSURANCE—PROVISIONS AGAINST ENCUMBRANCES IN FIRE AND THEFT POLICIES

Many insurance policies, especially those covering personal property, contain the provision that should the subject of insurance become encumbered by a chattel mortgage, the policy is void. Underwriters realize that any decrease in the value or extent of the interest insured will tend directly to increase the moral risk. For one thing, the owner of insured property encumbered by a mortgage is tempted to transform his encumbered property into unencumbered insurance money, since the lien on the property does not attach to the proceeds of insurance on that property. Also, since his property is so encumbered, the owner may have less interest in watching and guarding it. So that the insured shall have no greater motive to destroy, or less interest in watching and guarding the property insured, these stipulations against encumbrances have been used.

The advent of such provisions is due largely to the inadequacy of previous clauses which had been used as an attempt to protect against this danger of increased moral risk.¹ Policies have long contained provisions that the ownership

30. 7 WIGMORE, EVIDENCE § 1958.

31. *Fields v. Luck*, 335 Mo. 765, 74 S. W. (2d) 35 (1934).

32. 7 WIGMORE, EVIDENCE § 650 *et seq.*

33. Note 11, *supra*.

34. See remarks of L. Hand, J., in *United States v. Cotter*, 60 F. (2d) 689, 693 (C. C. A. 2nd, 1932).

1. VANCE, INSURANCE (2d ed. 1930) § 189.

of the insured be unconditional and sole. But it has been settled that the existence of a mortgage or other encumbrance does not constitute a breach of this condition.² The same is true as regards the condition that there be no change in the interest, title, or possession of the insured. The first form of this condition was one prohibiting the sale or alienation of the property. This was construed, however, to cover only a complete sale or alienation and so long as any interest whatsoever remained in the insured, it was not broken.³ Due to this inadequacy, the underwriters then added a prohibition against "any change of title." But in applying the rule of strict construction against the insurer, the courts held that this applied only to voluntary changes in title and not to any changes which might have taken place in the owner's interest.⁴ To obtain the broadest protection possible, the insurers then used the expression "any change in interest, title, or possession." Although "interest" is the broadest property term which can be used, the decided cases are in considerable conflict as to whether the giving of a mortgage amounts to a change of interest. Some cases have held that it does amount to a change of interest and therefore avoids the policy unless consented to by the insurer.⁵ But the weight of authority has held that the giving of a deed of trust or mortgage is not such a substantial change in the interest of the insured as to constitute a breach of the condition.⁶ So, the need for a provision that would unequivocally cover mortgages and other encumbrances was clearly evident.

The provisions against mortgages and other encumbrances in fire and theft

2. *Royal Ins. Co. v. Bailey*, 35 F. (2d) 916 (C. C. A. 4, 1930); *Westchester Fire Ins. Co. v. Green*, 223 Ala. 121, 134 So. 881 (1931); *Bankers' Fire Ins. Co. v. Williams*, 176 Ark. 1188, 5 S. W. (2d) 916 (1928); *Franklin Fire Ins. Co. v. Shahan*, 48 Ga. App. 181, 167 S. E. 194 (1932); *Sterling Fire Ins. Co. v. Comision Reguladora*, 195 Ind. 29, 143 N. E. 2 (1924); *Collins v. Manufacturers Ins. Co.*, 184 Iowa 747, 169 N. W. 199 (1918); *Ornatowski v. National Liberty Ins. Co.*, 290 Mich. 241, 287 N. W. 449 (1939); *Lloyd v. North British Ins. Co.*, 174 App. Div. 371, 161 N. Y. Supp. 271 (1916); *Pease v. Traveler's Fire Ins. Co.*, 185 Okla. 421, 93 P. (2d) 536 (1939); *Dunsmore v. Franklin Fire Ins. Co.*, 299 Pa. 86, 149 Atl. 163 (1930); *Hughes v. Insurance Co.*, 147 Tenn. 164, 246 S. W. 23 (1922); *Pauly v. Sun Ins. Office*, 79 W. Va. 187, 90 S. E. 552 (1916); *Koch v. Transcontinental Ins. Co.*, 269 N. W. 539 (Wis. 1936).

3. *Cowan v. Insurance Co.*, 40 Iowa 551, 20 Am. Rep. 583 (1875); *Hitchcock v. Insurance Co.*, 26 N. Y. 68 (1862); *Hoffman v. Insurance Co.*, 32 N. Y. 405, 88 Am. Dec. 337 (1865); *Stetson v. Insurance Co.*, 4 Mass. 330, 3 Am. Dec. 217 (1808); *Clinton v. Insurance Co.*, 176 Mass. 486, 57 N. E. 998 (1900).

4. *Thompson v. Insurance Co.*, 136 U. S. 287 (1890); *Rhode Island Underwriter's Ass'n v. Monarch*, 98 Ky. 305, 32 S. W. 959 (1895); *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144, 3 S. W. 718 (1887); *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476 (1895).

5. *East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23, 15 S. W. 166 (1890); *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 P. 513 (1895); *Olney v. Insurance Co.*, 88 Mich. 94, 50 N. W. 100 (1891); *Watson v. Insurance Co.*, 159 N. C. 638, 75 S. E. 1105 (1912); *Modlin v. Insurance Co.*, 151 N. C. 35, 65 S. E. 605 (1909).

6. *Wolf v. Insurance Co.*, 115 Wis. 402, 91 N. W. 1014 (1902). See also, to the same effect, *Sun Fire Office v. Clark*, 53 Ohio St. 414, 42 N. E. 248 (1895); *Lampasas Hotel & Park Co. v. Phoenix Ins. Co.*, 38 S. W. 361 (Tex. Civ. App. 1896).

policies have been held to be reasonable⁷ and not against public policy or illegal.⁸ The great weight of authority has held them to be valid stipulations, the breach of which constitutes a complete defense.⁹ Such a stipulation contained in the by-laws of a mutual insurance company has also been held to void the policy if breached.¹⁰ As to whether the breach of this provision completely voids the policy or merely makes it voidable for the period of encumbrance, the authorities are not in accord. The majority of courts seem to hold the entire policy void when the stipulation is breached.¹¹ It has been held, however, that a breach of the provision only temporarily suspends the insurance and doesn't forfeit the rights under the policy.¹²

Although provisions differ to some extent, most policies say that any encumbrance on the insured property without the written consent of the insurer will void the policy. Courts have adhered very strictly to this consent requirement saying that consent, in the form stipulated in the policy, is necessary to permit an encumbrance on the property without breaching the condition.¹³ Notice of the mortgage to the soliciting agent doesn't bind the insurers.¹⁴ Even where a mortgage is executed in order to use the proceeds to pay off a previous mortgage known to the insurer, consent to the subsequent mortgage is necessary.¹⁵

7. *Union Assur. Soc., Ltd. v. Reneer*, 86 Ind. App. 240, 156 N. E. 833 (1927).

8. *Niagara Fire Ins. Co. v. Mullins*, 218 Ky. 473, 291 S. W. 760 (1927).

9. *Sun Ins. Office v. Scott*, 284 U. S. 177 (1931); *Hartford Fire Ins. Co. v. Jones*, 31 Ariz. 8, 250 Pac. 248 (1926); *Butler v. Security Ins. Co.*, 244 Ill. App. 379 (1928); *Hoover v. First American Fire Ins. Co.*, 218 Iowa 559, 255 N. W. 705 (1934); *Greco v. Continental Ins. Co.*, 219 Iowa 150, 291 S. W. 760 (1934); *Niagara Fire Ins. Co. v. Mullins*, 218 Ky. 473, 291 S. W. 760 (1927); *Couch v. Fidelity-Phoenix Fire Ins. Co.*, 220 Ky. 802, 295 S. W. 1054 (1927); *Corey v. Niagara Fire Ins. Co.*, 243 Ky. 34, 47 S. W. (2d) 955 (1932); *Boley v. Banker's & Shipper's Ins. Co.*, 23 S. W. (2d) 1095 (Mo. 1929); *Williams v. Connecticut Fire Ins. Co.*, 47 S. W. (2d) 207 (Mo. 1932).

10. *Kennedy v. Farmer's Alliance Ins. Co.*, 127 Kan. 768, 275 Pac. 214 (1929); *Loehner v. Home Mutual Ins. Co.*, 17 Mo. 247 (1852).

11. *Butler v. Security Ins. Co.*, 244 Ill. App. 379 (1928); *Hoover v. First American Fire Ins. Co.*, 218 Iowa 559, 255 N. W. 705 (1934); *Greco v. Continental Ins. Co.*, 219 Iowa 150, 257 N. W. 210 (1934); *Ransom v. Potomac Ins. Co.*, 226 Mo. App. 664, 45 S. W. (2d) 95 (1932).

12. *Hargett v. Gulf Ins. Co.*, 55 P. (2d) 1258 (Cal. App. 1936); *Inventasch v. Superior Fire Ins. Co.*, 48 R. I. 321, 138 Atl. 39 (1927).

"Under such a provision the placing of a mortgage on plaintiff's automobile subsequent to the issuance of the policy and without knowledge or consent of the defendant would not render the policy void; it would merely relieve the insurer of liability for any loss or damage which might occur during the existence of such mortgage. Immediately upon the release of such mortgage, if affected during the term of the policy, the insurer's liability for loss or damage to the automobile would again attach." *Bridgewater v. General Exchange Ins. Corp.*, 131 S. W. (2d) 220 (Mo. 1939).

13. *Niagara Fire Ins. Co. v. McChord*, 24 F. (2d) 491 (1928); *Niagara Fire Ins. Co. v. Mullins*, 218 Ky. 473, 291 S. W. 760 (1927); *Corey v. Niagara Fire Ins. Co.*, 243 Ky. 34, 47 S. W. (2d) 955 (1932).

14. *Niagara Fire Ins. Co. v. McChord*, 24 F. (2d) 491 (1928); *Hargett v. Gulf Ins. Co.*, 55 P. (2d) 1258 (Cal. App. 1936).

15. *Dresher v. London & Lanchaster Ins. Co., Ltd.*, 153 Wash. 635, 280 Pac. 57 (1929).

Occasionally the problem arises as to just what constitutes an encumbrance under the provision in question. "Encumbrance" has been defined as a burden or charge on the property, and a "lien" has been defined as a charge on property for the payment of a debt or duty.¹⁶ Following the rule of liberal construction against the insurer, some courts have held that the provision against encumbrance is not violated unless the transaction complained of is technically a mortgage; that a lien of some other character is not sufficient.¹⁷ It would seem that since the purpose of the stipulation is to reduce the moral hazard involved, there should be no recovery even though the mortgage complained of is invalid. However, there is authority holding that the insurance is not affected unless the mortgage is valid.¹⁸ Neither will the case where the mortgage debt has been paid, but the mortgage not released, be one where the condition is deemed to be broken.¹⁹ And in a recent Missouri case,²⁰ a chattel mortgage, unknown to the named mortgagee, executed without consideration, and covering no debt, was found not to be an encumbrance. On the other hand, it has been held that a chattel mortgage is an encumbrance vitiating the policy, even though not verified nor deposited for record.²¹ The cases on this point, as can be seen, are in confusion; and needlessly so, it seems, as the real criteria should be whether or not the moral hazard has been increased. A mortgage valid on its face, but invalid in fact, could easily operate to increase the moral risk, and if so, should be held to breach the clause against encumbrances. In at least one case, the court intimated that the execution of a mortgage exceeding that which theretofore encumbered the property is a *prima facie* violation of the provision.²² Conversely, the transfer of a note already recognized in a loss-payable clause is not an encumbrance which will void the policy.²³

This encumbrance clause is clearly breached when the property is validly mortgaged after the issuance of the policy, and also when there is a valid mortgage at the time of the issuance of the policy.²⁴ Accordingly, there is a duty on the

16. Hartford Fire Ins. Co. v. Jones, 31 Ariz. 8, 250 Pac. 248 (1926).

17. Caplis v. Insurance Co., 60 Minn. 376, 62 N. W. 440 (1895). A deed of trust on insured personalty has been held not to violate the condition against chattel mortgages. Lambert v. Security Mutual Fire Ins. Co., 58 Pa. Super. Ct. 624 (1915); Continental Ins. Co. v. Bair, 65 Ind. App. 502, 114 N. E. 763 (1917) (judgment lien); Lavenstein v. Hartford Fire Ins. Co., 125 Va. 191, 10 S. E. 331 (1919). But it has been held that the condition against chattel mortgages was breached by the execution of a trust deed. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869 (1912).

18. Beckley v. National Fire Ins. Co., 194 Iowa 1106, 190 N. W. 594 (1922); Rowland v. Home Ins. Co., 82 Kan. 220, 108 Pac. 118 (1910).

19. Laird v. Littlefield, 164 N. Y. 597, 58 N. E. 1089 (1900).

20. Saffran v. Rhode Island Ins. Co., 141 S. W. (2d) 98 (Mo. 1940).

21. Home Ins. Co. v. Scott, 284 U. S. 177 (1931).

22. Hart v. Home Mutual Ins. Ass'n, 208 Iowa 1030, 226 N. W. 781 (1929).

23. Fireman's Fund Ins. Co. v. Galloway, 281 S. W. 283 (Tex. 1926). Here, by the endorsement of the note in blank, it was said to pass the title to the note to the transferee, as the owner of the same in due course of trade, which created an equitable lien in the transferee entitling it to be subrogated to the rights of the transferor (mortgagee) in the proceeds from the policy in case of loss.

24. Butler v. Security Ins. Co., 244 Ill. App. 379 (1928).

part of the insured to get the insurer's consent with reference to a mortgage existing at the time of the issuance of the policy, although in one case it was said that where the existence of the encumbrance isn't material to the risk, and where the insurer makes no inquiry, the policy isn't invalidated by the insured's failure to disclose.²⁵

Most policies restrict the operation of the encumbrance clause to the case where the insured property is personalty. The clauses generally read: "If the subject of insurance be personalty, and the personalty becomes encumbered by a chattel mortgage (or otherwise encumbered) the contract shall be void." Often a policy containing such a clause will be issued on both real property and personal property. In such a case, where a subsequent mortgage has been placed on the real property, the principle of strict construction against insurer and against forfeiture has been applied.²⁶ In the case of *Royal Insurance Co. v. Bailey*,²⁷ it was held that since the insurance contract made no mention of a mortgage on real estate, the parties by omitting reference to real estate mortgages thereby excluded them from the category of forbidden acts which would amount to a breach. A similar situation arises, although not involving real estate, where only a part of the insured property is made the subject of a mortgage or other encumbrance. In determining whether the policy is made void thereby or not, courts have seemed to look behind the reason for the inclusion of the encumbrance clause;²⁸ that is, the increase of the risk to the insurer. It has been held that the policy is made void as to the unmortgaged part of the property insured only when the insurable risk on that part is increased.²⁹ In a recent Missouri case,³⁰ where the contract of insurance covered both household goods and personal effects, a mortgage was placed upon the household goods only. In holding against the insurance company, the court said:

25. *Citizen's Ins. Co. v. Whitley*, 252 Ky. 360, 67 S. W. (2d) 488 (1934). Here, on a \$500 policy, the insured's failure to disclose three mortgages on the property totalling over \$1100 was held not to relieve insurer of liability because such encumbrance was not material to the risk. The test of such materiality used by the court was: "And a fact is material to the risk only when it is such that the insurer, acting in accordance with the custom and practices of insurance companies, would not have issued the policy had he known it, and failure to disclose a material fact is fraudulent when the insured knows it or an ordinary prudent person would have known it to be material to the risk."

It seems that that encumbrance would be material to the risk, yet the court held otherwise. This may be due to the violent conflict of testimony regarding the statements between insured and insurer as to the existence of the mortgages and also because the insured's solicitor did not qualify himself as a witness as to whether insurance companies generally would or would not have accepted the application if they had known of the existence of the mortgages.

For a contrary position, that a failure to disclose the encumbrance avoided the policy whether the encumbrance was material to the risk or not, see: *Loehner v. Home Mutual Ins. Co.*, 17 Mo. 247 (1852).

26. *Royal Ins. Co. v. Martin*, 192 U. S. 149 (1904); *McMaster v. New York Life Ins. Co.*, 183 U. S. 25 (1901).

27. *Royal Ins. Co. v. Bailey*, 35 F. (2d) 916 (1929).

28. See note 1, *supra*.

29. *Sarkosian v. American Const. Fire Assur. Co.*, 267 Ill. App. 443 (1933).

30. *Ransom v. Potomac Ins. Co.*, 226 Mo. App. 664, 45 S. W. (2d) 95 (1932).

"This chattel mortgage did not constitute a breach of the condition against encumbrance and did not operate as a forfeiture for the following reasons . . . The company did not protect against liability in the event a part only of the subject of insurance be encumbered, and we cannot amplify or extend the meaning of the words used to have such significance to the disadvantage of the insured."³¹

Thus, in this matter, the courts strictly apply the doctrine of construction of insurance policies against the insurer.³²

Some states have statutes making all statements in applications representations and providing in substance that only fraudulent or material misrepresentations shall preclude recovery on property insurance policies.³³ Yet it has been held that the insured, by breaching the condition against mortgaging the insured property, is not relieved from forfeiture by virtue of such a statute.³⁴ And the fact that the mortgage loan was used to improve the property does not destroy the effect of the policy provision, even in the face of such a statute.³⁵

Upon analysis of the cases involving encumbrance clauses, it seems that where the courts feel that the encumbrance on the insured property increased the risk to such extent as would possibly affect the issuing of the insurance had the company known of the encumbrance, they strictly enforce the provisions. Where such is not the case, they will not give effect to the provisions, thereby adopting an attitude hostile toward insurance forfeitures.

RICHARD LEWIN

31. *Western Assur. Co. v. Bronstein*, 77 Colo. 408, 236 Pac. 1013 (1925); *Merchants Ins. Co. v. Harris*, 51 Colo. 95, 116 Pac. 143 (1911); *Born v. Home Ins. Co.*, 110 Iowa 379, 81 N. W. 676 (1900); *Fitzgibbons v. Insurance Co.*, 126 Iowa 52, 101 N. W. 454 (1904); *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444 (1893); *Bailey v. Homestead Fire Ins. Co.*, 16 Hun 503 (N. Y. 1879); *Sullivan v. Mercantile Town Mutual Ins. Co.*, 20 Okla. 460, 94 Pac. 676 (1908); *Mecca Fire Ins. Co. v. Wilderspin*, 118 S. W. 1131 (Tex. 1909).

32. Boyer, C., in *Kimbrough v. National Protective Ins. Ass'n*, 225 Mo. App. 913, 35 S. W. (2d) 654, 658 (1930), ably states the doctrine in this manner: "The policy is to be construed liberally in favor of the assured against the insurer. . . . The law does not favor forfeitures, and contracts of insurance must be so construed, if possible, as not to defeat the claim to indemnity. The provisions in a policy, limiting or avoiding liability, must be construed most strongly against the insurer."

33. MO. REV. STAT. (1929) § 5823.

34. *Niagara Fire Ins. Co. v. Mullins*, 218 Ky. 473, 291 S. W. 760 (1927); *Couch v. Fidelity-Phoenix Fire Ins. Co.*, 220 Ky. 802, 295 S. W. 1054 (1928).

35. *Lee v. Hartford Fire Ins. Co.*, 223 Ky. 533, 4 S. W. (2d) 372 (1928).