Missouri Law Review

Volume 1
Issue 1 January 1936

1936

Recent Cases

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Recommended Citation

Recent Cases, 1 Mo. L. REV. (1936)
Available at: https://scholarship.law.missouri.edu/mlr/vol1/iss1/12

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Recent Cases

Advancements—Presumption of.

Miller v. Richardson

Four of the intestate’s heirs at law had received checks from him during his lifetime. He had written on these checks either “present,” “birthday present,” or “birth present.” The dates of the checks were not the birthdays of either the donor or donees. In holding the checks to be advancements the court said: “We think he (the deceased) intended said words to identify the checks as gifts. However, there was no evidence tending to show that he intended to make absolute gifts to said children. An advancement is an irrevocable gift, and therefore the use by the parent of the word ‘gift’ or ‘present’ in connection with the transaction is, standing alone, of little value in determining the parent’s intention.”

Two problems are raised by this case: (1) when, if at all, is a gift from parent to child presumed to be an advancement; and (2) when the presumption of an advancement has been raised, how may it be controverted? The doctrine of advancements was first set forth in 22 & 23 Car., II, c. 10 § 5 (1682-1683). This statute was not incorporated in the common law of Missouri. The only law regulating advancements in Missouri is that enacted by legislation. But the Missouri statutes do not define or distinguish advancements, excepting to say that “maintaining, educating or giving money to a child under the age of majority, without any view to a portion or settlement in life, shall not be deemed an advancement.”

The statutes having reference to advancements apply only in cases of intestacy. They have no application where the parent dies partially intestate.

Massachusetts, Michigan, Nebraska and Wisconsin courts will admit no presumption of an advancement. Those states have identical statutes which provide that “all gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gifts or grants to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant.” The courts of these states are unanimous in giving this provision its most strict interpretation. They hold that oral testimony is incompetent to prove an advancement, saying that a gift or grant will not be deemed an advancement unless it is expressed in the gift or grant to be so made, charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. This is the most conservative line of authority in the United States. Between the extreme conservative and liberal jurisdictions there is a middle ground

1. 85 S. W. (2d) 41 (Mo. 1935).
5. Turpin v. Turpin, 88 Mo. 337 (1885); Wickliffe v. Wickliffe, 206 Mo. App. 42, 226 S. W. 1034 (1920); In re Lear’s Estate, 146 Mo. App. 642, 124 S. W. 592 (1910).
of authority. Thus, a Federal case says that payments made to or for children, either minors or adults, are presumed to be gifts, not advancements of the children's property, unless the contrary is made to appear. A Pennsylvania court has held that there is no presumption of an advancement when a parent makes a gift of money to his child; and to establish an advancement it must be proved that the principal of the donor's estate is impaired by reason of the gift. Missouri courts follow the rule adopted by the greater number of jurisdictions in this country. They presume that a parent intends all his children to share equally in his estate, not only in what may remain at his death, but equally in all that came from him. They invoke the doctrine of advancements to effectuate equality in the distribution of estates. Obviously, the courts adopting this position would not stretch the doctrine of advancements so far as to apply it to every casual gift between parent and child. Quare, at what points do presents cease to be small and trivial? Missouri courts say that when a gift is "substantial" it is presumed to be an advancement. Whether or not a gift is substantial necessarily rests on the relative positions of the parties to the transaction, depending largely on the parent's means and circumstances. Other factors would be the character and personality of the donor, the time and manner of making the gift. A gift of land is always substantial.

Whether a transaction is a gift or advancement is always a question of the donor's intention. A presumption of advancement can therefore be rebutted by showing a different intention. The intent of the donor at the time the gift was made is controlling. In general,

13. Lynch v. Culver, 260 Mo. 495, 168 S. W. 1138 (1914); Dobbins v. Humphreys, 171 Mo. 198, 70 S. W. 815 (1902); Gunn v. Thruston, 130 Mo. 339, 32 S. W. 654 (1895); Ray v. Loper, 65 Mo. 470 (1877); Stephens v. Smith, 127 Mo. App. 18, 106 S. W. 533 (1907); McDonald v. McDonald, 86 Mo. App. 122 (1900).
14. Taylor v. Taylor, L. R. 20 Eq. 155, 44 L. J. Ch. 718 (1875); In re King's Estate, 6 Whart. 370 (Pa. 1841).
15. Lynch v. Culver, 260 Mo. 495, 168 S. W. 1138 (1914); Ray v. Loper, 65 Mo. 470 (1877); Gobel v. Kitchen, 217 Mo. App. 354, 266 S. W. 992 (1924); Waddell v. Waddell, 87 Mo. App. 216 (1901); McDonald v. McDonald, 86 Mo. App. 122 (1900).
16. Fennell v. Henry, 70 Ala. 484, 45 Am. Rep. 88 (1881); McDonald v. McDonald 86 Mo. App. 122 (1900) "... Circumstances will have probative force and are often of great aid, in the absence of direct evidence, in determining the question of the intention of the parent. If the gift is of small or slight consequence, the inclination would be to consider it as simply a gift, and not an advancement. Much could be inferred from the nature of the property and the financial condition of the parent. The gift of a horse or a cow by an opulent parent would not be so persuasive of an advancement as if the parent was poor. And while we have said that a transfer and delivery of property from parent to child is an advancement, yet a mere trifling sum or present would not be so considered, for the inconsequence of the matter would, on its face, rebut the presumption."
20. Pilkington v. Wheat, 330 Mo. 767, 51 S. W. (2d) 42 (1932); Dobbins v. Humphreys, 171 Mo. 198, 70 S. W. 815 (1913); Ladd v. Stephens, 147 Mo. 319, 48 S. W. 915 (1898); Ray v. Loper, 65 Mo. 473 (1877).
22. Bolin v. Bolin, 245 Ill. 613, 92 N. E. 530 (1930); Dillman v. Cox, 23 Ind. 440 (1864); Calhoun v. Taylor, 178 Iowa 56, 159 N. W. 600 (1916); Nobles v. Davenport, 183 N. C. 207, 111 S. E. 180 (1922).
the presumption is not strong, and slight evidence is sufficient to overcome it.\(^2\) How strong the rebutting evidence must be necessarily depends upon the strength of the presumption as raised by the circumstances of the case; so no steadfast rule can be set down. Evidence that the advancement was for adequate and valuable consideration will rebut the presumption,\(^3\) though a recital of nominal, inadequate consideration,\(^4\) or consideration of love and affection\(^5\) will not. Evidence of absolute gifts to other children, and of the amount thereof is admissible as tending to show the motive with which the gift was made.\(^6\) Subsequent and prior parol declarations of the donor to third parties can rebut the presumption.\(^7\)

The circumstances surrounding Miller \textit{v.} Richardson undoubtedly influenced the court in holding the checks to be advancements. The intestate had made gifts of realty to others of his heirs at law which the court held were advancements. The checks were evidently for relatively large sums, though the individual amounts of the checks are not given. Those of the intestate's children who were least well off and most needed present help were the recipients of more valuable gifts than the others. In the light of these facts, it would seem that the checks were properly construed as advancements.

\textbf{Victor C. Woerheide}

\textbf{ATTORNEY AND CLIENT—NEGLIGENCE OF ATTORNEY AS BASIS FOR SUIT FOR DAMAGES BY CLIENT.}

\textit{Roehl v. Ralph}\(^8\)

Plaintiff employed defendant, a practicing attorney, to defend him in an action on a note. Defendant failed to file answer in time, a default judgment was entered against plaintiff and the judgment term was allowed to expire. Plaintiff brought this action against de-

\begin{itemize}
  \item 23. Lisles \textit{v.} Huffman, 88 Mo. App. 143 (1901); Bissell \textit{v.} Bissell, 120 Iowa 127 94 N. W. 465 (1903); Packard \textit{v.} Packard, 95 Kan. 644, 149 Pac. 404 (1915); Neil \textit{v.} Flynn Lumber Co., 82 W. Va. 24, 95 S. E. 523 (1918). "This presumption is only indulged where there is no evidence of the real intention of the parties. If it can be ascertained from the contract made, or from the conduct of the parties and their subsequent dealings with the estate, that it was intended as a gift by the ancestor, it will be given that effect."
  \item 24. Lynch \textit{v.} Culver, 260 Mo. 495, 168 S. W. 1138 (1914). The presumption may be reinstated, however, by evidence that the transfers were not for the money consideration named; Nelson \textit{v.} Nelson 90 Mo. 460, 2 S. W. 413 (1886); Ray \textit{v.} Loper, 65 Mo. 473 (1877); Lisles \textit{v.} Huffman, 88 Mo. App. 143 (1901).
  \item 25. Lynch \textit{v.} Culver, 260 Mo. 495, 168 S. W. 1138 (1914); Nelson \textit{v.} Nelson, 90 Mo. 460, 2 S. W. 413 (1886); Ray \textit{v.} Loper, 65 Mo. 473 (1877); Lisles \textit{v.} Huffman, 88 Mo. App. 143 (1901); Murphy \textit{v.} Callan, 199 Iowa 216, 199 N. W. 981 (1924). "Where the consideration for the land conveyed to the child is grossly inadequate, the difference between the value and the consideration is presumed an advancement."
  \item 26. Seed \textit{v.} Jennings, 47 Or. 464, 83 Pac. 872 (1905); Schlicher \textit{v.} Keeler, 62 Atl. 4 (1905), aff'd 73 N. J. Eq. 738, 70 Atl. 1101 (1908). "A conveyance of land in consideration of natural love and affection or for a nominal consideration, by a parent to his child, has been held to be an advancement within our statute, unless the contrary intention is made to appear, and the presumption arising from such conditions overcome." Lynch \textit{v.} Culver, 260 Mo. 495, 168 S. W. 1138 (1914) held that evidence that a gift from parent to child was made because the donee was a good boy and stayed at home would not rebut the presumption of an advancement. Lisles \textit{v.} Huffman, 88 Mo. App. 143 (1901) held that where the deceased made deeds to all his children at the same time, giving the boys twice as much as the girls because they had remained with him longer and rendered him greater service, the presumption of an advancement was rebutted.
  \item 27. Gunn \textit{v.} Thruston, 130 Mo. 339, 32 S. W. 654 (1895).
  \item 28. Gunn \textit{v.} Thruston, 130 Mo. 339, 32 S. W. 654 (1895); Nelson \textit{v.} Nelson, 90 Mo. 463, 2 S. W. 413 (1886); Ray \textit{v.} Loper, 65 Mo. 473 (1877).
\end{itemize}

\textbf{1. 84 S. W. (2d) 405 (1935).}
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4. 6 C. J. 708.
7. 51 L. R. A. (N. S.) 279, note.
10. Gilman v. Hovey, 26 Mo. 280 (1858); Dodd v. Williams, 3 Mo. App. 278 (1877); Houck v. Mason, 9 Mo. App. 576, memo (1881); Renkert v. Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641 (1903); Pridy v. MacKenzie, 205 Mo. 81, 103 S. W. 968; National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561 (1909); Gabbert v. Evans, 184 Mo. App. 283, 166 S. W. 635 (1914).

Defendant for damages, alleging negligence in defendant's failure to file answer in due time. Defendant pleaded plaintiff furnished him no facts constituting a good defense to the action on the note. The jury found that defendant undertook the defense, failed to plead in due time, and returned a verdict for plaintiff. Defendant filed a motion for a new trial, assigning as error the court's refusal to instruct that even if defendant undertook plaintiff's defense, yet if plaintiff furnished defendant no facts constituting a valid defense, the verdict should be for defendant. The motion was sustained. Plaintiff appealed.

Held, defendant having undertaken plaintiff's defense, he impliedly represented to his client that he would exhibit the skill and diligence of an ordinary well-informed member of the legal profession, and his failure to plead in due time or take such other steps as were necessary to protect his client's rights would be negligence. But a client suing an attorney for negligence in failing to plead in due time must prove that the attorney's negligence was the proximate cause of the client's loss. The attorney's negligence cannot be the proximate cause of the client's loss if the client did not have a valid defense to the action brought against him and if he did not furnish same to the attorney. Judgment affirmed.

Clearly the jury was justified in finding negligence on the attorney's part in his failure to plead in due time, assuming that the client furnished the necessary information. Further, it seems just that the client should not recover damages from the attorney when he cannot be said to have suffered any through the attorney's fault.

The question arises whether such an action is in contract or in tort. Apparently the client may sue either on the theory of assumpsit for breach of the implied promise, or case for neglect of duty. In the principal case the court says the attorney "impliedly represented to the client that he would exhibit skill and diligence, etc.," suggesting the implied contract; but the opinion proceeds to deal with the attorney's negligence and the necessity for showing proximate causation. The action has been held to be in tort in some instances, while other courts have expressly declared the action to be in contract. The contractual relation between attorney and client undoubtedly carries with it duties both implied by the relationship and imposed by law. The question may become important with respect to the running of the statute of limitations, the measure of damages recoverable, the right to garnish and attach and questions of joinder of causes of action. In contract the client might obtain moral satisfaction through nominal damages where no substantial injury results to the client. Or perhaps not even nominal damages should be awarded if the filing of an answer where the client has no defense would constitute a breach of the attorney's professional obligations. The few reported Missouri cases seem to have been treated as actions in tort.

If the action be considered as in tort, the court's control over the case may be greater than in ordinary tort cases. The judge, being better qualified than a jury of laymen to pass on an attorney's negligence, may reasonably make inroads on factual territory in instructing the jury as to what is or is not, as a matter of law, negligence on the part of an attorney.

2. Frost v. Hansome, 198 Cal. 550, 246 Pac. 53 (1926); Martin v. Nichols, 110 Wash. 451, 188 Pac. 519 (1920); Milton v. Hare, 130 Ore. 590, 280 Pac. 511 (1929). See as to attorney's liability for passing on defective title, 5 A. L. R. 1389; for error in drafting a will or the like, 43 A. L. R. 932.
3. National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561 (1909); Gabbert v. Evans, 184 Mo. App. 283, 166 S. W. 635 (1914).

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For this reason, it might perhaps seem preferable for a client to sue in contract, where the question of proximate cause will not be involved. But even in a contract action, judicial control over the action is practically as great as in tort; for the contract is usually only implied by law and the court can say what is or is not a breach. Also, damages must be shown to result from a breach, the practical equivalent of showing proximate causation in a negligence case.

ROBERT A. WINGER

CONSTITUTIONAL LAW—EQUAL PROTECTION—EXCLUSION OF NEGROES FROM PETIT JURIES.

State v. Logan

The defendant, a colored man, was tried and convicted of murder in the first degree. The crime was committed in Boone County, Missouri. He was tried in the circuit court of Callaway County, Missouri, on a change of venue from Boone County, May term, 1935, before the regular judge of the eleventh judicial circuit of Missouri, special judge in this cause in this court.

In this trial the regular panel of petit jurors selected by the county court was not used and a special venire of thirty jurors was ordered by the court.

Defendant by his counsel, at the close of the voir dire examination, moved to quash the trial venire of thirty jurors summoned by the deputy sheriff of Callaway County, on the ground that the deputy sheriff, in selecting and summoning this venire, unlawfully discriminated against the defendant in violation of the Fourteenth Amendment to the Constitution of the United States, in that he arbitrarily selected all white citizens and did not select any negro citizens to serve as jurors, although there were hundreds of negro residents of Callaway County who were so qualified.

Defendant then offered evidence in support of the motion by calling the deputy sheriff as a witness who testified, among other things, that it was not the custom in Callaway County to select negroes for jury service, and that during four years as sheriff and two and six months as deputy sheriff, he had never selected a negro to sit on a jury.

The following is a part of that testimony:

"Q. If, when you had gone out to get this panel of 30, there had been four or five good negro men sitting at your door, Callaway Citizens, would you have selected one of them?

"A. I don't think so. Q. Why? A. Well, that has not been the custom.

"Q. I will ask you to tell this Court whether or not in all that period of time as Sheriff and Deputy Sheriff of Callaway County, you have ever selected a negro to sit as juror.

"A. No sir. Q. Why didn't you? A. I could answer you better out of the court room. We haven't been raised that way, now...to be plain with you."*

Defendant then called the official court reporter as a witness. This witness testified that he had been court reporter continuously for twenty-six years, and never in that period to his knowledge had there been a negro summoned as a juror in Callaway County, and that no doubt there were many negroes in Callaway County above twenty-one years of age and of good moral character.

The court overruled the motion to quash the trial venire and the defendant was tried and convicted. Counsel for defendant, at the proper time, moved for a new trial on the ground, among others, that the court erred in overruling defendant's motion to quash the trial venire thus depriving the defendant of his Constitutional rights as guaranteed in the Fourteenth Amendment.

In the argument on this motion counsel for the defendant relied on the interpretation of the Fourteenth Amendment by the Supreme Court of the United States in Clarence Norris v. State of Alabama* (one of the commonly called "Scottsboro Cases").


2*. Transcript of Record.

The motion for a new trial was overruled and defendant's appeal is now pending in the Supreme Court of Missouri.

In the Scottsboro cases, nine negroes were indicted in Jackson County, Alabama, for the crime of rape. Eight were convicted and sentenced to death. The Supreme Court of Alabama affirmed the conviction of seven. The United States Supreme Court reversed the conviction on grounds not material to us here. After the remand a motion for a change of venue was granted, and the cases were transferred to Morgan County, Alabama, where one of the defendants, Clarence Norris, was brought to trial in November, 1933. A motion was made to quash the trial-venire in Morgan County on the ground of long continued, systematic and arbitrary exclusion of qualified negroes from juries in that county, solely because of their race or color, in violation of the Constitution of the United States. The trial judge denied this motion and on appeal to the Supreme Court of Alabama, the judgment was affirmed. The United States Supreme Court reversed the judgment and remanded the case.

The Statutes of Missouri and Alabama are substantially the same with reference to the methods of empanelling juries. In State v. Logan, however, there was a special venire of thirty jurors ordered by the court, and in the Norris case, the regular panel was used.

The United States Supreme Court expressly held in the Norris case that whenever, by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as petit jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied him, contrary to the Fourteenth Amendment. And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited discrimination.

The evidence indicating intentional exclusion of negroes from the trial venire was substantially the same in the Logan case as it was in the Norris case. The latter case was tried in a county with a population of 46,176 of which 8,311 were negroes. For at least a generation no negroes had been called for jury service and none were on the jury roll, although there were many qualified for jury service in the county. The Supreme Court held that this showing of a long continued, unvarying and wholesale exclusion of negroes from jury service constituted a discrimination forbidden by the equal protection clause of the Fourteenth Amendment and required the quashing of the venire, notwithstanding testimony by an administrative officer that negroes were not intentionally excluded because of race or color.

In the light of this decision in the Norris case, may we conclude that the uncontested testimony in the Logan case to the effect that the deputy sheriff did not select negroes because such was not the custom in Callaway County, and the testimony of the court reporter that never to his knowledge had there been a negro selected for jury service in Callaway County, show such a long continued and wholesale exclusion as to violate the Fourteenth Amendment?

In the Logan case the trial judge in overruling the motion for a new trial drew the following distinction between that case and the Norris case: "The more I think about it, Gentlemen, the more clear it is to my mind that there is a broad distinction between the Scottsboro case and the case at bar. In the Scottsboro case there is no question of proof of discrimination, intentional, by the officer empowered by law to select jury panels. They had stricken from the jury list men of the colored race intentionally. . . . In this case (case at bar) a special venire was ordered by the Court of 30 men . . . the deputy who served the writ was put on the stand to prove discrimination. From his testimony you might assume he holds some prejudice against an African serving on a jury . . . but as far as using it, he absolutely says he did not."

5. Reversed on the ground that defendants had been denied due process of law, in that the trial court had failed to make an effective appointment of counsel to aid defendant.
7. Stranier v. West Virginia, 100 U. S. 303 (1879); Neal v. Delaware, 103 U. S. 370 (1880).
9. Ibid.
It is difficult to draw a distinction between these two cases, in that in the Norris case the regular jury panel was used, while in the Logan case, a special venire was ordered, nor is there such a difference between the statutes of Missouri and Alabama regulating the empanneling of juries as to justify a distinction when we consider the United States Supreme Court's interpretation of the rights guaranteed in the Fourteenth Amendment.

The trial judge, in his statement in overruling the motion for a new trial, seems to find a distinction in that in the Scottsboro case there was evidence of intentional striking of colored people off the jury list. While there was some doubtful evidence as to the names of negroes being included on the precinct lists but not upon the final jury roll, the matter was not treated as controlling. The Supreme Court relied primarily upon the showing of a long continued adherence to a policy of wholesale exclusion of negroes as evidenced by their complete absence from jury rolls over a long period of years, despite the existence of legally qualified negro citizens within the country. Unless there is thought not to have been a sufficient showing of qualified negroes in Callaway County, the ruling of the United States Supreme Court in the Norris case would seem to be controlling in the Logan case. The latter case is now pending on appeal before the Missouri Supreme Court. It will be interesting to observe what conclusion that tribunal reaches.

SAM PAUL KIMBRELL

CONTRACTS—CONSIDERATION—ACCEPTANCE OF LESS THAN AMOUNT DUE IN FULL SATISFACTION OF A DEBT.

Wayland v. Pendleton

This was an action in equity seeking to compel the acceptance of $1200 as an agreed compromise settlement of a deed of trust and the $2000 secured thereby. Plaintiff's agreed indebtedness consisted of two notes of $2000 each, secured by two deeds of trust. The executors of the creditor, defendant herein, in order to raise money to pay cash legacies to heirs told plaintiff they "would take $3000 for the entire indebtedness if the money were raised within a reasonable length of time." After a few preliminary negotiations for a different offer, plaintiff did tender $3000, but defendant refused to release both trust deeds. He did finally accept $1800 in satisfaction of one trust deed, so that the sale of the lot upon which the deed was given could be completed. He stated at the time of making the release that this action had nothing to do with the other trust deed and that he would not release it for $1200. This suit was commenced to prevent foreclosure of this second trust deed, and for the purpose of requiring the executors to accept $1200 in full settlement. It was held,1* that "there is no such contract in this case, which can be enforced... . Both notes were subject to immediate collection in full; both trust deeds were subject to immediate foreclosure to enforce their collection; and there was no dispute as to their validity or that the principal and accrued interest was unpaid. In view of the longstanding default of the last note, the acceptance of less than the full amount in satisfaction thereof would not be a valid consideration for an agreement to compromise the indebtedness secured by the other trust deed for less than its full amount."

Assuming (for the purpose of this note) that there was a contract to accept $3000 in settlement of the $4000 debt, when the money was tendered we have at least a partial execution to the extent of $1800. The court in its decision followed the well settled general rule of law in Missouri,2 and by far the majority of other jurisdiction;3 namely, that part payment of a debt is not a discharge of the debt even when the creditor agrees that it shall be.

1. 85 S. W. (2d) 482 (Mo. 1935).
1*. Aside from the question of there being a valid offer and acceptance, and apart from the question of approval of the proposed compromise by the probate court, as required by Mo. Rev. Stat. (1929) § 234.
2. Price v. Cannon, 3 Mo. 453 (1834); Riley v. Kershaw, 52 Mo. 224 (1873); Willis v. Gammill, 67 Mo. 730 (1878); Tucker v. Bartle, 85 Mo. 114 (1884); Young v. Schofield, 132 Mo. 650, 34 S. W. 497 (1896); Winter v. Kansas City Cable Ry. Co., 160 Mo. 159, 61 S. W. 606 (1900); Tucker v. Dolan, 109 Mo. App. 442, 84 S. W. 1126 (1905); Scott v. Parkview Realty and Imp. Co., 241 Mo. 112, 145 S. W. 48 (1912).
3. Fire Ins. Ass'n. v. Wickham, 141 U. S. 564 (1891); Reynolds v. Reynolds, 55
If we grant that the principal case involves a claim for an undisputed, liquidated amount there is still a justification for a view contra to that reached in the general rule. It has been held by some courts that although an unexecuted contract between debtor and creditor by which the latter agrees to take a less amount than that owing on a past due indebtedness is void and unenforceable because there is no consideration, nevertheless, where such a contract has become executed the contract is binding. Now since the full amount was not accepted in the principal case and since the evidence of the indebtedness was not surrendered, it may be said, perhaps, that the contract herein involved was not executed. If this is the case, then the decision is sound and is the law in all jurisdictions. But even though we consider the contract executed, the general rule that the payment of a lesser sum does not discharge the debt still applies in the great majority of jurisdictions. The soundness of this rule, however, seems doubtful.

The reasoning back of the general rule is stated by Professor Williston as follows: "Since a debtor incurs no legal detriment by paying part of what he owes, and a creditor obtains no legal benefit in receiving it, such a payment... is not valid consideration for any promise." That is, that since by paying part, the debtor is only doing what he was bound to do anyway, and the creditor by accepting part, is getting only what he was entitled to get, there is no consideration for the creditor's promise to release the rest of the debt. Indeed the reasoning does seem sound—but it is well for us to inquire if it is not more logical sounding, than legally supported?

The early history of the problem is admirably traced by Mr. Ames, who finds that it was raised as early as the year 1455, in the Year Books, where it was remarked that part payment was effective if it was so agreed. Later, however, came Pinney's Case which contained the dictum of Coke which has been so blindly and unjustifiably followed for some 335 years. In that ancient case, the plaintiff accepted a lesser sum in full for a debt. Pinney pleaded the payment of a part generally and that the plaintiff accepted it in full satisfaction (when the plaintiff sued him for the balance of the debt). The courts were over jealous of the rules of pleading and their application and gave judgment for the plaintiff because of Pinney's insufficient pleading, in that he did not plead that he had paid the amount in full satisfaction, but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfaction. Thus, a purely technical pleading point was the basis of decision in that now famous (or, more aptly, infamous) case. Our own question was not decided there, but the far reaching evil effect of Coke's dictum, "... by no possibility a lesser sum can be satisfaction for a greater", has continued through the ages, bringing with it results of which we have little to be proud. To Coke's mind, less than the whole could not be the whole. But as he points out in a later case: If A owes B 1000 pounds, and pays him 500 pounds in discharge of the bill, there is no satisfaction of the 1000 pounds, but it is consideration for the discharge. Coke's own reasoning thus shows the difference and distinction between part payment acting as satisfaction and part payment acting as consideration.

Coke's dictum then in itself was good; however, in later cases it was twisted to mean that, "There must be some consideration for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum."

Ark. 369, 18 S. W. 377 (1892); Peacher v. Witter, 131 Cal. 316, 63 Pac. 468 (1901); Attorney General v. Supreme Council, 196 Mass. 151, 81 N. E. 966 (1907); Scott v. Rawls, 159 Ala. 399, 48 So. 710 (1909).

The cases make an apparent exception to the rule where there is a bona fide dispute as to the amount due, or where the amount is uncertain and unliquidated; in such cases a compromise and payment of a certain agreed sum as satisfaction of the entire claim is valid.

4. A. Greener and Sons v. P. W. Cain and Sons, 137 Miss. 33, 101 So. 859 (1924).
5. Williston, Contracts (1st ed. 1920) 257.
7. Y. B. 33 Hen. VI, f 48, A. Pl. 32 (1455).
8. 5 Co. Rep. 117 a (1602).
9. Ibid.
Thus we have arrived at our destination—a payment of part of the debt will not release the entire debt, even though it be so agreed—a destination reached by the misapplication of the doctrine of consideration, which is contrary to all legal and business expectations. It has been followed through the years, but its application by judges, learned in the law, is being made more and more reluctantly. These judges realize that to apply it does nothing but thwart the intentions and agreements of business men.

Writers have again and again shown the folly of the rule. In some states it has been changed by statute. Hesitant some judges may be to overthrow the tyranny of the rule established by time, yet others of them have refused to allow unfounded precedent to defeat the intention of the parties.

It is hard to realize that one could in truthfulness and seriousness say that, "the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazards of litigation in an effort to collect all, is not often—nay generally—greatly to the benefit of the creditor. ... Why may one accept a horse worth one hundred dollars in full satisfaction of a promissory note for one thousand dollars, and be bound thereby, and yet not b. legally bound by his agreement to accept nine hundred and ninety-nine dollars, and his actual acceptance of it, in full satisfaction of the one thousand dollar note? ... A rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a lesser amount of money at the time and place stipulated in the original obligation, or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason and not founded in authority...."

"The actual value of a debt or demand depends on probability of voluntary payment, or the possibility of collection by legal process. Where a debt is doubtful a creditor may obtain a part of the nominal amount by discharging the residue and thus realize all that it is actually worth, and perhaps more." However much in the minority the idea here expressed may be, and however down-trodden it may be by decisions, it rests upon sound business practices and principles. The result has lead judges "to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or in other words, to extract if possible from the circumstances of each case a consideration for the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement."

It would seem, therefore, that this rule is based upon a historical mistake, is unsupported by reason, and is opposed to the expectations and intentions of reasonable men. These facts are recognized by our courts and some of them have already cast aside directly the yoke of precedent, while others have done so indirectly. This breaking away from the old rule, that part payment can never be consideration for the release of the entire indebtedness, by some courts and its abrogation by some legislatures is a step towards greater simplicity and freedom of contract, and toward the abolition of an anachronism in our law.

Lawrence R. Brown

12. The direction in which the dictum of Lord Coke started the wheels of the law turning has become so well established that although judges now see the light, they hesitate to overrule the ancestral case dictum.
13. Ames, supra note 6, at 521.
14. 1 Williston, op. cit, supra note 5, at 259.
15. Clayton v. Clark, 74 Miss. 499, 22 So. 189 (1897); Frye v. Hubbell, 74 N. H. 358, 68 Atl. 325 (1907); Brown v. Kern, 21 Wash. 211, 57 Pac. 798 (1889); Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724 (1906).
17. 1 Sutherland, DAMAGES (4th ed. 1916) 749.
RECENT CASES

Criminal Law—Robbery—Instructions to Jury—Consent of the Owner—Intent.

State v. Wright

The defendant testified that a stranger told him one Dr. McCampbell wanted somebody to rifle his safe which had been insured against robbery. The defendant further stated that he went to the doctor's drug store in order to execute the fake hold-up and that in effecting his escape he was forced to exchange shots with Dr. McCampbell which resulted in the latter's death. The trial court refused defendant's request for an instruction to the jury on second degree murder, and he was found guilty of murder in the first degree on the basis of homicide in the attempt to perpetrate a robbery. An appeal was taken by the defendant, who contended that if the jury believed his testimony, it could reasonably have found him guilty of murder in the second degree, and that the court erred in refusing his request for that instruction. The Supreme Court held that instructions as to second degree murder should have been given, since it was possible to infer from defendant's testimony that the owner had consented to the taking and in such case there would have been no robbery.

By a close examination of defendant's testimony, it would seem that consent on the part of the owner, sufficient to refute the allegation of robbery, cannot be inferred therefrom. In the first place, the only information relating to the consent of the owner was alleged to have been given by a stranger who neither made the statements before the Court nor was before the Court to be cross-examined. Clearly this was hearsay evidence and should not have been admitted for this purpose. But if the evidence were admissible, it would seem merely to imply that the doctor would consent at some future time rather than that consent had already been given, since a successful fake hold-up would necessitate far more conniving between the owner and the robber than existed here. Finally the evidence does not imply that consent extended up to and during the time of the hold-up. The lack of this essential element is manifested by the fact that the doctor jeopardized his life and the lives of others in an attempt to prevent the hold-up. If the owner did not give consent to the taking in this case it would seemingly follow that there was at least an attempted robbery.

There is another element of the crime, however, which is not discussed by the Court, but which should figure vitally in a substantiation of the holding. This is the intention or state of mind of the wrong-doer in relation to the crime of which he is accused. The statute apparently sets down no requirements as to this point. Clearly, if a general bad intent or mens rea be all that is required, the results of the above reasoning would remain the same, for it is evident that mens rea was present in this case since the defendant's own statements show he was acting to defraud an insurance company. But if a specific intent is required on the part of the wrong-doer, it would be permissible to find that there was no robbery here, for the evidence which could not be considered to show a consent to be robbed on the part of the doctor could be used to show that the defendant merely meant to perform a fake hold-up and thus did not specifically intend to commit robbery. Illinois holds that no intent at all is necessary. Other jurisdictions hold that merely a general intention to commit a bad act is sufficient. The few Missouri cases that have decided this point seem to unite in holding, however, that a specific intent to steal, on the part of the wrong-doer, must have

1. 85 S. W. (2d) 7 (Mo. 1935).
existed before he can be found guilty of robbery. This being the Missouri holding and it being permissible to assume from the defendant's testimony that he did not specifically intend to steal the doctor's money, it would have been possible, in the light of the testimony, for a jury to have found that the defendant did not attempt to rob the deceased and thus that the homicide did not occur in an attempt to perpetrate a robbery.

So, while it is doubtful whether consent on the part of the doctor to be robbed can be inferred by the defendant's testimony, the holding of the Court can certainly be substantiated on the ground that a lack of intention to rob on the part of the defendant might reasonably be inferred from the testimony.

John H. Foard

**Divorce—Passivity of One Spouse Toward the Misconduct of the Other as Amounting to Connivance.**

Manville v. Manville

In the divorce suit of Manville v. Manville the defendant husband filed a general denial and a crossbill asking for a divorce from the plaintiff on the grounds of adultery. The lower court denied both parties a divorce and the defendant alone appealed. A brief review of the evidence shows that the alleged adultery of the plaintiff was committed with one Richard Corkins. Defendant was required to be away from home on alternate nights during the summer of 1933 in order to care for a sick relative, and it was agreed that certain neighbors should stay with the plaintiff. Included in this group were Richard Corkins and his two brothers who would come and spend the night at the Manville home. It appeared from the testimony that plaintiff and Richard Corkins had frequently gone riding together in the automobile of the plaintiff and defendant, sometimes alone, sometimes in the company of others. Although there is no showing that the defendant affirmatively consented to these trips, nevertheless, he apparently did not actively object. When the defendant was at home he slept upstairs with the baby, the others sleeping downstairs, and after defendant retired, the plaintiff would lock the door leading to the second floor. Several witnesses testified for the defendant that plaintiff and Richard Corkins had embraced each other at various times and that early in the morning of August 15, 1933, they were disrobed and asleep in the same bed. Later the same morning the separation occurred. There is no doubt that all along defendant had made some complaint about these neighborly visits, but it was disputed as to the strength of these protests and as to whether or not Richard Corkins was particularized in the complaints. The Kansas City Court of Appeals held that the evidence entitled the defendant to a divorce because of his wife's adultery as against the claim of connivance and remedied the cause with appropriate directions.

Connivance may be generally defined as a corrupt consenting by one spouse to the misconduct of the other. It is universally recognized as a defense to a suit for divorce and comes from the unwritten law on the subject. It usually arises in cases of adultery, although it is available in all divorce suits. Where there is connivance there is a guilty mind and it should be distinguished from condonation or a forgiveness of the wrongdoing, although too easy condonation may become connivance.

10. State v. O'Connor, 105 Mo. 121 S. W. 510 (1891); State v. Woodward, 131 Mo. 369, 33 S. W. 14 (1895); State v. Culpepper, 293 Mo. 249, 238 S. W. 801 (1922). In State v. O'Connor the Court's holding on this point is as follows: "To constitute robbery the property must be taken from the person by force or putting in fear, against the will of the owner, without any honest claim to it on the part of the taker. In other words the taking must be with the intent to steal."

1. 81 S. W. (2d) 382 (Mo. App. 1935).
2. 2 Bishop, Marriage, Divorce and Separation (1891) § 203; Tiffany, Handbook on the Law of Persons and Domestic Relations (3d ed. 1921) § 105; 2 Schouler, Marriage, Divorce, Separation and Domestic Relations (6th ed. 1921) § 1706.
3. 1 Bishop, op. cit. supra § 129.
4. 2 Schouler, op. cit. supra. § 1707; Tiffany, op. cit. supra § 105.
5. 2 Bishop, op. cit. supra § 223; 2 Schouler, op. cit. supra § 1712.
It is well settled that no affirmative acts are necessary to constitute connivance. Passive conduct on the part of the complaining spouse may quite effectively bar his (or her) right to a divorce. But there is a necessity for a corrupt intention that amounts to a consent to the adulterous acts, and a mere passive acquiescence to the misconduct where the complaining spouse does no affirmative acts to further the opportunity for the adultery and is not guilty of any omission of duty will not constitute connivance even though the complaining party knows of the misconduct and allows the guilty act in question to be completed in order to secure evidence for divorce. But where the mind consents to the misconduct and where the husband is willing that the wife should commit adultery, provided that he can thereby obtain a divorce, that is connivance. And it is also connivance where the husband, for other reasons than to secure grounds for divorce, consents to the suspected misconduct and permits his wife to remain in an environment dangerous to her moral well-being or where the husband shows a real intention to have his wife commit adultery or at least an intention to permit her to continue in her delinquency undisturbed.

From the above, it would seem that the decision of the Kansas City Court of Appeals in the case of Manville v. Manville, holding that the defendant's conduct did not amount to connivance, is in accordance with previous Missouri cases and that the majority of courts would follow it if a similar fact situation were presented. Although the defendant originally consented that Richard Corkins and the other neighbors spend the nights in the Manville home, nevertheless, this consent was given before there were any suspicious circumstances of which the defendant might have cognizance, arising from the commendable desire that his wife be not subjected to the possible dangers attending her sole occupancy of the house on the nights defendant was absent. There is no showing that the defendant at any time consented to the plaintiff's immorality or that he had any corrupt intention to permit such to continue. On the contrary, on the morning of Aug. 15, 1933, when there was the first definite evidence of his wife's adultery, the defendant asked the plaintiff to cease her relationship with Richard Corkins, and, upon her refusal to do so, caused the separation.

GEORGE B. BRIDGES

EVIDENCE—ADMISSION OF PRIOR SELF-CONTRADICTION AS SUBSTANTIVE TESTIMONY.

Pulitzer v. Chapman

In a will-contest case the trial court granted the contestant a new trial, assigning as one of its reasons that the verdict of the jury in upholding the will was against the weight of the evidence on the issue of undue influence by two of the chief beneficiaries. On appeal to the Supreme Court of Missouri the question before the court was whether that order granting a new trial should be sustained. At the trial the attorney who had prepared the will in contest testified that the beneficiaries charged with exercising undue influence on the testatrix were not present at any of the occasions when he had discussed the contents of the will with the testatrix. On cross-examination the contestant's attorney called the witness' attention to his deposition in which he had stated that the beneficiaries had been present at certain of the conferences. The witness admitted he had said that, but replied that he had been mistaken. The proponents contended on this appeal that while the statements in the deposition

12. 85 S. W. (2d) 400 (Mo. 1935).
were admissible to impeach the witness, they could not be treated as having affirmative testimonial value, and that unless these statements were treated as having substantive value the contestant failed to make out a case for the jury on the issue of undue influence. The court held that the statements in the deposition should be treated as having independent testimonial value, even if the proponents had attempted to limit the effect of the deposition to an impeachment of the witness.

The well-settled and apparently universal rule has been that prior self-contradictions of a witness cannot be accepted as substantive testimony, but may be admitted only for the purpose of impeaching the witness.\(^5\) In several cases the Missouri courts have followed this rule.\(^6\) The theory as to the relevancy of the prior inconsistent statement for impeachment purposes is that when the two statements are compared and found inconsistent, it is evident that one of them is erroneous. From the fact that the witness has been in error on one point the jury may infer that he has the capacity to err as to other matters. The reason given for not receiving the prior self-contradiction as substantive testimony is that it is hearsay. But as Professor Wigmore says, "... the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination. Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has been already satisfied."\(^7\) In the instant case the witness was present and subject to re-direct examination as to the inconsistent statement. Re-direct examination is proper, and it is sometimes said to be a matter of right, where relevant facts are brought out for the first time on cross-examination.\(^8\) Thus the calling party's rights are amply protected and the hearsay rule has been satisfied.

The holding in the principal case seems much more desirable than the prevailing view mentioned above. It should be noted that the court merely holds that prior contradictory statements made in a deposition in the same case may be admitted as substantive testimony. But it would seem that the reasoning of the court would apply equally well had the statement not been contained in a deposition.

W. L. Nelson, Jr.

**Evidence—Impeachment of a Witness by a Showing of His Religious Belief.**

*McClellan v. Owens*\(^4\)

In the case of *McClellan v. Owens*, there arose for apparently the first time the question of whether or not in Missouri a witness' religious belief may be inquired into on cross-examination of the witness himself for the purpose of affecting the credibility of his testimony. The plaintiffs were contestants of a probated will and on appeal sought to have affirmed the order of the trial court sustaining plaintiffs' motion for a new trial. One of plaintiffs' contentions was that the trial judge erred in refusing to permit the witness in question to be cross-examined as to his belief in Jesus Christ or as to his belief in God or a deity. The Supreme Court of Missouri held that such cross-examination for the purpose of impeachment is improper, and reversed the order granting a new trial.

At the common law the oath requirement necessitated at least that the witness have a religious belief in punishment for false swearing before he could be put on the stand.\(^9\) However, by constitutional provisions (or statutes giving the witness the alternative of affirma-

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2. 2 Wigmore, *Evidence* (1923) § 1018b.
6. 74 S. W. (2d) 570 (Mo. 1934).
7. 2 Omichund v. Barker, 1 Atlk. 45 (Eng. 1744); see 3 Wigmore, *Evidence* (2d ed. 1923) § 1816 et seq.
tion) the oath requirement has been effaced in practically all jurisdictions. The abolishment of the oath unveiled the cognitive problem of whether a sense of right and wrong is a necessity before the witness is competent to testify. At common law, this question was so closely bound up with the oath and religious belief as to be relatively unimportant, and, since its elevation in prominence, the courts have been somewhat careless in failing to distinguish the two. Although there is much confusion in the cases, it would seem that a sense of right and wrong as distinguished from religious belief is a testimonial requirement.

The Missouri Constitution provides that "no person can, on account of his religious opinions, be disqualified from testifying or serving as a juror" and the courts have correctly construed this to mean that even an atheist is not disqualified as a witness. Some states either by constitutional or statutory provisions specifically state whether or not the witness' religious belief may be used for purposes of impeachment; however, as yet, Missouri has not taken that step. In jurisdictions which have a type of constitutional provision similar to ours, the courts have differed to a certain degree as to whether the credibility of the witness may be affected by a showing of his religious belief. A few courts seem to distinguish between impeachment by cross-examination of the witness and through testimony of third persons as to statements by the witness outside of court, disallowing the former but holding the latter permissible. There seems to be no valid reason for such a distinction. Other courts that permit impeachment by evidence of disbelief in God do not permit impeachment by a showing of a belief in any particular sect. The modern trend, however, is against impeachment of the witness by any showing of his religious belief whatsoever, and perhaps the slight weight of authority is in accord. This view seems logical because truthfulness and honesty are, to-day, characteristics quite often distinct from any religious belief and to permit impeachment by showing lack of religious belief might result in the lessening of the strength of reliable testimony.

On the other hand, the same considerations do not apply to dying declarations. The theory and chief guarantee of trustworthiness of this exception to the hearsay rule is that the declarant is motivated to be truthful when dying because of a fear of an impending punishment in the after life for falsehood. Even courts that exclude impeachment of a witness by showing his religious belief correctly permit the credibility of dying declarations to be attacked in such manner.

GEORGE B. BRIDGES

EVIDENCE—INFERENCE FROM FAILURE TO CALL WITNESSES.

Chambers v. Chamber

In a will contest case the contestants maintained that the signature of the testator and of one of the attesting witnesses were forgeries. They attempted to prove that these

3. 3 Wigmore, Evidence § 1828.
4. What Wigmore calls "a sense of moral responsibility,—a consciousness of the duty to speak the truth". 1 Wigmore, Evidence § 506.
5. 1 Wigmore, Evidence § 495; id. § 506; 3 id. § 1823.

1. 74 S. W. (2d) 104 (Mo. 1934).
signatures had been forged by means of tracing the genuine signatures of the two men. One of the attorneys for the proponents took the stand to testify in their behalf. On his cross-examination, the contestants endeavored to show that at some time during the trial he had consulted a handwriting expert; that the expert had been asked to come to the place of trial and compare the disputed signatures with genuine signatures; that he did examine the signatures, disputed and genuine, but that proponents did not call him as a witness at the trial. The theory of this offer was that the failure of the proponents to call a witness within their power is a circumstance from which the jury could, if permitted, draw an inference that the testimony of the witness would be unfavorable to the proponents. The trial court refused this offer. On appeal, the Kansas City Court of Appeals held that the ruling was proper and affirmed the judgment in favor of the proponents.

Wigmore on Evidence states that "the failure to bring before the tribunal some circumstance, document, or witness, when the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance, document, or witness, if brought, would have exposed facts unfavorable to the party. The propriety of such inference is not doubted."

In regard to the failure to produce witnesses, the Missouri courts have followed the general principle stated above, but this principle is subject to certain limitations. The inference is based on the non-production of a particular person when it would be natural to suppose that he would have been produced if the facts known by him had been favorable. No inference can be drawn where the party has no power to produce a person who has knowledge of material facts; that is, where the witness is privileged and the privilege is independent of the party's control. One of the earliest Missouri cases, State v. Degonia, holds that where the prosecuting attorney, in his closing argument, commented on the fact that the defendant had not called as witnesses his two brothers, who were indicted as accessories, the alleged error was cured by the fact that the attorney was revoked by the court and commanded to keep within the record. In this case no unfavorable inference was permissible, since the two brothers were privileged not to testify, and this privilege was beyond the defendant's control. When, however, there is a privilege between the party and the witness not produced, which belongs to the party, an inference may properly be drawn that the testimony of the person not produced would be unfavorable. This point is illustrated by the numerous personal injury cases, where the plaintiff failed to produce as witnesses the physicians whom he employed to examine and treat him. Section 1731, Mo. Rev. Stat. (1929) provides that all information obtained by a physician necessary to enable him to prescribe for a patient as a physician is privileged. In McClanahan v. St. Louis & S. F. R. Co., it was held that the failure of the plaintiff to produce as witnesses the physicians whom she employed to attend her was a strong circumstance against her, since the plaintiff could have called the physicians and waived her privilege. An earlier Missouri case, contra, has been overruled by the later cases. In the principal case under discussion, the handwriting expert had no privilege which he could assert against testifying. We can assume, therefore, that the proponents could have put him on the stand if they had desired.

No inference can be drawn, of course, if the party failing to produce a witness has no knowledge that such a witness exists; or if the witness is out of the jurisdiction or convenient

2. 1 Wigmore, Evidence (2d ed. 1923) § 285.
reach of the party. This factor was not involved in the principal case, since the expert was at hand during the trial, or at least the contestants offered to show that he was. The cases also hold that the party may rebut an unfavorable inference by showing circumstances which furnish an adequate reason for the non-production of a witness.

As another limitation to the general rule, the inference is not a proper one where the person not produced is one who from the circumstances would be so prejudiced against the party not calling him, that the latter could not secure from him impartial testimony. This point was not involved in the principal case, since it may be assumed that a man who holds himself out as a handwriting expert will be an unbiased witness and there was no showing that this expert was prejudiced against the proponents.

Moreover, it would seem to be elementary that no unfavorable inference should be drawn from a party's failure to produce a person whose testimony would add nothing in value to the testimony actually produced or which would be inferior in value. The case of Miller v. Fleming holds that generally no inference can be drawn from the non-production of witnesses, unless their testimony would be superior in respect to the fact proved. The court cites Wigmore on Evidence as its authority. Wigmore says "no inference can be fairly drawn except from the non-production of witnesses whose testimony would be superior". But he also says that this limitation should not be enforced with any strictness and depends entirely on the facts of each case. In the principal case, the court said that "the failure to produce a witness who is naturally in apposition to have a peculiar knowledge of material facts in issue is a proper subject of comment. To extend the application as contestants seek to do would permit the trial to go off into a question of why a mere handwriting expert was not put upon the stand".

If the sole basis for the court's decision is that the contestants failed to show that the expert had peculiar knowledge, in the sense of knowledge superior to that of other witnesses already utilized by the proponents, it would seem that the court failed to consider the evidence actually offered by the proponents, and narrowed the general rule laid down in other Missouri cases. The proponents put on the witness stand the following persons: one of the attesting witnesses, four persons connected or formerly connected with some bank in which the testator in the case had carried an account, and the son of the other attesting witness. It is to be expected that the living attesting witness could authoritatively state whether his own signature on the will was genuine or not; but as to the signature of the testator, the testimony of the other five witnesses would seem to be inferior in value to any testimony of a person whose business it is to specialize in examining handwriting. While all the five witnesses had been familiar with the handwriting of the testator, their very familiarity with his signature might cause them to identify as genuine a signature which was a tracing of an authentic signature. A handwriting expert would not be prone to make this error, and it would seem that his testimony would be superior to that of a non-expert witness.

It is commonly held that no unfavorable inference can be drawn if the witness is equally available to both parties. In the case of Crane v. K. C. So. Ry. Co., it was said that it is only where the party failing to call a witness has the advantage of the other party by having the witness within easier control, that an unfavorable presumption arises. This restriction seems unnecessary. There is no logical reason why it should not be possible for both parties

8. Brief for Appellants pp. 21, 22; Chambers v. Chambers, 74 S. W. (2d) 104 (Mo. 1934).
12. 1 Wigmore, Evidence § 287.
13. 74 S. W. (2d) 104 (Mo. 1934).
to show facts which might lead the jury to make an unfavorable inference against either or both parties who failed to call some person having personal knowledge of the facts in issue in a case. The relative strength of the inference would depend on the circumstances of the particular case.

The principle involved applies equally to criminal and civil cases. However, since the failure of a defendant in a criminal case to take the stand is not the proper subject of comment by the prosecuting attorney, out of regard for the privilege against self-incrimination, care must be taken, in commenting to the jury on a defendant’s failure to produce a witness, not to make a statement so broad that it takes in both the defendant’s failure to testify and his failure to produce witnesses whom it would be natural to assume he would have produced if they had been favorable to him.

An unfavorable inference may be drawn in cases where there is non-production of witnesses related to the party failing to call them, and in cases of non-production of witnesses presently or formerly employed by the party failing to call them.

Wigmore states that “the kind of witness is immaterial. The inference for example may be drawn from a failure to use expert testimony.” The Missouri cases seem to bear out this statement. An unfavorable inference may be drawn equally in a case where one party, having objected to the admission of copies of telegrams on the ground that the messages were not signed, failed to put the authors on the stand as in a case where the plaintiff in a personal injury suit did not call her family physician to testify as to the extent of her injuries. In the last case, the person not produced would have been in a position to give expert testimony; while in the first case, the person not called would have only been able to give the testimony of an ordinary witness with personal knowledge of the facts in issue. One of the latest Missouri cases, Waeckerly v. Colonial Baking Co., decided by the St. Louis Court of Appeals, held that in an action for personal injuries, an unfavorable inference could be drawn from the plaintiff’s failure to produce two physicians who had examined her, and this court cited Winkler v. Ry. Co. as stating the true doctrine. Since the Winkler case held that an unfavorable inference may be drawn where the witness not produced was an expert, there is direct Missouri authority for the rule that the kind of witness is immaterial. The Missouri cases holding that an inference may be drawn from failure to call a physician as a witness are numerous.

In the principal case, the proponents contend that the examination of a document by a handwriting expert is in no wise analogous to the physical examination of a plaintiff by a physician. It is submitted that the analogy is sound, since in both

17. State v. Field, 234 Mo. 625, 138 S. W. 520 (1911); State v. Gordon, 253 Mo. 510, 161 S. W. 721 (1913); State v. Hughes, 258 Mo. 264, 167 S. W. 529 (1914); State v. Steele, 280 Mo. 63, 217 S. W. 80 (1919); State v. DePriest, 288 Mo. 459, 232 S. W. 83 (1921).
20. 1 Wigmore, Evidence § 290.
23. 67 S. W. (2d) 779 (Mo. App. 1934).
24. 321 Mo. 27, 10 S. W. (2d) 649 (1928).
cases the findings of an expert are involved, the findings of one specially versed in a particular field. Only one case has been found where precisely the same facts were in controversy as in the Chambers case; that is the Massachusetts case of McKim v. Foley. In that case, an action against the surety upon a bond, the genuineness of the signature was denied, and the court held that it was proper for the plaintiff’s counsel to comment on the failure of the defendant to call as witnesses handwriting experts whom the defendant had consulted. The court said that it was a fair inference that the party did not call the experts as witnesses, because he knew their testimony would be adverse. The McKim case is cited with approval in the Chambers case, yet it is difficult to see how it supports the decision. The Federal courts have sanctioned the general rule as to failure to produce expert testimony. On a libel to recover damages for personal injuries to a stevedore, allegedly caused from a defective plank, the court held that where the claimant failed to call as a witness the ship’s carpenter, who had examined the plank the day after the accident, and gave no explanation for the failure to produce such evidence, there is a presumption that the evidence would be unfavorable to the claimant. The courts make no distinction between expert and non-expert witnesses.

The cases in Missouri hold that the failure of a party to call a witness is the proper subject of comment for the opponent’s counsel in his closing argument to the jury. The leading case is McCord v. Schaff, a Supreme Court decision.

In the numerous cases dealing with the inference to be made from a party’s failure to call a witness, no discrimination has been made as to the manner in which the opposite party may show the facts from which the inference may be drawn. The facts may be shown by such party’s witness on direct examination; or it may be shown by the opponent’s own witness; or it may be disclosed by cross-examination of the opponent’s witness. The court in the Chambers case stated that “there is no decision upholding the right of the opposing parties to inquire of the other attorneys whom they had consulted or conferred with during the trial.” But a careful investigation of both the Missouri cases and those of other states fails to reveal a single decision holding that this procedure is improper, when employed for the purpose of showing facts from which the unfavorable inference may be drawn. The privilege for confidential communication between attorney and client was not involved in the principal case. In civil cases Missouri follows the orthodox rule as to cross-examination; the scope of cross-examination is not limited to matters dealt with on direct examination. A witness may be cross-examined as to any facts relevant to the case. It would seem, therefore, that there is no reason for holding that a party cannot cross-examine the opponent’s attorney for the purpose of showing facts from which the unfavorable inference under discussion may be drawn, and it would seem that a party should be allowed to call the opponent’s attorney as his own witness in order to show such facts.

It is submitted that the Chambers case is not in harmony with the decisions in other states or with the earlier Missouri decisions mentioned above.

Helen Hunker

Federal Judgments as Liens on Real Estate — Effect of Sections 1103 and 1142 of the Session Laws of Missouri of 1935.

Rhea v. Smith

Since the decision in Rhea v. Smith, holding that sections 1554, 1555, and 1556 of the 1919 Revised Statutes of Missouri did not comply with the Act of Congress of August 1, 1888, Missouri has been without a statute providing conformity between liens of judgments of the federal courts and judgments of the state courts of general jurisdiction of first instance. Rhea v. Smith arose after the Federal District Court at Joplin, in Jasper county, had rendered a cost judgment against Whitlock, the common source of title of both Rhea and Smith. No transcript of this judgment was filed in the state circuit court in Jasper county. Smith bought land in Jasper county from Whitlock, and Rhea later bought the same land under execution issued on the federal judgment. Rhea brought suit to determine title, and in effect. The United States Supreme Court, reversing the Supreme Court of Missouri, held that the judgment of the federal District Court against Whitlock was a lien upon the land even though no transcript of the judgment had been filed in the state circuit court, and that therefore, Rhea, having purchased under execution issued on the federal judgment, was entitled to possession and title. The basis for the decision was that the Missouri statutes above mentioned required a transcript of the judgment of the federal District Court to be filed in the office of the clerk of the state circuit court before the judgment could be a lien on the real estate of the judgment debtor in the county in which the judgment was rendered; whereas a judgment of the state circuit, county, or probate court was, without this transcript, a lien on the property in the county in which the court was held. The court said that these statutes did not comply with the Act of Congress of August 1, 1888, and as a result, judgments of the federal courts were liens on any real property of the judgment debtor within the entire jurisdiction of the court without any transcript being made. The act of 1888 provides that federal judgments rendered within any state shall be liens on the judgment debtor’s property “throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state.” The provision is applicable, however, only in such states as authorize the filing of federal judgments in the same manner as judgments “of the courts of the state.”

Before 1888, in order to put judgments of the federal courts in as strong a position as those of the state courts in protecting the rights of suitors, it was an established doctrine of the federal courts that federal judgment had the same effect in their operation as a lien upon the property of the judgment debtor as the law of the state in which they were rendered prescribed for judgments in state courts, and that such lien extended to all counties within the territorial jurisdiction of the court; that is, to the limits of the state or district for which the court sat. This doctrine was first noted in Massingill v. Downs. There the court said, “In those states where the judgment or the execution of the state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceedings in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the courts of the United States whether the lien was held to be created by the issuing of process or by the express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the union. It would place suitors in the state courts in a much better condition than in federal courts.” This naturally led to a hardship through the loss of their lands by citizens unaware of the fact of the existence of liens from such judgments, not of record in the county where the land was situated. This, along with certain kindred considerations, led Congress to pass the act of 1888 previously mentioned.

The 58th General Assembly of Missouri has attempted to remedy the situation resulting from the decision in Rhea v. Smith in Sections 1103 and 1142 of the Session Laws of 1935, p. 207. The new statutes provide as follows:

1. 274 U. S. 434 (1927).
3. 7 How. 760. (1848).
Section 1103: Judgments and decrees rendered by the Supreme Court, by any United States District or Circuit Court held within this state, by the Kansas City Court of Appeals, the St. Louis Court of Appeals, the Springfield Court of Appeals, and by any Court of Record, shall be liens on the real estate of the person against whom they are rendered, situate in the county for which or in which the court is held. Section 1142: Judgments and decrees obtained in the Supreme Court or either court of appeals or any United States Court or any court of record in this state, shall, upon the filing of a transcript thereof in the office of the clerk of the Circuit court of any other county, be a lien upon the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed.

By virtue of the 1935 statutes, Missouri has, perhaps, technically complied with the act of 1888, but due to the unfortunate wording of section 1103, the possibility exists that the legislature has failed to take full advantage of the 1888 statute. The federal statute was passed so that state legislatures might make provision in their own statutes which would eliminate the necessity of a search of federal court records to discover any federal judgments which might be held as liens against the land. But section 1103 says that "Judgments and decrees rendered ... by any United States District or Circuit Court ... shall be liens on the real estate of the person against whom they are rendered, situate in the county for which or in which the court is held." This wording is ambiguous and certainly lays itself open to the interpretation that a federal judgment shall be a lien upon any land of the judgment debtor within the jurisdiction of the court; and if such interpretation is taken, a search of the federal court records of the district will still be necessary to discover federal judgment liens held against the land. It will further mean, if this interpretation is used, that records of the state appellate courts and of the supreme court will also have to be searched to discover liens resulting either from cost judgments, or from money judgments in matters of original jurisdiction of those courts.

It seems that the problem could have been more easily solved, and the statute of 1888 could have been fully taken advantage of, by a statute requiring the filing of any judgment of any court of record, either federal or state, with an officer of the county in which the land is situated, possibly with the Recorder of Deeds, whether it is the county in which the court is sitting or not, before the judgment will act as a lien upon the land. The court in In re Jackson Light and Traction Co. held that a Mississippi law respecting the filing of a judgment within the county wherein the judgment was rendered in order to create a judgment lien within the terms of the act of 1888 as affected by an act of Congress of 1916; and therefore there does not appear to be any reason why the Missouri General Assembly could not pass some statute which would clear up the situation, and which would provide the holder or purchaser of land with ready access to the record of any judgment lien held against the land. As the situation exists at present, however, there is a strong possibility that a search of judgment records of the state circuit court, the state appellate and supreme courts, and the federal court of the district will still be required.

Kirk Jeffrey

Insurance—Contract—Death by "Accidental Means".

Mutual Life Insurance Co. of New York v. Still

Two insurance policies contained insurer's promise to pay double indemnity in case insured's death resulted from bodily injury through external, violent and accidental means, provided, however, that the double indemnity was not payable if death resulted "directly or indirectly from bodily or mental infirmity or disease of any sort". The insured, a roofing contractor, stepped upon a table which slid from under him and he fell upon his back onto a cement floor. Purpura, a degeneration of the liver, resulted from the fall, and from that

disease the insured died. Expert witnesses differed as to the cause of the death, but the jury found it to be the fall. This finding of fact by the jury was conclusive.\(^4\) Held that the death was the result of accidental means. The insurer claimed that this death resulted “directly or indirectly from bodily infirmity or disease”, but the court held this language of the policy was but additional notice to the insured that the double indemnity provision related only to death, of which the sole proximate cause was an accident. The court said that the double indemnity would not be paid when a disease, not caused by an accident, resulted in death. This is by far the majority rule.\(^5\)

One distinction not always observed by the courts is the difference between “accidental death” and “accidental means”. This court, although it reached the correct result, did confuse these terms in the opinion. The promise of the insurer was to pay the double indemnity if death resulted from accidental means but not in case of accidental death.\(^6\) Early policies contained provisions relating only to accidental death,\(^6\) but the courts were so liberal in construing almost any condition to be an accident that it became necessary for the insurance companies to add the more restrictive clause.\(^6\) Many attempts have been made to explain accidental means but they are by no means consistent. Probably the most quoted rule was stated by Mr. Justice Blatchford in United States Mutual Accident Ass’n v. Barry: “...if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produced the injury, then the injury has resulted through accidental means”. When the policy stipulates that the company shall be liable in case of death by accidental means then the death or injury must have resulted from conduct (means) which was not intentional, not foreseen, not as expected, and, therefore, accidental.

The federal courts have generally followed the rule as advanced by the United States Supreme Court.\(^6\) One case, Interstate Business Men’s Accident Ass’n of Des Moines v. Lester,\(^6\) has made a direct attack on the rule. There the court said: “It is possible to build up an argument to the contrary only by catching at phrases and single sentences and separating them from the real scope of judicial decisions.”\(^10\) This case is certainly contra to the great weight of authority.

The appellate courts of Missouri established a doctrine not in accord with the majority rule. The Missouri Supreme Court acknowledged the rule of the appellate courts and said no

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4. As is shown in Royster Guano Co. v. Globe & Rutgers Fire Ins. Co., 252 N. Y. 75, 168 N. E. 834 (1929), the policy is a contract between the insurer and the insured and the words have a definite meaning in establishing the liabilities and rights of the parties.
7. 131. U. S. 100 (1889).
8. Western Commercial Travelers’ Ass’n v. Smith, 85 Fed. 401 (C. C. A. 8th, 1898); Anderson v. Travelers’ Protective Ass’n of America, 74 F. (2d) 170 (C. C. A. 5th, 1934).
10. This case was cited in Occidental Life Ins. Co. v. Holcomb, 10 F. (2d) 125 (C. C. A. 5th, 1925) as authority. The policy provided for compensation in case of “accidental event” but the court made no attempt to construe the term to be the same as accidental means. Instead it decided the case on the basis of “accidental death” and in support a Missouri case, Lovelace v. Travelers’ Protective Ass’n, 126 Mo. 104, 28 S. W. 77 (1894), was cited that was not in point on the facts and also the latest authority on the subject by that court was Caldwell v. Travelers’ Ins. Co., 305 Mo. 619, 267 S. W. 907 (1924).
distinction has been made between "an injury which is the unforeseen or unexpected result of an intended act" and when "the cause, i. e. the means, which occasioned such injury" is "accidental and unintended." But the next year in Caldwell v. Travelers' Insurance Co. Blair, P. J. considered the previous cases of the appellate courts and the Supreme Court and established a rule in accord with the United States Supreme Court after reversing the cases not in accord. This definitely established the rule in Missouri.

ALDEN A. STOCKARD

PARTIES—UNINCORPORATED ASSOCIATIONS—REPRESENTATIVE SUITS.

Corbett v. Milk Wagon Drivers Union

The two suits involved in this consolidated cause were brought by appellant to recover sick and death benefits arising out of contracts of insurance entered into by the association with appellant's deceased husband, a former member of said association. Appellant alleged that respondent was "an unincorporated labor organization which had no capital stock, was organized and carried on solely for the mutual benefit of its members and other beneficiaries, was not a profit-making organization, and had a lodge system with a ritualistic form of work and a representative form of government." Respondent demurred, inter alia because, being a voluntary unincorporated labor union as shown by the face of said petition, it could neither sue nor be sued as an entity. The demurrers were sustained and upon appellant's refusal to plead further, judgment was rendered in favor of respondent. The court held that, since there were no allegations in the petition showing facts from which it could be inferred that the association possessed or exercised any powers or privileges not possessed by individuals or partnerships, it did not come within statutory provisions for the suability of such associations, and that under the common law an unincorporated association has no distinct legal entity and can neither sue nor be sued in its own name. Judgment affirmed.

The decision in this case calls attention to the difficulties attending recovery against voluntary unincorporated associations in this state. It is unquestionably in accord with other cases in Missouri on this point as well as the great weight of authority in other jurisdictions. It seems that the case might well have been brought within the holding of Clark v. Grand Lodge wherein the Missouri Supreme Court considered the association of a fraternal benefit society within the meaning of the statute, but, as was pointed out by the appellate court in distinguishing the cases, the failure to allege any powers or privileges in the association not possessed by individuals, was fatal to such a determination. The acuteness of the problem, brought about by the growth and development of such associations, was recognized.

11. Eicks v. Fidelity & Casualty Co., 300 Mo. 279, 253 S. W. 1029 (1923).
12. 305 Mo. 619, 267 S. W. 907 (1924).
13. Eicks v. Fidelity & Casualty Co., 300 Mo. 279, 253 S. W. 1029 (1923), cited note 11, supra; Young v. Railway Mail Ass'n, 126 Mo. App. 325, 103 S. W. 557 (1907); Bell v. Travelers' Protective Ass'n, 155 Mo. App. 629, 135 S. W. 497 (1911); Columbia Paper Stock Co. v. Fidelity & Casualty Co., 104 Mo. App. 157, 78 S. W. 320 (1904).

1. 84 S. W. (2d) 377 (Mo. App. 1935).
5. 328 Mo. 1084, 43 S. W. (2d) 404 (1931).
in the opinion of Chief Justice Taft in the *Coronado Coal Case*, where an unincorporated trade union was held liable, despite the absence of statutory provisions for such suits. Citing the opinion of the highest English court in the *Taff Vale Case*, involving closely analogous facts, the Chief Justice held that affirmative legal recognition of the existence and usefulness of such associations in this country required such a result. But this liberal decision has not been widely followed, due principally to the fact that the courts have not regarded voluntary unincorporated associations as legal entities, and have felt that to permit suits against them as such would be an usurpation of corporate powers which can only be granted by the state.

Should a plaintiff, therefore, be required to resort to the difficult and expensive procedure of impleading as defendants all the members of an association against which he seeks to recover? It would seem just to permit a representative suit in this case. The representative suit undoubtedly originated in equity as a beneficial rule of procedure, and, like many other such rules, has been included in most of the codes. It is usually provided when the question is of common or general interest of many persons, or the parties are very numerous and it is impracticable to bring all of them before the court. This provision is not included in the Missouri code, which is probably accounted for by the fact that the Missouri code was adopted before the provision was included in the New York code which served as a basis for the codes later adopted by other states. But the doctrine has been recognized in Missouri in suits in equity and, although it has been generally held that it could not be applied to actions at law, the fusion of legal and equitable procedure by the code, should permit such a result.

The interpretation of the code provisions for representative suits and their application by the courts in specific cases have been very confusing. Some courts have refused to permit a representative suit where the parties were united in interest and joinder would otherwise be compulsory. This position seems indefensible in view of the fact that the provisions for representative suit are specifically made an exception to the mandatory joinder rule. A few courts have taken the other extreme and allowed such a suit even where the parties represented could not have been joined. But most courts have permitted representative suits where joinder was either required or permitted. Nor have the decisions been consistent

7. (1901) A. C. 426.
11. Ibíd.
13. Newmeyer v. Mo. & Miss. R. R. Co. 52 Mo. 81 (1873); Bushong v. Taylor, 82 Mo. 660 (1884); Lilly v. Tobbein, 103 Mo. 477, 15 S. W. 618 (1890); Harger v. Barrett, 319 Mo. 633, 5 S. W. (2d) 1100 (1928).
17. George v. Benjamin, 100 Wis. 622, 76 N. W. 619 (1898).
19. McKenzie v. L'Amoureux, 11 Barb. (N. Y.) 516 (1851); Thomas v. Jones 97 N. C. 121, 1 S. E. 692 (1887); Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735 (1893); Hodges v. Nalty, 104 Wis. 464, 80 N. W. 726 (1899).
as to the distinction between the representative suit provisions when applied to mandatory or permissive joinder cases. Most courts construe the words "common or general interest of many" as applying to cases of permissive joinder, while the provision as to the impracticability of bringing numerous parties into court is usually applied to both cases of mandatory and permissive joinder.20 Because of the greater hardship of the mandatory joinder rule, it has been suggested that a showing that the parties are numerous should not be required in such a case.21 Such a result appears reasonable, upon consideration of the procedural basis for the doctrine of the representative suit. The instant case clearly comes within the mandatory joinder rule, unless the plaintiff could have elected to treat the contract of insurance as joint or several.22

Another objection which might be made is that the case was not prosecuted as a representative suit, but in the name of the association.23 But it is difficult to distinguish a suit against the association and one against its members. If officials or other members of the association are properly served,24 the fact that the suit is prosecuted in the common name of the association should be considered a mere formal procedural defect, which if not raised as matter of abatement, is waived.25

The advisability of permitting representative suits is always a troublesome question and should be largely left to the discretion of the court. The objections usually raised to such procedure are centered in the general reluctance of the courts to adjudicate the rights of parties not before them. But cases like the instant case present considerations in which this objection is outweighed by the fact that, unless the relief is granted, there may be a total failure of justice.

W. G. Maupin

PLEADING—UNCONSTITUTIONALITY OF A STATUTE.

Cooley v. Jasper County1

Plaintiff, a county superintendent of schools, sued the county to recover the unpaid balance of salary alleged to be due him, basing his claim upon a statute.2 Defendant filed a general demurrer which was overruled, and an answer was filed in which the defendant challenged the constitutionality of the statute for the first time. Judgment for the defendant. Plaintiff appeals.

Preliminary to holding this statute unconstitutional as a special law, the Supreme Court considered the question of the proper procedural stage at which to challenge the constitutionality of a statute and held that a constitutional question "should be lodged in the case at the earliest possible moment that good pleading and orderly procedure will admit, under the circumstances of the given case, otherwise it will be waived." The court decided, however, that as determination of the constitutional question in the instant cause would require

20. Ibid.
22. Mo. Rev. Stat. (1929) § 2953: "All contracts which, by the common law, are joint only, shall be construed to be joint and several".

1. 85 S. W. (2d) 57 (1935).
proof of facts not appearing on the face of the petition, the objection could not be raised by
demurrer and hence was properly raised by answer.

It would seem that the rule that a constitutional question must be raised at the earliest
opportunity cannot be supported in view of § 774 of Mo. Rev. Stat. (1929).\(^3\) The effect of
this statute is to allow the objection that a petition does not state facts sufficient to consti-
tuate a cause of action to be raised at any time and not be subject to waiver by failure to raise
the objection by demurrer or answer.\(^4\) It must be conceded that the constitutionality of a
statute may be raised at any time if, by basing an alleged cause of action upon an unconstitu-
tional statute, there is a failure to state a cause of action. And that by so basing a claim
one fails to state a cause of action seems to be the only logical and sound conclusion that can
be drawn. The allegations of a petition are premised upon some legal principle—common law
or statutory. If this premise is invalid and no valid one can be substituted, the facts fail to
state a cause of action. This is apparent when the petition is based upon a repealed statute
or one already declared unconstitutional. Even if there has been no previous adjudication
of the latter point, the unconstitutional law, being void from the very time of its enactment,\(^5\)
is an invalid premise. A prior decision to this effect is not necessary for its invalidity.

While most of the Missouri cases, as well as the one under discussion, seem to follow
Lachmeyer v. Cordage Co.,\(^6\) and hold that a constitutional question must be raised at the earli-
est possible moment, there is at least one Missouri case,\(^7\) in accordance with the views herein
expressed. In that case it was said that "the defendant at any time and in any court until
the final end of the case, has the right to object that the plaintiff's petition does not state
facts sufficient to constitute a cause of action, for the reason that the statute upon which it is
founded is unconstitutional." Courts in several other jurisdictions have held similarly.\(^8\) In
some states where a case involves the punishment of a person for a crime, the constitution-
ality of the statute authorizing the prosecution may be questioned at any stage of the pro-
cceeding.\(^9\) It is difficult to see why a distinction should be made in this respect between civil
and criminal cases.

If we assume, however, that this question must be raised at the first moment that is
consistent with good pleading, was the court correct in deciding in the principal case that
the objection was raised timely by answer? The basis for the court's decision on this point
was that "in the instant case, as will appear hereinafter, it required proof of facts not ap-
pearing on the face of the plaintiff's petition in order to present the grounds upon which
the defendant challenged the constitutionality of the statute and to enable the court to
determine that question." The facts considered by the court in determining the validity
of the statute consist of: (1) certain provisions of the state constitution; (2) particular
Missouri statutes; (3) the population of certain important cities in the state; (4) the 1928
vote for presidential electors in certain counties in the state, as contained in the Blue-Book
for 1927-1928; (5) the number of teachers and pupils therein, as tabulated in the annual
report of the State Superintendent of Schools for 1928; and (6) the number of county teacher
certificates issued in these counties, also found in this report. The court presumably decided
that because these facts do not appear on the face of the petition the defendant could not

4. Andrews v. Lynch, 27 Mo. 167 (1858); Ivory v. Carlin, 30 Mo. 142 (1860); Carpen-
5. 6 R. C. L., Const. Law, § 117; Louisiana v. Pillsbury, 105 U. S. 278 (1881).
6. 214 Mo. 685, 113 S. W. 1108 (1908).
8. Schwartz v. People, 46 Colo. 239, 104 Pac. 92 (1909); State v. Winehill, 47 La.
781, 86 So. 181 (1920); cf. Kaukauna v. Green Bay Co., 142 U. S. 254 (1891); State
ex rel. Mulholland v. Smith, 141 Mo. 1, 41
9. S. W. 906 (1897); Kristanick v. Chevrolet Motor Co., 335 Mo. 60, 70 S. W. (2d) 890
(1934).
10. 9 R. C. L., Const. Law, § 96; Commonwealth v. Hana, 195 Mass. 262, 81 N. E. 149,
122 A. S. R. 251, 11 Ann. Cas. 514, 11 L. R. A. (N. S.) 799 (1907); Weems v. United
States, 217 U. S. 349 (1909); State v. Pugh, 31 Ariz. 317, 252 Pac. 1018 (1927); State v.
Gibson, 174 N. W. 34 (Iowa 1919); State v. Diamond, 27 N. M. 477, 202 Pac. 988 (1921);
Ex parte Lewis, 45 Tex. Crim. 1, 73 S. W. 811, 108 A. S. R. 929 (1903); 12 C. J., Const.
Law, § 217 (said to be the better rule).
have objected to the constitutionality of the statute by demurrer. But courts take judicial notice of facts of this nature. This is especially true in the type of case under discussion.\textsuperscript{10} It is universally held that courts will take judicial notice of the law of their own state. By statutory provision,\textsuperscript{11} courts of this state take judicial notice of the population of all the cities of the state. Furthermore it has been held that a tribunal may notice election returns and statutes to determine the salary of a county superintendent of schools on a certain date.\textsuperscript{12} It appears that the facts concerning the number of teachers and pupils and the number of certificates were not considered in connection with the defendant's arguments, but rather with those advanced by the plaintiff in upholding the statute, and thus were facts of which consideration would not have been necessary on demurrer. In any event, such facts should be judicially noticed, since they are indisputable, concern a public institution, and are contained in the official report of one of the highest state officials.\textsuperscript{13}

It appears that the decision is open to criticism in two respects. However it should be noted that these rulings taken together reach a correct conclusion. By unnecessarily holding that the objection of unconstitutionality of the statute must be raised at the earliest possible moment and then declaring that it could not have been raised by demurrer, the court attains the sound result of deciding that the point may be properly raised by answer.

\textit{Sesco v. Tipton}

**Torts: Humanitarian Doctrine—Antecedent Negligence of Defendant.**

\textit{Phailment v. Kansas City Southern Ry. Co.}\textsuperscript{3}

Plaintiff's decedent, an employee of the Burlington Railroad, while on duty in its yards at about midnight on a dark night, was killed by a train of the defendant company which was engaged in transferring cars in the Burlington yards. Defendant's train consisted of an

\begin{itemize}
  \item 10. 5 Wigmore, Evidence (2d ed. 1923) § 2555, "The principle of judicial notice has usually been loosely invoked...where a legislative act is to be unconstitutional and this is to depend upon the unreasonableness of the law in its purpose or operation, and thus the external facts furnishing the possible legislative motive or possible legislative effect must be considered."
  \item 12. Cartwright v. McDonald Co., 319 Mo. 848, 5 S. W. (2d) 54; see also, Mosley v. Lee, 319 Mo. 976, 5 S. W. (2d) 83 (1928); Mason v. Hanna, 30 Mo. App. 190 (1888); Ruckert v. Ritcher, 127 Mo. App. 664, 106 S. W. 1081 (1908); State ex rel. Ladock v. Moneyham, 212 Mo. App. 573, 253 S. W. 1098 (1923); Stellhorn v. Board of Commissioners, 60 Ind. App. 14, 110 N. E. 89 (1915).
  \item 1. 85 S. W. (2d) 116 (Mo. 1935).
\end{itemize}
engine pushing two refrigerator cars. The train was coasting, making no noise, and the plaintiff's evidence was that there was no light on the front car, no lookout on the end of the car and no warning of any kind. Plaintiff's decedent stepped on the track in front of the train, evidently not seeing it, and was run over and killed. The court instructed the jury that if it were the custom to have lights and lookout and defendant knew or should have known such, but did not have them; and that if defendant knew or should have known of plaintiff's presence in time to avoid the accident, then the verdict should be for the plaintiff in spite of his negligence. *Held:* It is prejudicial error, in an instruction submitting humanitarian negligence, to inject therein primary negligence of defendant or contributory negligence of plaintiff; to require consideration of any antecedent negligence of either plaintiff or defendant which existed prior to the time the humanitarian doctrine commenced to operate; or to predicate recovery upon any different facts than those which actually existed at the time the peril arose and was discovered, or, if there was a duty to keep a lookout, when it was discoverable by the exercise of the required degree of care.

Practically all jurisdictions recognize the rule of law known as the doctrine of Last Clear Chance, first judicially expressed in 1842. Professor Clark gives three views which are applied by various courts: 1. Conscious Last Clear Chance Doctrine; 2. Unconscious Last Chance Doctrine; 3. Humanitarian Doctrine.

Under the Conscious Last Chance Doctrine, often termed Discovered Peril, recovery is allowed only where the defendant was conscious of the peril of the plaintiff in time to have avoided injury by the exercise of ordinary care, the plaintiff being unable to avoid the injury either because he was unconscious of the peril or because he could not, by using ordinary care, have extricated himself from the peril if he had known it.

The Unconscious Last Chance or Undiscovered Peril Doctrine, goes further and allows recovery where the defendant was unconscious of the peril, but could by exercise of due care have discovered the danger in time to have avoided the injury—the plaintiff, whether conscious of the peril or not, being helpless to avoid it.

Under the Humanitarian Doctrine in Missouri recovery is allowed if the defendant knew, or if by exercise of due care he could have known, of the plaintiff's peril in time to have avoided the injury though the plaintiff himself may have been negligent in not discovering his peril in time to have avoided the injury. Thus Missouri allows a plaintiff to recover in situations where the plaintiff was not in helpless peril, a situation where he could not recover under either of the other views.

In the principal case the question arises if the failure to provide a light is such negligence as can be considered in applying the Humanitarian Doctrine. The court held that such omission has no part in the doctrine as it was antecedent to the occurrence of the perilous situation. This ruling is in harmony with a long line of Missouri cases and follows a formula stated in *Banks v. Morris & Company:*

"The constitutive facts of a cause of action under the Humanitarian rule . . . are . . . 1. Plaintiff was in a position of peril; 2. Defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices); 3. Defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; 4. He failed to exercise ordinary care to avert such impending injury, and 5. By reason thereof plaintiff was injured." 4

Applying the rule as thus stated it is seen that in spite of the seeming liberality of the Missouri courts in adhering to the doctrine, they have been loath to extend it to hold a defendant liable when the accident is due to defendant's failure to be properly equipped to meet or discover the danger and avoid the injury. In other words, the only negligence to be considered is the negligence at the scene of the accident, no showing of primary negligence being admissible, regardless of the part it might have played in causing the plaintiff's injury.

2. Davies v. Mann, 10 M. & W. 546 (1842).
4. 302 Mo. 254, 267, 257 S. W. 482 (1924). (Italics the writers.)
RECENT CASES

Several courts have allowed recovery by the plaintiff in cases similar to the principal case and purported to be applying the doctrine of Last Clear Chance. In Lloyd v. Albre- 
marle & R. R. Co., the situation was very similar to the principal case. Plaintiff’s intestate 
was killed in the night by an engine running with the tender in front, with only a small hand 
lantern for light. Plaintiff was negligent in being on the tracks. In holding the defendant 
liable the court here said that if the jury found that a headlight would have enabled the 
defendant, by due diligence on the part of its servant, to have seen the intestate in time to 
have stopped the train before reaching him, then the failure to provide one, and have it at 
the front, was a continuing negligent omission of a duty, the performance of which would 
have given the defendant the last clear chance to prevent the injury and therefore have 
made its negligence the proximate cause of it. In Reid v. Atlanta Ry. Co., the plaintiff was 
walking over a crossing at night when she was hit by defendant’s train, which was running 
without light or anyone stationed to give warning, and the court held the defendant liable 
for this failure to provide warning or light. In Tullock v. Connecticut Co. the plaintiffs 
were negligent in stopping their truck so near the railroad track, but the court held that 
the defendant should have discovered their peril and was negligent in not having lights sufficient 
to enable them to discover the plaintiff. Liability was based on last clear chance, the court 
considering this negligence applicable under the doctrine. The court in Dent v. Bellows 
Falls Ry. Co., held that while the law under the Last Clear Chance Doctrine contemplates 
only the subsequent negligence of defendant, the negligence in failing to provide a headlight 
was continuous to a time when the accident became inevitable and makes defendant liable 
regardless of plaintiff’s contributory negligence. These cases would seem to be similar to 
the principal case in that the accident was due to primary negligence in failing to have suffi- 
cient lights, and they appear to be contra to the Missouri law.

The case of Thompson v. Salt Lake Rapid-Transit Co., shows how the Missouri law 
would operate in other situations. Here it was held that the negligence of the defendant in 
having defective brakes so that he could not stop in time to avoid the accident made the 
company liable even though the plaintiff was also negligent. According to the principal case 
such prior negligence could not be considered and as there was no further negligence at the 
scene of the accident, the defendant would not be held liable. The same result would proba- 
ble be reached in a case like British Columbia Electric Ry. Co. v. Loach, another case 
where the defendant was held liable for having defective brakes so the train could not be 
stopped.

Missouri courts have in a few instances held that prior negligence in violating speed 
ordinances, so that the excessive speed prevented the train from stopping, could be con- 
sidered under the Humanitarian Doctrine. But the Springfield Court of Appeals in Alex- 
ander v. St. Louis-San Francisco Ry. Co., disapproved these cases and the Supreme Court 
in Carney v. Chicago, R. I. & P. Ry. Co. and Todd v. St. Louis-San Francisco Ry. Co. has 
apparently overruled them, holding that the doctrine covers only the last clear chance 
which comes to the defendant to avert the otherwise certain injury and blots out all that 
preceded, whether primary or contributory negligence, and measures defendant’s liability 
solely on its ability and failure to avert the injury under the then existing circumstances.

The Restatement of the Law of Torts states: “In order that the defendant may be 
liable under the rule stated in this section (Last Clear Chance) it is necessary that after he 
has discovered or should have discovered the plaintiff’s peril he should have had the ability

5. 118 N. C. 1010, 24 S. E. 805 (1896).
6. 140 N. C. 146, 52 S. E. 307 (1905).
7. 94 Conn. 201, 108 Atl. 556 (1919).
8. 95 Vt. 523, 116 Atl. 83 (1922).
9. 16 Utah 281, 52 Pac. 92 (1898).
10. 1 A. C. 719 (1916).
   Williams v. Kansas City Elevated Ry. Co. 149 Mo. App. 489, 131 S. W. 115 (1910);
12. 289 Mo. 599, 4 S. W. (2d) 888 (1928).
13. 323 Mo. 470, 23 S. W. (2d) 993 (1929).
15. Restatement, Torts, § 479, Com- 
   mentaries, F, 878 (1934).
to avert the accident if he had used due care and competence in utilizing it. If the defendant, after discovering plaintiff's peril, does all that can reasonably be expected of him, the fact that his efforts are defeated by antecedent lack of preparation or a previous course of negligent conduct is not sufficient to make him liable. All that is required of him is that he use his then available ability." This, as indicated by the principal case, is the Missouri view, but it seems that the Missouri courts might well extend the doctrine and hold a defendant liable where his previous negligence has made it impossible for him to take advantage of an opportunity to avoid the impending accident.

Professor Bohlen, in discussing this point, says: "Those jurisdictions which have taken the so-called humanitarian view and allowed recovery where both the plaintiff and defendant are equally able to avert the accident and are equally guilty of inadvertence continuing until the opportunity to control the event is over, might very properly take the same final step. They have already substantially repudiated the theory that recovery is permitted only where the defendant's negligence is subsequent to that of the plaintiff. Having imposed upon the defendants a superior duty of vigilance, they may well go further and insist that they maintain their equipment in such condition to make such vigilance effective. Otherwise, as stated in the Loach case,\textsuperscript{16} 'the defendant company would be in a better position where they had supplied a bad brake but a good motorman, than where the motorman was careless, but the brake efficient.'\textsuperscript{17} This same thought is suggested in an article by Judge Merrill E. Otis,\textsuperscript{18} who says the trend seems to be toward more liberality.

E. C. Curtis

\textsuperscript{16} 1 A. C. 719 (1916).
\textsuperscript{17} See Bohlen, Studies in the Law of Torts (1926) 541.
\textsuperscript{18} Otis, The Humanitarian Doctrine (1912) 46 Am. L. Rev. 381, 396.