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Recent Cases

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CRIMINAL LAW—ASSAULT WITH INTENT TO KILL OR TO DO GREAT BODILY HARM—SPECIFIC INTENT—POWER TO COMPEL DEFENDANT'S WIFE TO TESTIFY OVER HIS OBJECTION

State v. Dunbar[1]

A recent decision by the Supreme Court of Missouri presents two interesting questions for consideration. Appellant shot his wife with a shotgun, causing her serious and permanent injury. Upon a complaint signed by Mrs. Dunbar, an information[2] was filed charging that apellant ". . . in and upon one Florence E. Dunbar on purpose and of malice aforethought, wilfully and deliberately did make an assault and did then and there . . . deliberately and feloniously shoot at her . . . with the felonious intent then and there . . . on purpose and of his malice aforethought, deliberately and feloniously to kill and murder contrary to the form of the statute. . . ." Appellant was found "guilty as charged in the information" and sentenced to the state penitentiary for a term of thirteen years. On appeal to the supreme court it was urged that instruction number one[3] was broader than the information since it authorized a verdict of guilty as charged in the information if the jury found that appellant had made a malicious assault on his wife with intent either to "kill and murder or do some great bodily harm." Division One of the supreme court, Clark P. J., held that since the instruction "followed the words of the statute" the inclusion of the words "or do some great bodily harm" did not "vitiate" the instruction. However, the words do not follow the language of the statute[4] upon which the information and punishment was based,[5] and although

1. 360 Mo. 788, 230 S.W. 2d 845 (1950).
2. The information is set out in full on page two of Respondent's Brief.
3. The instruction in full found on page 7 of Respondent's Brief: "The court instructs the jury that if you believe and find from all of the evidence in this case and beyond a reasonable doubt that on the 11th day of December, 1948, at and in the county of Iron, State of Missouri, the defendant, Chester Dunbar, unlawfully, willfully, feloniously on purpose and of his malice aforethought did make an assault upon one Florence Dunbar with a shot-gun loaded with gunpowder and leaden balls with the intent then and there, the said Florence Dunbar, on purpose and of his malice aforethought, feloniously to kill and murder or do some great bodily harm. You will find defendant guilty as he stands charged by the information in this case, unless you find the defendant not guilty by reason of insanity as explained by other instructions herein given you. If you find the defendant guilty you will fix his punishment therefor at imprisonment in the penitentiary for a term of not less than two years."
4. MO. REV. STAT. § 559.180 (1949): "Assault with intent to kill.—Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not less than two years."
This section has often been called the "bloody statute" and the offense described therein is popularly called "malicious assault" or "assault with malice."

judgment was reversed on other grounds,[6] there does seem to be an error in the instruction which counsel for the appellant failed to exploit and which the court passed over with but little deliberation.[7]

The language of the information is sufficient[8] to charge an offense under Section 559.180. A lawful conviction in such a case requires allegation and proof of a specific intent as an essential element of the crime.[9] Since the crime charged is assault "with intent to kill," the specific intent to kill must be present at the time of the act. A specific intent to kill is a "particular or specific direction of the mind against the life of the person assailed,"[10] yet the trial court instructed the jury to find appellant guilty if they found he made a malicious assault with intent to kill *or do some great bodily harm.* It is the writer's opinion that the intent to do some great bodily harm is something less than or different from a "particular or specific direction of the mind against the life of another," and the instruction is, indeed, broader than the information.[11] The jury is authorized to find appellant guilty of malicious assault with intent to kill although they find his intent was not to kill, but to do some great bodily harm.

The general assembly has made assault without malice but with intent to do great bodily harm a felony,[12] but it is a lesser offense than a malicious assault with

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5. Point one of the argument in Respondent's brief (page 17) states that the information was based on Section 559.180.

6. The supreme court reversed the judgment because the trial court forced Mrs. Dunbar to testify against her will and failed to instruct on accidental shooting.

7. Appellant's brief contained but one citation upon this point; neither respondent nor the court cited any cases.

8. See State v. Crawford, 262 S.W. 700 (Mo. 1924) for an example of an information sufficient in form and substance to charge a crime under Section 559.180. An information was held sufficient in State v. Phelon, 65 Mo. 547 (1877) although it failed to allege an assault since it followed the words of the statute.

9. State v. Cooper, 358 Mo. 269, 214 S.W. 2d 19 (1948), citing State v. Martin, 342 Mo. 1089, 119 S.W. 2d 298 (1938) and State v. Arvin, 123 S.W. 2d 182 (Mo. 1938).

10. 1 BURDICK, LAW OF CRIMES § 120, p. 140.

11. A person motivated by revenge or a desire to get information might put out the eyes, pull the teeth or mutilate another yet be very careful to preserve his life, even to the point of administering antiseptic after inflicting the wound. In such a case an intent to do great bodily harm would be evident, but just as evident would be the absence of an intent to kill.

12. MO. REV. STAT. § 559.190 (1949): "Punishment for assaults.—Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, rape, burglary, manslaughter or other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars." A crime under either § 559.180 or § 559.190 is a felony. Malice aforethough is a necessary element of a crime under § 559.180, but not under § 559.190. Also §559.180 requires the assault to be committed with a deadly weapon or other means of force likely to produce death or great bodily harm, § 559.190 does not. State v. Garner, 360 Mo. 50, 226 S.W. 2d 604 (1950). To the same effect see State v. Meinhardt, 82 S.W. 2d 890 (Mo. 1935) and State v. Cooper, 358 Mo. 269, 214 S.W 2d 19 (1948)

intent to kill as defined in Section 559.180.[13] Upon an information charging assault with intent to kill within the meaning of Section 559.180, accused may be convicted of assault with intent to do great bodily harm under Section 559.190 and sentenced accordingly.[14] But if such an instruction as instruction number one in the principal case is correct, a person may be convicted of assault with intent to kill, as charged, without having specifically intended to kill and it need only be shown that he was guilty of a different crime than the one charged in the information.

It has also been held, in *State v. Hardy*,[15] that an information charging an assault with malice with intent "to kill or do some great personal injury or bodily harm" is sufficient. An instruction was framed in the same language as the information and the verdict was guilty as charged. The Supreme Court of Missouri, Leedy, J., said that the words "great bodily harm" mean nothing more than "maim" as used in Section 559.180 so that the information, instruction and verdict were all proper under that section and judgment was affirmed. The precise point has previously been considered by the supreme court. In *State v. Littler*,[16] defendant was apparently charged with an assault with malice with intent to kill as was appellant in the principal case.[17] There, as here, the jury was instructed to convict if they found defendant intended to kill "or do him great bodily harm." There also the verdict was "guilty as charged in the information," but judgment was reversed, the court saying: "The verdict, read in the light of the instruction, does not indicate whether the jury found an intent to kill as charged or an intent to do great bodily harm which was not charged. It cannot be affirmed that the error in the instruction was not prejudicial." The important distinction between the *Hardy* case[18] and the principal case is that the information in the latter case charged only assault with intent to kill or murder. Thus, the analysis used in the *Hardy* case is not applicable.

The other question which deserves consideration arises from the trial court's ruling requiring Mrs. Dunbar to testify against appellant against her will and over his objection. She had voluntarily signed the complaint against appellant, but at the trial she positively stated that she did not wish to testify against her husband and that she appeared as a witness only because subpoenaed.

The common law rule was that neither a husband nor a wife could testify in a criminal proceeding against the other,[19] nor could either be prosecuted upon a com-

13. State v. Gill, 64 S.W. 2d 264 (1930).
14. In State *ex rel.* Dutton v. Sevier, 336 Mo. 1236, 83 S.W. 2d 581 (1935) defendant was convicted of assault with intent to kill and sentenced to a twelve year term in the state penitentiary. On appeal the judgment of the trial court was declared absolutely void since defendant was prosecuted under § 559.190 and the maximum penalty under that section is five years imprisonment.
15. 359 Mo. 1169, 225 S.W. 2d 693 (1950).
16. 186 S.W. 1045 (Mo. 1916)
17 In State v. Hardy, *supra* note 15, Judge Leedy, speaking of State v. Littler says, "There the information charged an assault with intent to kill, under the statute here involved. . . ."
18. See note 15, *supra.*
19. State v. Ulrich, 110 Mo. 350, 19 S.W. 656 (1892).

plaint signed by the other.[20] An exception to this common law rule was a prosecution of one for criminal injury to the other. In such a case the proceedings could be commenced upon a complaint signed by the injured spouse[21] and such spouse was competent to testify at the trial of the other.[22] The reason for the rule has been stated to be one of public policy[23]—protecting the harmony and confidence of the marriage relation. The exception has been based upon the grounds of necessity.[24] If the injured husband or wife were not allowed to swear out a complaint and testify against the offending spouse many crimes against the peace and dignity of the state will go unpunished.

The rule of the common law is in force in Missouri except where it has been changed or modified by statute.[25] Section 546.260[26] has been upon the statute books in Missouri since 1877[27] and provides in part that "no person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being . . . the husband or wife of the accused . . . : Provided, that no such . . . wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf. . . ."

The Supreme Court of Missouri correctly held that Mrs. Dunbar should not have been forced to testify against her husband against her will and over his objection. She was a competent witness either at common law or by reason of Section 546.260[28] and was therefore competent to sign the complaint against appellant, having done so voluntarily, but the ruling of the trial court forcing her to testify was in direct conflict with the plain terms of the statute. When Mr. Justice Clark interpreted "require" to mean "compel" and held that the prohibition extended to *any* criminal cause, he was no doubt correct. However, the court then proceeded to set forth some dictum which seems equally inconsistent with Section 546.260 as previously interpreted by this court. The opinion states[29] that "the preceeding portion of the statute makes one spouse a competent, but not compellable, witness

20. State v. Berlin, 42 Mo. 572 (1868).
21. State v. Newberry, 43 Mo. 429 (1869).
22. State v. Pennington, 124 Mo. 388, 27 S.W. 1106 (1904). For a discussion of what amounts to a criminal injury by one spouse to another, see 11 A.L.R. 2d 646 (1950). See State v. Vaughn, 136 Mo. App. 645, 118 S.W. 1186 (1909), to the effect that breach of the peace is not a criminal injury. As to whether one spouse can be compelled to testify against the other for criminal injury done, see cases cited in State v. Vaughn, *supra*.
23. See note 18, *supra*.
24. See note 19 *supra*.
25. *Ex parte* Dickinson, 132 S.W. 2d 243 (Mo. 1939).
26. Mo. REV. STAT. § 546.260 (1949).
27. Mo. Laws, 1877, p. 356, § 1.
28. No Missouri decision construing § 546.260 has been found where a wife has suffered a criminal injury at the hand of her husband and is willing to testify against him. In State v. Anderson, 252 Mo. 83, 158 S.W. 815 (1913), the wife was allowed to testify in such a case over the objection of her husband, but no mention was made of a statute. However, the case was decided some 46 years after §546.260 was made law. It seems clear that if the wife is willing to testify in such a case, the husband's objection can have no avail.
29. 360 Mo. 788, 792, 230 S.W. 2d 845, 847 (1950).

in *any* criminal charge against the other spouse; that is, he or she *may, at his or her own option,* testify as a witness for the state." (Emphasis the writer's) Perhaps this is the prevailing philosophy in view of more modern times and policies,[30] but it has not been the prevailing view in Missouri.

In construing this statute the Missouri courts have held that one spouse may now testify on behalf of the other charged with a crime,[31] but a husband or wife may not testify against his or her spouse over the objection of such spouse except in a prosecution for a criminal injury by one to the other. This has been specifically decided in a prosecution for forgery,[32] rape[33] and assault with intent to kill.[34] The disability includes testimony by a third person as to extra judicial confessions made by a wife against her husband,[35] testimony by a third person as to a wife's hearsay statements[36] and testimony before a coroner.[37] It extends to common law spouses[38] and continues after the marriage has ended in divorce.[39] The privilege may be waived by failure to object to testimony of the spouse.[40] Thus, it can be seen that the Missouri courts have held that the option is with the spouse on trial, not the testifying spouse.[41]

WALTER MCQUIE, JR.

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30. Professor Wigmore has criticized this privilege and suggests its complete abolition. 8 WIGMORE, EVIDENCE 232, § 2228 (3d ed. 1940). Note also the vote of the American Bar Association Committee on the Improvement of the Law of Evidence in favor of abolishing the privilege in all civil and criminal cases.

31. State v. Finklestein, 269 Mo. 612, 191 S.W. 1002 (1917).

32. State v. Willis, 119 Mo. 485, 24 S.W. 1008 (1894).

33. State v. Evans, 138 Mo. 116, 39 S.W. 462 (1897). In this case it is said "The controlling question on this appeal is the alleged error in permitting the wife of the defendant to testify against him." Defendant had objected to the trial court's ruling permitting his wife to testify. Referring to § 546.260, the supreme court said: "It (the legislature) had declined to relax or change the common law so as to render the wife a competent witness against her husband in a criminal prosecution of this kind. It permits her to testify for him at his option, but not against him." This construction of the statute is further yet from the construction given it by Judge Clark when he said a spouse may at his or her own option testify for the state and is probably a little too broad in view of the express words of the statute.

34. State v. Kodat, 158 Mo. 125, 59 S.W. 73 (1900). Here again the supreme court reaffirmed the common law exception in referring to § 546.260 and said: "They may testify for each other in criminal prosecutions, except as to confidential communications, but not against each other." Judge Clark failed to comment on this case in the opinion although both parties cited it in their briefs.

35. State v. Pace, 190 S.W. 15 (1916).

36. State v. Cooper, 358 Mo. 269, 214 S.W. 2d 19 (1948).

37. State v. Allen, 290 Mo. 258 ,234 S.W. 837 (1921).

38. State v. Harris, 283 Mo. 99, 222 S.W. 420 (1920).

39. State v. Kodat, note 32 *supra.*

40. State v. Hill, 76 S.W. 2d 1092 (Mo. 1934).

41. See State v. Willis, note 30, *supra.* Defendant was convicted of forgery and the "single point in the case" presented to the court was the action of the trial court in permitting the wife of defendant to testify against him, over his objection. The court said. "There has been no change of the common law rule in this state, by legislative enactment, by which the wife is made a competent witness against the husband, and against his consent, in a criminal prosecution of this kind." Citing § 546.260.

CRIMINAL LAW—DEFENSE OF INSANITY—BURDEN OF PROOF

State v. Barton[1]

Defendant was convicted of grand larceny. On appeal he alleged error in the given insanity instruction, in that it placed upon him an undue burden. The trial court instructed the jury that in order to acquit on the ground of insanity the accused must bear the burden of proving such insanity to their "satisfaction" or "reasonable satisfaction." The supreme court, with two dissents, held this to be reversible error.

In answer to the questions propounded by the Lords in regard to *M'Naghten's* case in the year 1843 the judges answered that ". . . the jurors ought to be told in all cases that every man is to be presumed to be sane . . . until the contrary be proved to their satisfaction; . . . it must be clearly proved. . . ."[2] This measure of proof was reiterated in several later English cases[3] and adopted in most of the early American decisions.[4] As to the quantum of proof required to "clearly prove" insanity there could well be room for disagreement. One court reasoned that an issue cannot be said to have been clearly proved so long as a reasonable doubt remains.[5] As a rule, the early cases in this country required a strong showing by the accused that he was in fact insane. Many courts, as the one above, set his task at convincing the jury beyond a reasonable doubt.[6]

Apparently the reason for such a stringent requirement was the fear that many crimes would go unpunished should insanity be more easily proved.[7] Clever arguments and confusing testimony, it was felt, could thwart the ends of justice with the much used defense.[8] The validity of this argument has been questioned, at least so far as it would be applicable today considering the present state of psychiatric knowledge.[9] The trend of the cases has been away from this harsh burden,[10] leaving only Oregon still requiring the defense of insanity to be proved affirmatively beyond a reasonable doubt. The rule apparently only remains in that state because of a statutory requirement to that effect.[11]

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1. 236 S.W. 2d 596 (Mo. 1951).
2. M'Naghten's Case, 10 Cl. & Fin. 200 (1843).
3. Reg. v. Stokes, 3 Car. & K. 185 (1848); Reg. v. Layton, 4 Cox's C. C. 149 (1849); See Queen v. Nobin Chundler Banerjee, 13 B.L.R. Appx. 20 (India 1873).
4. Chaice v. State, 31 Ga. 424 (1860); People v. Klien, 1 Edmonds Select Cases 13 (N. Y. 1845); Clark v. State, 12 Ohio Rep. 483 (1843); Carter v. State, 12 Tex. 500 (1854).
5. State v. DeRance, 34 La. Ann. 186 (1882).
6. State v. Brinyea, 5 Ala. 241 (1843); State v. Spencer, 21 N.J.L. 196 (1846); State v. DeRance, *supra* n. 5.
7. It should be remembered that, at one time, no provision was made for the confinement of those acquitted on the ground of insanity. 1 WHARTON, CRIMINAL LAW § 47 (12th ed. 1932).
8. Spencer v. State, *supra* n. 6 at 206.
9. WEIHOFEN, INSANITY AS A DEFENCE IN CRIMINAL LAW 156 (1933).
10. JONES, EVIDENCE § 535 (2d ed. 1926).
11. OREG. COMP. LAWS ANN. § 26-929 (Bancroft-Whitney, 1940). See critical note, 8 ORE. L. REV. 190 (1929).

A great many jurisdictions, including England under recent decisions, have adopted what has come to be known as the English rule. That is, that the accused has the burden of proving insanity, in the sense that he has the risk of persuading the jury to that effect, not beyond a reasonable doubt, but at least by a preponderance of the evidence.[12] The difficulty comes in determining exactly what words correctly convey to the jury the proper test to be applied. Most courts have held instructions using the words "clearly prove" to be erroneous as requiring too high a degree of proof.[13] The same for "to a moral certainty,"[14] "most satisfactory,"[15] and "fully satisfied."[16]

In the case at hand the trial court instructed that the evidence of insanity must "reasonably satisfy," and be found to the jury's "reasonable satisfaction." In so doing the court followed a long line of authority which, in each case approved instructions containing the same words.[17] However in other cases instructions were approved which contained the further phrase "by the preponderance or greater weight of the evidence."[18] The court in the principal case, with an evident purpose to require as little proof as possible, disapproved of the given instructions. Said the court: "We are convinced that the measure of proof required for an insanity defense in a criminal case is the proponderance or greater weight of the evidence; and that the sole requirement of the jury's satisfaction or reasonable satisfaction imposes upon him a higher degree of proof than that of the preponderance or greater weight of the evidence." The court went on to say that in their opinion all reference to "satisfaction" and "reasonable satisfaction" should be omitted in drafting instructions.

The earlier cases failed to draw any distinction between the different phrasings. *State v. Sapp*[19] and *State v. Scott*[20] in approving instructions containing "reasonably satisfied" and "by the preponderance or greater weight of the evi-

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12. See digest of cases, WEIHOFEN, *op. cit. supra* n. 9 at 172.
13. People v. Wheden, 59 Cal. 392 (1881); People v. Precedio, 31 Cal. App. 519 (1916); State v. Hundley, 46 Mo. 414 (1870); Comm. v. Malton, 230 Pa. 399, 79 Atl. 638 (1911).
14. Bowden v. State, 151 Ga. 336, 106 S.E. 575 (1921).
15. Goosley v. State, 153 Ga. 496, 112 S.E. 467 (1922).
16. Malone v. State, 20 N.J.L. 146 (1897).
17. Baldwin v. State, 12 Mo. 223 (1848); State v. McCoy, 34 Mo. 531 (1864); State v. Redemeier, 71 Mo. 173 (1879); State v. Schaefer, 116 Mo. 96, 22 S.W. 447 (1893); State v. Lewis, 136 Mo. 84, 37 S.W. 806 (1896); State v. Duestrow, 137 Mo. 44, 38 S.W. 554 (1896); State v. Privitt, 175 Mo. 207, 75 S.W. 457 (1903); State v. Church, 199 Mo. 605, 98 S.W. 16 (1906); State v. Porter, 213 Mo. 43, 111 S.W. 529 (1908); State v. Barbata, 336 Mo. 362, 80 S.W. 2d 865 (1935). And see State v. Smith, 53 Mo. 267 (1873).
18. State v. Klinger, 43 Mo. 127 (1868); State v. Hundley, 46 Mo. 414 (1870); State v. Wright, 134 Mo. 404, 35 S.W. 1145 (1896); State v. Banker, 216 Mo. 532, 115 S.W. 1102 (1908); State v. Douglas, 312 Mo. 373, 278 S.W. 1016 (1925); State v. Sapp, 356 Mo. 705, 203 S.W. 2d 425 (1947); State v. Scott, 359 Mo. 631, 223 S.W. 2d 453 (1949).
19. *Supra* n. 18.
20. *Supra* n. 18.

dence" cited as authority cases approving only the shorter phrase.[21] Other cases give similar indication of a failure to draw a distinction.[22]

The term "preponderance or greater weight of the evidence" is practically self-explanatory. Bouvier defines it to be the "evidence which is more credible and convincing to the mind."[23] The term "satisfy," on the other hand, is generally interpreted as requiring much more,[24] and has even been looked upon as synonymous with "beyond a reasonable doubt."[25] Webster has defined it as "to free from doubt, suspense, or uncertainty; . . . to set at rest the mind of; to convince. . . ."[26] The Missouri court has often disapproved of, though tolerated, its use in civil cases.[27]

If the burden is to be with the accused to prove this defense, the ruling of the court seems theoretically wise. There can be little doubt that when the words "satisfy" and "reasonably satisfy" are scrutinized they demand a more certain finding than should be required. But perhaps some heed should be given to the dissenting opinion which criticizes the reversal of the trial court when in all probability the jury would make no distinction between the disputed terms. The dissenting judges think that the opinion "wholly overlooks the fact that the test of the correctness of an instruction lies not in the close analysis which a critical lawyer, or an appellate court, with the aid of briefs, arguments, and hours of research may give to it, but how the instruction would be understood and acted upon by the average juror who is wholly unskilled in the technicalities of the law."

In the federal courts and in nineteen states insanity is no longer an affirmative defense. In the year 1857, Brown, J., concurring in *People v. McCann*,[28] posed the following question: "If there be doubt about the act of killing, all will concede that the prisoner is entitled to the benefit of it; and if there be any doubt about the will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of it, when both the act and the will are necessary to make out the crime?" That was the beginning. From it grew what is termed the American rule.[29] Theoretically insanity negatives criminal intent. Criminal intent is an essential element of crime which must be proved by the prosecution beyond a

21. State v. Duestraw, *supra* n. 17; State v. Barbata, *supra* n. 17.
22. State v. Klinger, *supra* n. 18; State v. Hundley, *supra* n. 18; State Smith, *supra* n. 17; State v. Wright, *supra* n. 18.
23. BOUVIER'S LAW DICTIONARY (8th ed. 1914).
24. James v. State, 167 Ala. 14, 52 So. 840 (1910); Kelch v. State, 550 Ohio St. 146, 45 N.E. 6 (1896); San Antonio & A. P. Ry. v. Graves & Patterson, 131 S.W. 613 (Tex. 1910).
25. Rolfe v. Rich, 149 Ill. 436, 35 N.E. 352 (1893) Indemnity Co. v. Hallaway, 30 S.W. 2d 921 (Tex. 1930); and see Comm v. Colandro, 231 Pa 343, Atl. 571 (1911).
26. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1940).
27. Randolf v. Supreme Liberty Life Ins. Co., 359 Mo. 251, 221 S.W. 2d 155 (1949); and see Johnson v. Dawidoff, 352 Mo. 343, 177 S.W. 2d 467 (1944); Seago v. N. Y. Cent. Ry., 349 Mo. 1249, 164 S.W. 2d 336 (1942); Also see Rasp. v. Baumbach, 223 S.W. 2d 472 (Mo. 1949).
28. People v. McCann, 16 N. Y. 58 (1857).
29. State v. Bartlett, 43 N.H. 224 (1861) seems to have been the first case to squarely adopt the rule.

reasonable doubt. Therefore, those courts adhering to the American rule require that when the issue of insanity is raised the prosecution must prove the accused sane in the manner that it must prove the other necessary elements of crime.[30]

What then happens to the presumption of sanity? A presumption is not in itself evidence. It is but a shortcut in legal reasoning. Presumptions "assume the truth of certain matters for the purpose of some given inquiry."[31] The presumption of sanity relieves the prosecution of the necessity of introducing evidence of the accused's mental condition until the issue is raised by the defense. All that is usually required in this respect is sufficient proof to create a reasonable doubt.[32] Though in one jurisdiction—Nebraska—the court has held that any evidence at all will suffice.[33]

A leading case on this subject, and the first pronouncement on the question by the Supreme Court of the United States, is *Davis v. United States*.[34] There Justice Harlan wisely asked: "How . . . upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely the capacity in law of the accused to commit that crime?" But for a statute requiring insanity to be "proved," the Supreme Court of Canada would have adopted this view in *Clark v. The King*.[35] *In State v. Redemier*,[36] Henry, J., dissenting, argued strongly for the adoption of this less stringent rule in Missouri. "If a jury are to acquit on a reasonable doubt of defendants guilt and one cannot be guilty if insane, by what process of reasoning will a jury, having a reasonable doubt of defendants sanity, come to the conclusion that they should convict notwithstanding the instructions that a reasonable doubt of his guilt entitles him to an acquital?"

There are primarily two reasons why the majority of courts still require the defense to prove insanity by at least a preponderance of the evidence. The first is the fear that insanity might be too easily feigned and a less stringent rule would open a door to unjustified acquittals.[37] Secondly, the courts, giving too much weight to the presumption of sanity, reach such a result as a matter of theory.[38] In a forcefully written separate opinion, concurred in by four other judges, Hollingsworth, J. proposes that it is wrong to require an accused to prove his innocence on the ground of insanity by even a preponderance of evidence. To do so, he says,

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30. Davis v. United States, 160 U.S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499 (1895) and cases therein cited. WEIHOFEN, *op cit., supra* n. 9 at 158.
31. THAYER, EVIDENCE 314 (1898).
32. WEIHOFEN, *op. cit., supra* n. 9 at 161.
33. Torske v. State, 123 Neb. 161, 242 N.W. 408 (1932); Snider v. State, 56 Neb. 309, 76 N.W. 574 (1898).
34. *Supra* n. 30.
35. 61 Can. Sup. Ct. Rep. 608 (1921). See opinion of Anglin, J. at 622. See notes in 3 AUST. L. J. 328 (1930).
36 *Supra* n. 17.
37. See *supra* n. 8. State v. Klinger, *supra* n. 18, for a refutation of this argument see Davis v. United States, *supra* n. 30.
38. Kelch v. State, *supra* n. 24; State v. Quigley, 26 R. I. 263, 58 Atl. 905 (1904).

"violates a basic concept of American and English jurisprudence: the presumption of the innocence of every person charged with crime." Notwithstanding the court's desire to lessen the defendant's burden, they fail to do so. Not, however, for one of the above reasons, but because a statute of this state provides that when a jury has acquitted a defendant on the sole ground of insanity they will further determine whether he has recovered from his insanity, and if he has not so recovered then it provides for his commitment to a state hospital.[39] The court seems to feel that this, by implication, requires a factual finding of insanity. The same conclusion was reached in *State v. Murphy*[40] which, though it involved a different problem, considered the question here in issue in reaching its result. Obviously, said the court, the statute "is incompatible with the theory that the jury may acquit when they entertain only a reasonable doubt as to the sanity of the accused."

It is unfortunate that a procedural statute stands in the way of the adoption by the Missouri court of the more liberal view. The trend of the cases has been in this direction,[41] and both justice and logic support such a change. Perhaps a statutory revision will provide the solution.

If a change is made there is one problem that will have to be met. The court apparently would not abolish the requirement that insanity be an affirmative defense.[42] What it would require would be that the defense sustain the burden, though it must only create a reasonbale doubt as to sanity to authorize an acquittal on that ground. Isn't this in effect the American rule? Whether the prosecution must prove sanity beyond a reasonable doubt, or the defense affirmatively raise that same doubt, would seem of no consequential difference in practice. Especially is this so when it is remembered that in all but one of the jurisdictions following the American rule the defendant must produce enough evidence to create a reasonable doubt before the presumption of sanity is rebutted and the state is required to assume the burden of proof.[43] It would seem just, and less confusing,

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39. Mo. Rev. Stat. § 546.510 (1940): "Acquittal because of insanity, disposal. When a person tried upon indictment for any crime or misdemeanor shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; . . . .

40. 338 Mo. 291, 90 S.W. 2d 103 (1936). Also see State v. Quigley, *supra* n. 38, and cases therein cited where similar statutes were construed to the same effect.

41. Weihofen, *op. cit. supra* n. 9 at 168; Jones, Evidence, *supra* n. 10 § 2535. But see Wigmore, Evidence § 2501 (3d ed. 1940) who seems to think otherwise.

42. State v. Barton, *supra* n. 1 at 602.

43. In Georgia and South Carolina the approved instruction is that insanity is an affirmative defense to be proved by the accused by a preponderance of the evidence, but that if the jury entertain a doubt on the whole showing, including the question of insanity, they must give the benefit of that doubt to the accused and acquit. Carr v. State, 96 Ga. 284, 22 S.E. 570 (1895); State v. McIntosh, 39 S. C. 97, 17 S.E. 446 (1893). However, the Georgia court seems to have tacitly abandoned this seemingly inconsistent rule, in favor of a charge that the burden is on the accused to the reasonable satisfaction of the jury. Carroll v. State, 204 Ga. 510, 50 S.E. 2d 330 (1948). Also see, Wilson v. State, 9 Ga. App. 274 (1911).

to adopt the American rule in full, placing the burden of proving all the essential elements, including the voluntary will of the accused, upon the prosecution.[44]

WILLIAM B. ANDERSON

INSURANCE—LIFE—ASSIGNMENT TO ONE WITHOUT AN INSURABLE INTEREST
Butterworth v. Mississippi Valley Trust Co.[1]

On February 8, 1935, one Butterworth took out a $100,000 ordinary life insurance policy on himself naming one Tarlton, a business associate, as beneficiary. On March 13, 1935, Butterworth, the holder of the policy, purported to make an absolute assignment of the policy to Tarlton, the beneficiary, for the purpose of "settling the accounts" between the two men. On February 10, 1936, Tarlton irrevocably assigned the policy to the defendants as trustees of a trust set up by him, called the "Tarlton Trust." Tarlton died in 1943. In 1944, Butterworth, the original holder and "cestui que vie," purported to assign his interest in the policy to plaintiffs as trustees of the "Butterworth Trust." Butterworth died in 1947, and the defendants, as trustees of the Tarlton Trust, collected the face amount of the policy. Neither Butterworth nor the Butterworth Trust paid any premiums on the policy; Tarlton and his assignee paid all of them from 1935. It was conceded that the Tarlton Trust had no insurable interest in the life of Butterworth. The trustees under the Butterworth Trust brought this action against the trustees of the Tarlton Trust for an accounting of the proceeds of the policy. Plaintiffs contended that the policy was assigned to Tarlton in the first instance as a security for a debt and that the creditor may retain only the amount of the indebtedness then unpaid, plus any premiums paid to maintain the policy. Plaintiffs also contended that the assignment to the Tarlton Trust was void because it had no insurable interest in Butterworth, thus being a violation of the rule of public policy against wagering contracts. A decree for the defendant trustees was affirmed, the supreme court holding that the assignment to Tarlton was not given as security for a debt and that an assignment to one without an insurable interest, made in good faith and not as a mere cloak to cover a gambling transaction, is not against public policy and is valid.

It has long been settled in most states, including Missouri, that where an insured (*i.e.*, the person who contracts with the insurer) takes out a policy of insurance on the life of another, the policy is void unless the insured has an insurable interest in the insured life.[2] It is equally well settled that where the beneficiary is the active and moving party in procuring another to insure his own life, the policy is void unless the beneficiary has an insurable interest in the insured life.[3] These

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44. Since the writing of this note the supreme court has again held an instruction almost identical with the one in the principal case to be erroneous as imposing a higher degree of proof than the law requires. State v. Eaves 243 S.W. 2d 129 (Mo. 1951).

1. 240 S.W. 2d 676 (Mo. 1951).
2. Singleton v. St. Louis Mut. Ins. Co., 66 Mo. 63, 72 (1877).
3. Deal v. Hainley, 135 Mo. App. 507, 116 S.W. 1, 13 (1909); Whitmore v. Supreme Lodge, 100 Mo. 36, 13 S.W. 495 (1889).

well-settled rules were extended by the Supreme Court of the United States in the leading case of *Warnock v. Davis.*[4] In that case it was held that where one insured his own life pursuant to a prior contract with a third party, who had no insurable interest, which provided that the policy, when issued, should be assigned to the third party, who would pay the premiums, the assignment was void. The decision in *Warnock v. Davis* was unquestionably sound upon the facts there involved but the opinion contained *dictum* which went far beyond the facts, to the effect that an assignment of a life insurance policy is never valid unless the assignee has an insurable interest in the insured life. That dictum was overruled by the United States Supreme Court in *Grigsby v. Russell,*[5] a decision holding valid an assignment of a life insurance policy to an assignee with no insurable interest. In that case a man had insured his own life, without contract or plan to assign the policy, and, years later, made the assignment in question. The *dictum* in *Warnock v. Davis* created considerable confusion in the state courts. In Missouri it resulted in several conflicting decisions of courts of appeals which have left the law in a doubtful state for more than sixty years. The decision now noted settles the law on the question.[6]

The first Missouri case on the subject was *McFarland v. Creath.*[7] In that case, the holder took a policy on himself and made payable to himself. Before his death, the holder assigned the policy to the defendant, who had no insurable interest in the life of the insured. The court held that such an assignment made the defendant the beneficiary and held the assignment valid, distinguishing between a case where the policy is taken out by a person having no insurable interest in the insured life and the case where the policy was taken out by the person whose life was insured himself and then assigned to one without an insurable interest. In the subsequent case of *Heusner v. Mutual Life Ins. Co.,*[8] the St. Louis Court of Appeals held that an assignment to one without an insurable interest was void. In that case, the holder assigned a paid-up policy worth $1500 at maturity for $342. The court said the peculiar facts showed that the assignee was merely gambling on the life of the insured. The court in effect said that the decision of *McFarland v. Creath, supra,* was overruled by the Missouri case of *Whitmore v. Supreme Lodge,*[9] a case which did not involve an assignment. In the *Whitmore* case, the policy was taken out by the person whose life was insured but there was evidence that the beneficiary was the active and moving party in the transaction. In the *Heusner* case, *supra,* the

4. 104 U.S. 775, 779 (1881).
5. 222 U.S. 149, 156 (1909). In ruling on the precise question, Justice Holmes wrote, "And cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager have no similarity to those where an honest contract is sold in good faith."
6. Neither the decision noted nor the present note is applicable to policies of life insurance on the assessment plan in Missouri. As to such policies, Section 377.080, Mo. REV. STAT. (1949), provides, "2. Any assignment of a policy or certificate to a person having no insurable interest in the insured life shall render such assignments void and of no effect."
7. 35 Mo. App. 112 (1889).
8. 47 Mo. App. 336, 343 (1891).
9. 100 Mo. 36, 46, 13 S.W. 495 (1889).

assignee was, however, permitted to recover the amount he had paid for the policy. Following the *Heusner* case, *supra,* subsequent Missouri appeals decisions permitted the assignee to recover only the amount he had paid for the policy plus the amount of the premiums he had paid.[10] In these cases, the courts refused to apply the assignment in good faith rule and usually said that an assignment to one who had no insurable interest was void.

In the case of *Lee v. Equitable Life Assurance Society,*[11] the Kansas City Court of Appeals seemed to return to the holding of *McFarland v. Creath.*[12] In the *Lee* case, the assignee paid values for a policy of a paid-up value of $750. The court upheld the assignment, recognizing the general rule that a policy secured by a beneficiary who does not have an insurable interest in the life of the insured is void but refusing to apply that rule to the case where the policy is obtained by the person whose life is insured and later assigned to one without an insurable interest. In *Allen v. Aetna Life Ins. Co.,*[13] the Springfield Court of Appeals held that there was no assignment of the policy there involved but intimated that even had there been, the assignee would have had no interest in the policy except as to the premiums paid.

In *Minnesota Mutual Life Ins. Co. v. Manthei,*[14] the policy taken out by the insured was assigned to the assignee as security for a note. The court said that where a policy is assigned in good faith and without any intention that the assignment is to be used as a cloak for a mere wager or gambling transaction, the assignment is not against public policy, and the policy may be assigned by the insured. The only qualification is that where the assignment is made to a creditor of the insured as security for a debt, it is valid only to the extent of the debt it secures, and the creditor must thereafter account to the beneficiary, or the insured's estate, as the case may be, for any excess of the proceeds.

The Missouri Supreme Court, in deciding the principal case, relied upon the language of the *Manthei* case, *supra,* as well as *Grigsby v. Russell,*[15] in reaching its result. Missouri now follows the weight of authority, which holds that an assignment of a life insurance policy to one without insurable interest in the insured life is valid to the entire extent of the policy if the assignment was made in good faith and not made to cover up a gambling transaction.

MONTGOMERY L. WILSON

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10. Tripp v. Jordan, 177 Mo. App. 300, 164 S.W. 158 (1914); Locke v. Bowman, 168 Mo. App. 161, 151 S.W. 468 (1912); Bruer v. K. D. Life Ins. Co., 100 Mo. App. 540, 75 SW. 380 (1903); Mutual Life Ins. Co. v. Richards, 99 Mo. App. 88, 72 S.W. 487, 489 (1903); N. Y. Life Ins. Co. v. Rosenheim, 56 Mo. App. 27, 34 (1895).

11. 195 Mo. App. 40, 189 S.W. 1195 (1916). See also Comment, 15 Mo. L. REV. 68-71 (1950).

12. *Supra,* note 7.

13. 228 Mo. App. 18, 62 S.W. 2d 916, 918 (1933), citing Locke v. Bowman, *supra,* note 10.

14. 189 S.W. 2d 144, 151 (Mo. App. 1945). *Contra:* Schneider v. Kohler, 219 S.W. 2d 499 (Mo. App. 1947)

15. *Supra,* note 5.

PROPERTY—ADVERSE USER—CLAIM OF RIGHT—ACTUAL KNOWLEDGE OF OWNER—APPELLATE JURISDICTION—EJECTMENT AGAINST NON-POSSESSOR

Zinser v. Lucks[1]

In 1933 the defendants went upon the plaintiffs' land adjacent to the intersection of U.S. Highway No. 54 and the old Linn Creek Passover Road, and erected two sign boards directing vacationers to the defendants' place of business, the "Art Lucks Resort." The plaintiffs' property here concerned was unfenced woodland. From 1933 to the time this action was brought in 1949, the defendants went on the plaintiffs' land and maintained and repaired the sign boards, and kept the weeds and brush cut to enable the sign boards to be plainly visible from the highway at all times. The sign boards were erected without permission from the owners and without knowing to whom the land belonged. Plaintiffs, residents of Chicago, Illinois, brought an action of ejection in 1949 wherein the defendants by their answer sought to enjoin the plaintiffs from interfering with their use, claiming an easement by prescription. The trial court dismissed plaintiffs' petition, and held that defendants by prescription had a right of ingress and egress to maintain the two sign boards, and permanently enjoined the plaintiffs from interfering therewith. The Missouri Supreme Court reversed the trial court's decision on the ground that the use of the land by the defendants "was not of such character as to indicate to the owners of the land that the lands claimed were used under a claim of right, and to put the owner on inquiry as to the character of the use so as to charge them with notice irrespective of whether they had actual notice or not."

No question was raised whether ejectment was the proper action. It would seem that an action of ejectment would not lie in this case. Ejectment is an action for the recovery of *possession* of land.[2] Plaintiffs, to recover in ejectment, must show that, at the time of the commencement of the action, the defendants were in *possession* of the premises claimed.[3] Here the defendants were not in possession. Defendants were merely engaged in wrongful user. Adverse *possessors* of land for ten years acquire *title* by adverse possession, instead of an *easement* by prescription. The proper action would seem to be a suit to enjoin repeated or continuing trespasses.[4]

It would seem doubtful whether the supreme court had jurisdiction in the present case. The question of whether the supreme court has appellate jurisdiction in actions of ejectment has caused some difficulty in Missouri. The Missouri Constitution gives the supreme court jurisdiction in "cases involving . . . title to real

1. 235 S.W. 2d 844 (Mo. 1951).
2. MO. REV. STAT. § 524.010. (1949).
3. MO. REV. STAT. § 524.080. (1949).
4. Evans v. Shaphard, 81 Ind. App. 147, 142 N.E. 730 (1924); Hobart-Lee Tie Co. v. Stone, 135 Mo. App. 438, 117 S.W. 604 (1909); Kennedy v. Robinson, 104 Vt. 374, 160 Att. 170 (1932; 28 AM. JUR., *Injunctions*, Sec. 137; Note, 92 A.L.R. 583 (1934); Note, 32 A.L.R. 492 (1924). The cases hold that an action of trespass is inadequate because of multiplicity of suits and because in some cases the trespass if continued will ripen into an easement.

estate."[5] Numerous Missouri cases have held that a simple action of ejectment is merely a possessory action and does not involve title to real estate.[6] But the cases have also held that if the answer seeks an adjudication of title, then title to real estate is involved.[7] *Tooker v. Missouri Power & Light Co.*[8] held that an action of ejectment for possession of land on which the defendant claims an easement or right of way does involve title to real estate so as to give the supreme court appellate jurisdiction. However, *Ballenger v. Windes*[9] overruled the *Tooker* case, "as well as other cases holding likewise." According to the Ballenger case, before title to real estate is involved the judgment must adjudicate a title controversy; the court explains this by quoting from *Nettleton Bank v. McGauhery's Estate*[10] that "the judgment sought or rendered must be such as will directly determine title in some measure or degree adversely to one litigant and in favor of another; or, as some of the cases say, must take title from one litigant and give it to another." The court in the Ballenger case concluded that a simple action of ejectment in which no title relief is sought or granted merely involves a "judgment for possession," and though it is necessary for the court to determine which party owns the land in order to correctly decide the question actually up for judgment, title to real estate is not involved in the constitutional sense. In the case of *Cantrell v. City of Caruthersville*,[11] decided in 1949, the Missouri Supreme Court agreed with the holding in the *Ballenger* case, and affirmed the view that before 1943 in actions of simple ejectment in which no title relief is sought or granted title is involved only incidentally or collaterally, the judgment does not directly determine title, and therefore title to real estate is not involved so as to give the supreme court appellate jurisdiction. However, the court then held that under the 1943 Missouri Code for Civil Procedure a judgment in the statutory action of ejectment is conclusive between the parties as to title as to issues raised or which might have been raised,[12] but this part of the decision was given a prospective effect. It is yet to be seen whether this doctrine affects the appellate jurisdiction of the supreme court in actions of ejectment. After the *Cantrell* case it would seem that a judgment in an action of ejectment may or may not directly determine title, depending on the issues raised or

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5. Mo. CONST. Art. 5, § 3 (1945); Mo. CONST. Art. 6, § 12. (1875).

6. State *ex rel.* Edie v. Shain, 348 Mo. 119, 152, S.W. 2d 174 (1941); Wood v. Gregory, 155 S.W. 2d 168 (Mo. 1941); Hyer v. Baker, 130 S.W. 2d 516 (Mo. 1939); Frederich v. Tobaben, 117 S.W. 2d 251 (Mo. 1938); Ballenger v. Windes, 338 Mo. 1039, 93 S.W. 2d 882 (1936).

7. Davidson v. Eubanks, 185 S.W. 2d 73 (Mo. App. 1945); Murphy v. Milby, 344 Mo. 1080, 130 S.W. 2d 518 (1939); Welsh v. Brown, 339 Mo. 235, 96 S.W. 2d 345 (1936). *But cf.* Hinkle v. Wood, 155 S.W. 2d 191 (Mo. 1941).

8. 336 Mo. 592, 80 S.W. 2d 691 (1935).

9. 338 Mo. 1039, 93 S.W. 2d 882 (1936).

10. 318 Mo. 948, 2 S.W. 2d 771 (1928) (leading case).

11. 221 S.W. 2d 471 (Mo. 1949). See Eckhardt, *Ejectment or Trespass as Determining Title*, 15 Mo. L. REV. 379 (1950).

12. At common law a recovery in ejectment did not bar further actions of ejectment even though between the same parties, having the same defenses, concerning the same land. The title was not "directly in issue" and could be "collaterally and incidentally" tried again and again. 18 AM. JUR., *Ejectment*, § 124, p. 100.

which might have been raised in the particular case, and therefore some actions of ejectment involve title to real estate so as to give the supreme court appellate jurisdiction. But in view of the fact that in the principal case the defendant claimed only a non-possessory right, and that ejectment probably was not the proper action, the decision would seem not to foreclose further consideration of the problem of appellate jurisdiction by the court.[13]

An easement may be acquired by prescription in the same general manner as title to land by adverse possession.[14] In other words, the elements of adverse user are substantially the same as the elements of adverse possession; the use must be hostile and under claim of right, actual, open and notorious, exclusive, and continuous for ten years.[15] The use must be open and notorious in order to give the owners a reasonable opportunity to learn of the existence and adverse nature of the use and protect their rights.[16] Actual knowledge[17] by the owners of such use is not necessary if they had a reasonable opportunity to learn of the existence of the use claimed to be adverse; knowledge will be imputed.[18] A reasonable opportunity to learn of the existence of the use is equivalent of knowledge of all that would be learned by reasonable inquiry.[19] According to the *Restatement of Property*,[20] such reasonable opportunity exists if the use is such as to be apparent upon an ordinary inspection of the premises,[21] or if it is of such common knowledge in the community that the owners could learn of it by availing themselves of such knowledge.

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13. The court in the present case held that "An easement implies an interest in land which places the jurisdiction in the Supreme Court," citing *Wood v. Gregory*, 155 S.W. 2d 168 (Mo. 1941). The court in the Wood case, however, following the rule quoted in the Ballenger case, pointed out the fact that the Tooker case has been overruled, and held that the facts of the case before the court (involving an action of ejectment in which the defendant set up an affirmative defense of estoppel and prayed for a determination of title) did not involve any actual controversy over the title of the property and therefore transferred the case to the Springfield Court of Appeals.

14. Schroer v. Brooks, 204 Mo. App. 567, 224 S.W. 53 (1920); Rice v. Wade, 131 Mo. App. 338, 111 S.W. 594 (1908); Power v. Dean, 112 Mo. App. 288, 86 S.W. 1100 (1905).

15. Hilgert v. Werner, 346 Mo. 1171, 145 S.W. 2d 359 (1940).

16. City of St. Louis v. Priest, 103 Mo. 652, 15 S.W. 988 (1890); RESTATEMENT, PROPERTY, § 458(c); note 18, *infra*.

17. If the owners have actual knowledge, even though the adverse user is unaware that the owners have actual knowledge, and even though the adverse user attempts to conceal such user, the use is open and notorious. RESTATEMENT, PROPERTY, Sec. 458(c), Comment *h.*, p. 1977 (1944). In *accord*, Mann v. Mann, 353 Mo. 619, 183 S.W. 2d 557 (1944); Norton v. Kowazek, 193 S.W. 556 (Mo. 1917).

18. Anson v. Tietze, 354 Mo. 552, 190 S.W. 2d 193 (1945); Johnson v. Moore, 346 Mo. 854, 143 S.W. 2d 254 (1940); Hilgert v. Werner, 346 Mo. 1171, 145 S.W. 2d 359 (1940); Miller v. Rosenberger, 144 Mo. 292, 46 S.W. 167 (1898); Key v. Jennings, 66 Mo. 356 (1877); Scruggs v. Scruggs, 43 Mo. 142 (1869); Warfield v. Lindell, 38 Mo. 561, 90 Am. Dec. 443 (1866); RESTATEMENT, PROPERTY, Sc. 458 (c), Comments *h.* and *i.*, p. 1977 (1944).

19. Johnson v. Moore, 346 Mo. 854, 143 S.W. 2d 254 (1940); Langford v. Welton, 48 S.W. 2d 860 (Mo. 1932).

20. RESTATEMENT, PROPERTY, Sec. 458(c), Comment *i.*, p. 1977 (1944).

21. In *accord*, Warfield v. Lindell, 38 Mo. 561, 90 Am. Dec. 443 (1866).

Though the court points out in its opinion that actual knowledge is not necessary if the adverse user's acts are so apparent that knowledge should be imputed to the owners, the court's holding would lead one to believe that knowledge of the existence and nature of the use will not be imputed in the case of unfenced woodland. The defendants entered the land and erected, maintained, and repaired two sign boards, 10 x 14 feet, adjacent to the intersection of a highway and road, and they continuously went on the land and cut the weeds and brush, thereby rendering the sign boards clearly visible from the highway at all times. It would seem that a more open or notorious use could not be made.[22] Nevertheless, the court held that "the use in this case was not of such character as to indicate to the owners of the land that the lands claimed were used under a claim of right,[23] and to put the owner on inquiry as to the character of the use so as to charge them with notice irrespective of whether they had actual notice or not." What the court apparently means is that the use was not considered by the court as open and notorious so as to give the owner a reasonable opportunity to learn of the existence and adverse nature of the use.[24] Though the court indicated that it thinks otherwise, the fact that the owners were non-residents of Missouri would seem to be irrelevant.

The court also seemed to rely heavily on the Texas case of *Burton v. Holland*[25] which held that the act of putting a sign board on the land of another and maintaining it and cutting the grass and weeds in front of the sign boards continuously for the statutory period, was not sufficient to put an ordinary prudent person on notice as to the intentions of the claimant to exclude the owners *from the whole tract.* The Texas case, however, was concerned primarily with the question of constructive adverse possession—whether actual possession of a part is constructive possession of the whole.[26] Furthermore, an intention to claim title in the whole tract is materially different from an intention to claim only an easement on the part actually used, and it would seem that acts necessary to manifest such intention in the one case are materially different than in the other.

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22. It is conceded that ordinarily mere user of a right of way through unfenced woodland would not be sufficient to impute knowledge of the existence and alverse nature of the use. 28 C.J.S., *Easements,* § 18, pp. 672, 673. The reason for this is that such lands usually consist of vast stretches of undeveloped, unoccupied territory such as prairies and forests, so vast in extent, that mere user of a right of way rarely, if ever, is brought to the actual knowledge of the record owner. Schroer v. Brooks, 204 Mo. App. 567, 224 S.W. 53 (1920). But, as has been pointed out, defendants' user in the present case was more than mere user of a right of way.

23. The term "claim of right," when used in connection with adverse possession or adverse user, means the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. Tillman v. Hutcherson, 348 Mo. 473, 154 S.W. 2d 104 (1941); 1 AM. JUR., *Adverse Possession,* Sec. 187; RESTATEMENT, PROPERTY, Sec. 458, Comment *d.* (1944).

24. 235 S.W. 2d 844 at p. 850, the court in the principal case says, . . . "we hold that the nature of the use and the situation of the parties under the facts in this case was not such open, notorious, uninterrupted, and adverse use of the lands sought to be acquired as an easement to give notice to the owners thereof of such intentions on the part of the defendants."

25. 278 S.W. 252 (Ct. Civ. App. Tex. 1925).

26. See Mo. REV. STAT. § 516.040 (1949).

The decision in the principal case may be supported on two grounds not discussed by the court. The defendant's testimony at the trial would seem to be fatal to his defense: "Q. Then you don't claim any ownership of that land at all? A. No, I don't." To acquire an easement by prescription the use must be made under a claim of right. Although there may be some question as to the meaning of the word "ownership" as used in the question, the question and answer would seem to negative any use of the land under the claim of right, and to amount to a present disclaimer of any interest in the land.[27]

The principal case might have been disposed of on the ground that a *revocable license* to erect and maintain sign boards on unfenced woodland of the character of the plaintiffs' land is *implied* from the custom and habits of the country.[28] User cannot be adverse so long as it has its inception in and continues under such an implied license, and the statutes of limitation do not begin to run until there is a distinct and positive assertion of a right hostile to the owner and "brought home to him."[29] Under such a theory the plaintiff's lack of actual knowledge of the user is highly significant.

LEONARD A. O'NEAL

PROPERTY—TENACY BY ENTIRETIES—REPLEVIN—PARTIES

Foulke v. McIntosh[1]

Husband and a third person were owners of certain lands as tenants in common, but prior to this action the third person quitclaimed his half-interest to the husband and wife. Husband brought replevin in his own name, not joining wife as plaintiff, against defendant for allegedly removing fence wire and posts from this property. The trial court entered judgment that the husband was entitled to the possession of this property, and defendant appealed. This judgment was reversed by the court of appeals because plaintiff's proof failed to establish that the fence was located on the land.[2] In its opinion, the court noticed that plaintiff was not the sole owner, saying: "There is no question but that at the time of this litigation, plaintiff and his wife owned the land."

On retrial, the lower court entered judgment on a verdict for the plaintiff, and the defendant appealed a second time, contending that the judgment should be re-

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27. *Supra*, notes 15 and 23. The possession (or use) cannot be adverse unless the possessor (or user) intends it to be adverse. Stamper v. Griffin, 20 Ga. 312, 65 Am. Dec. 628 (1856); Stevenson v. Black, 168 Mo. 549, 68 S.W. 909 (1902); Pharis v. Bayless, 122 Mo. 125, 26 S.W. 1032 (1894); Ricard v. Williams, 7 Wheat. 59, 5 L.Ed. 398 (U.S. 1822).

28. *See, e.g.*, McKee v. Gratz, 260 U.S. 127 (1922).

29. Williams v. Diederich, 359 Mo. 683, 223 S.W. 2d 402 (1949); Freed v. Greathouse, 238 Mo. App. 470, 181 S.W. 2d 41 (1944); McCune v. Goodwillie, 204 Mo. 306, 102 S.W. 997 (1907). This would seem to mean that before a permissive use can be transformed into an adverse use the owners must have *actual knowledge* of the user's hostile acts.

1. 234 S.W. 2d 805 (Mo. App. 1950).
2. 214 S.W. 2d 735 (Mo. App. 1948).

versed because the plaintiff's wife was not a party. Defendant based this contention on prior Missouri decisions to the effect that "one who is not the sole owner of chattels cannot sue in replevin to recover possession of them," and, "that all of the owners must join in the suit."[3]

Although stating that the court was not bound by its remarks as to this point in the first appeal, since it was not then in issue, the court did acknowledge that they therein said the plaintiff and his wife owned the land at the time of litigation, and in this second appeal treated the husband and wife as tenants by entireties in a half-interest of the property the husband was seeking to replevy.[4]

In considering the defendant's contention, the court said: "We do not dispute the rule that in replevin all *ordinary*[5] persons must join as plaintiffs." But the court rejected the defendant's contention, stating: "As they were tenants by the entirety in the half interest in such land, the husband had the right to maintain an action in his own name to replevin property taken from such land."[6]

At common law, the husband and wife were in legal contemplation but one person, and the husband was that person, the legal existence of the wife being considered for most purposes as suspended during the marriage and merged in that of the husband.[7]

The essential characteristic of an estate by the entirety in land is that each spouse is seized in the whole or entirety and not of a share, moiety, or divisible part.[8] Each is seized *per tout et non per my*.[9] Because of this, it has been the policy of the law to prevent acts by either spouse which would have the effect of destroying such unity. Thus the courts hold that in such an estate in real property, one tenant by the entirety has no such right, title, or interest therein as may be conveyed or encumbered by his or her sole act, and that neither spouse alone, without the consent of the other, can sell, mortgage, or encumber the property, or any part thereof, or any interest therein.[10] It has been pointed out[11] that a tenancy by the

3. McCabe v. Black River Trans. Co., 131 Mo. App. 531, 110 S.W. 606 (1908).

4. Davidson v. Eubanks, 354 Mo. 301, 189 S.W. 2d 295, 161 A.L.R. 450 (1915); Peters v. Peters, 312 Mo. 609, 280 S.W. 424 (1926) (where the court said: "It is true in this state, as at common law, that where real property is conveyed to a husband and wife, and there are no limiting words in the operative clauses of the deed, they take an estate by the entirety."). Also see: Kelly, *Tenancy By The Entirety*, 16 Mo. L. Rev. 183 (1951); Steiner, *Tenants By the Entirety*, 26 U. of Mo. Bull. L. Ser. 46 (1923).

5. Emphasis added.

6. This in full is the reason assigned by the court.

7. 41 C.J.S. 394; Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); Russell v. Russell, 122 Mo. 235, 26 SW. 677 (1894).

8. Note, 8 Mo. L. Rev. 213 (1943).

9. Schwind v. O'Halloran, 346 Mo. 486, 142 S.W. 2d 55 (1940); Greene v. Spitzer, 343 Mo. 751, 123 S.W. 2d 57 (1938); Ahmann v. Kemper, 342 Mo. 944, 119 S.W. 2d 256 (1938).

10. Baker v. Lamar, 140 S.W. 2d 31 (Mo. 1940); Samuel v. Frederick, 262 S.W. 713 (Mo. 1924); Hartford Fire Ins. Co. v. Bleedorn, 235 Mo App. 286, 132 S.W. 2d 1066 (1939).

11. Tiffany, Real Property § 430 (3d ed. 1939).

entirety, though differing from a joint tenancy in some particulars,[12] is essentially a form of joint tenancy, modified by the common law theory that the husband and wife are one person.[13]

Turning now to personal property, the weight of authority is to the effect that estates by the entirety may exist in personal property as well as in reality,[14] and Missouri recognized this in an 1871 opinion.[15] The husband became absolute owner (in law) of his wife's separate personal property, and may have had the exclusive right to possession of personal property held by them as tenants by the entirety. Consequently before the married women's acts, the husbands may have been the only person who could maintain replevin. However, with the passage of a married woman's property act in 1875, relating to personal property, the situation takes on a different aspect.[16] In *Rezabek v. Rezabek*,[17] the Missouri court recognized a tenancy by the entire in personal property and said that during coverture each is entitled to one-half of the rents and profits arising therefrom. Also it was pointed out in *Johnston v. Johnston*[18] that the statutes placing the husband and wife on the same footing with regard to the right to have and hold personal property, in effect abolished the legal unity which gave rise to estates by the entireties, without abolishing the estate itself. In view of the foregoing, the question arises as to whether today either tenant by the entirety, acting alone, may maintain an action of replevin.[19]

With reference to tenancies in common and joint tenancies, it is stated to be the general rule that to enable one to maintain replevin, his right to the possession must be exclusive.[20] Therefore, where a chattel is owned by several persons, the owner of an undivided interest cannot maintain replevin for it.[21] All of the owners

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12. As seisin, possibility of severance, and the nature of the survivor's interest.

13. Tyler v. U.S., 28 F. 2d 887 (D. Md. 1928); Licker v. Gluskin, 265 Mass., 403, 164 N.E. 613 (1929); *Cf.* Frost v Frost, 200 Mo. 474, 98 S.W. 527 (1906) (where the court says such estates did not arise as a necessity from this theory since it was possible for husband and wife to be tenants in common).

14. Woodard v. Woodard, 216 Mass. 1, 102 N.E. 921 (1913); In re Sloan's Estate, 254 Pa. 346, 98 Atl. 966 (1916); Shields v. Stillman, 48 Mo. 86 (1871); Rezabek v. Rezabek, 196 Mo. App. 673, 192 S.W. 107 (1917); Lomax v. Cramer, 216 S.W. 575 (1919). Also see cases collected in Note, 8 A.L.R. 1017 (1920) and 117 A.L.R. 915 (1938).

15. Shields v. Stillman, *supra* note 14, which in effect overruled Polk v. Allen, 19 Mo. 467 (1854) where tenancy by entireties in personal property was denied by the court; Garner v. Jones, 52 Mo. 68 (1873); see Steiner, *Estate By The Entirety in Personal Property*, 30 U. OF MO. BULL. L. SER. 60 (1924).

16. No Missouri decisions on this point found.

17. Mo. Laws 1875, p. 61; MO. REV. STAT. § 451.250 (1949).

18. 173 Mo. 91, 73 S.W. 202, 61 L.R.A. 166, 96 Am. St. Rep. 486 (1903).

19. Bryan, *Actions to Recover Chattels in Missouri*, [1950] WASH. U. L. Q. 553.

20. 54 C.J. § 52, p. 441.

21. Gossett v. Drydale, 48 Mo. App. 430 (1892); Bryant v. Dyer, 96 Mo. App. 455, 70 S.W. 516 (1902); Cox v. Morrow, 14 Ark. 603 (1854); McArthur v. Lane, 15 Me. 245 (1839); Corcoran v. White, 146 Mass. 329, 15 N.E. 636 (1888); Reinheimer v. Hemingway, 35 Pa. 342 (1860).

are required to unite in the action, for the reason that all joint owners, unless there is an agreement to the contrary whereby one has a right to possession against the other part owners, are equally entitled to the possession of the property, and none has the right to the immediate and *exclusive* possession of the same as against the others.[22]

In *McCabe v. Black River Transportation Co.*,[23] cited by the defendant in support of his contention, the St. Louis Court of Apepals said that one who is not the sole owner of chattels cannot sue in replevin to recover possession of them and that all of the owners must be joined in the suit. In that case, the plaintiff based his claim on an unpaid mortgage executed to him by one who owned an undivided eleven-twelfth's interest in certain barges. The court held that his failure to join the party owning the remaining one-twelfth interest prevented his maintaining the action.

In *Upham & Gordon v. Allen*,[24] where a second mortgage brought replevin, the defendant getting possession of personal property while it was in the possession of an agent for the first, second, and third mortgagees, the court held that all of the mortgagees should join in the action and that one or two could not maintain replevin.

This general rule, and the reason supporting it, have been used by the courts repeatedly in cases involving tenants in common and joint tenants, and it is submitted that its soundness would apply equally to tenants by the entirety. In addition to the reasons discussed, it would seem that more support could be found for such a rule where tenants by the entirety are involved. Each of the parties is the owner of the whole, and not of an undivided part of the property. Neither tenant has the right to exclusive possession of the property, and the Missouri courts have continually asserted that in order to recover in an action of replevin, the plaintiff must have a right to the immediate and *exclusive* possession thereof.[25]

Another factor which should be considered in this connection is that, under the Missouri statutes on replevin,[26] the prevailing party may elect to take either the specific property involved, or damages for the value of the same.[27] Also the prevailing party is awarded damages in the event the property cannot be recovered from the adverse party.[28] In view of these provisions, it would seem that both the

22. Lisenby v. Phelps, 71 Mo. 522 (1880); Cross v. Hulett, 53 Mo. 397 (1873); Spooner v. Ross, 24 Mo. App. 599 (1887). In a considerable number of cases, however, it has been held that there may be exceptional circumstances under which one joint owner may properly bring, against a stranger, an action of replevin for the recovery of specific property. For such cases, see 110 A.L.R. 356 (1937).

23. *Supra*, note 3.

24. 73 Mo. App. 224 (1898).

25. Pugh v. Williamson, 61 Mo. App. 165 (1895); Oester v. Sitlington, 115 Mo. 247, 21 S.W. 820 (1891); Steffen v. Long, 165 Mo. App. 254, 147 S.W. 191 (1912).

26. Mo. Rev. Stat. §§ 533.120, 533.130, 533.140 (1949).

27. Woolridge v. Quinn, 70 Mo. 370 (1879); Tippack v. Briant, 63 Mo. 580 (1876); Hanlon v. O'Keefe, 55 Mo. App. 528 (1893).

28. Jones v. Jones, 188 Mo. App. 220, 175 S.W. 227 (1915); Bradley v. Campbell, 132 Mo. App. 78, 111 S.W. 514 (1908).

husband and wife who are tenants by the entirety should be parties to the action, not only for their mutual protection, but also for the protection of the defendant. Suppose the husband is the only party to the action and recovers damages from the defendant in lieu of the specific property. There is no assurance that the wife, who in the eyes of the law is also the owner of the whole property, will receive any of the proceeds from the satisfaction of such a judgment. Furthermore, since the wife was not a party to the action, the question may arise as to whether she can subject the defendant to a second action. Should the husband's action be deemed res adjudicata as to the wife, even though she was not a party to that action?

The decision of the court in the principal case leaves important questions unanswered, and it is hoped that the matter will be thoroughly reconsidered when a subsequent case arises.

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