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Notes on Recent Missouri Cases

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JUNE NINETEEN HUNDRED AND FOURTEEN

NOTES ON RECENT MISSOURI CASES

CONVERSION BY A PLEDGEE.—Whether a pledgee who wrongfully sells or repledges his security in excess of his authority, is liable to his pledgor in trover without a tender of the debt, is a question on which the authorities are in conflict. The first adjudication of the question in England was had in the Court of Common Pleas in the case of *Johnson* v. *Stear*.[1] That case allowed a recovery in trover by the pledgor against the pledgee, who had sold the pledged goods before he had a right to do so under the pledge, but the majority of the court limited the recovery to the damage actually suffered—that is, the recovery was diminished to the extent of the pledgee's interest, on the theory of compensation. Williams, J., in a separate opinion maintained that the pledgor should in an action of trover recover the full value of the property pledged.

This case has, in effect, been overruled in England by the later cases of *Donald* v. *Suckling*[2] and *Halliday* v. *Holgate*.[3] The former was a suit in the Court of Queen's Bench by the original pledgor against one to whom the pledgee had repledged the goods for a greater debt of his own, and it was held that there was no conversion. *Halliday* v. *Holgate* was a suit in the Court of Exchequer against the vendee to whom the pledgee had

1. (1863) 15 C. B. (N. S.) 329, 33 L. J. C. P. 130.
2. (1866) L. R. 1 Q. B. 585.
3. (1868) L. R. 3 Ex. 299.

sold the pledged property before he had a right to do so under the pledge. It was held that there was no conversion, and this decision was affirmed in the Court of Exchequer Chamber. The latter court cited *Donald* v. *Suckling* and recognized it as authority for the proposition that there is no conversion by sale or repledge of pledged property. Cockburn, C.J., said in *Donald* v. *Suckling*, "We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as agent of the party having the lien for purpose of its custody. In the contract of pledge the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the property pledged as his own, if the debt is not paid and the thing redeemed at the appointed time." The special property of the pledgee in the property, is considered as continuing in existence until the pledge is redeemed or sold at the time specified. Mellor, J., in the same case says that the sale or repledge is simply inoperative as to the pledgor, and that there must be a tender of the amount for which the goods were originally pledged to enable the pledgor to maintain trover.

This is the present English law, but the rule is difficult to defend. The English court itself states that a lien-holder is liable in trover on parting with the possession of the property. The court then attempts to justify the ruling as to a pledgee by saying that his powers are more extensive, and concludes that the sale or repledge does not put an end to the pledge relation. The amplitude of the powers, it would seem, is beside the point. No matter what his powers are, if he exceeds them, he should be held as strictly accountable as a lienor.

The various jurisdictions in the United States are not uniform in their attitudes on this matter. The views taken in *Johnson* v. *Stear* and in *Donald* v. *Suckling* and *Halliday* v. *Holgate* have each found a following.[4] Where the acts of the pledgee are held to constitute a conversion, they may be taken advantage of by the pledgor as the basis of an action of trover, or of a counterclaim in an action by the pledgee for the debt.[5] If the pledgee has made a sale of the pledged property for money, the pledgor may also sue in assumpsit for money had and received.[6]

Having determined that the pledgee is liable in trover, what should be the amount of the recovery? Some cases hold that the value of the

4. Following *Halliday* v. *Holgate: Reardon* v. *Patterson* (1897) 19 Mont. 231, 47 Pac. 956; *Williams* v. *Ashe* (1896) 111 Cal. 180, 43 Pac. 595; *Moffat* v. *Williams* (Col., 1894) 36 Pac. 914; *Talty* v. *Freedman's Savings and Trust Co.* (1876) 93 U. S. 321, distinguished in *Rush* v. *First Nat. Bank of Kansas City* (1895) 71 Fed. 102, 105, on the ground that it was a suit against a purchaser from the pledgee and not against the pledgee himself. The distinction seems doubtful.

Following *Johnson* v. *Stear: Rosenzweig* v. *Frazer* (1882) 82 Ind. 342; *Feige* v. *Burt* (1898) 118 Mich. 243, 77 N. W. 928; *Smith* v. *Savin* (1893) 69 Hun, 311, 23 N. Y. Supp. 568; *Work* v. *Bennett* (1872) 70 Pa. St. 484; *Waring* v. *Gaskill* (1895) 95 Ga. 731, 22 S. E. 659.

5. *Rush* v. *First Nat. Bank of Kansas City* (1895) 71 Fed. 102; *Bowen* (1859) 9 Wis. 320, and see *Villas* v. *Mason* (1870) 25 Wis. 310; *Richardson* v. *Aimsworth* v. *Ashby* (1895) 132 Mo. 238, 33 S. W. 806.

6. *Belden* v. *Perkins* (1875) 78 Ill. 449.

property at the time of the conversion is the proper measure of damages.[7] But the measure of damages in an action for conversion of property "is, in the absence of special circumstances, the value of the property or the property rights converted, at the time of conversion with interest."[8]

The pledgor, then, should recover the value of his property rights in the pledge, that is, the value of the property at the time of the conversion, less the amount of the debt for which it was pledged. This result is reached in most courts,[9] but in different cases it is sometimes based on different reasoning. It is often stated in the cases that the pledgee when sued for conversion of the pledge may recoup the amount of the debt,[10] but it is not a strict recoupment. Nor is the reduction of the pledgor's recovery by the amount of the debt properly explained on the theory of counterclaim or set-off. The fact is that the pledgee has an interest in the property to the amount of the debt, and the pledgor's property right which has been infringed does not include that interest, and the pledgor's recovery should only be for injury to his property right.[11]

There are few cases in Missouri on this question. In 1895 in the case of *Richardson* v. *Ashby*[12] the Supreme Court held that where the pledgee repledged the property so as to put in out of his control, the pledgor had an immediate right to bring an action of trover without tendering the amount of his indebtedness. In 1901 the St. Louis Court of Appeals in the case of *Schaaf* v. *Fries*[13] held that a tender was necessary before the pledgor could bring trover. The latter court said: "We deem the weight of authority and arguments to be on the side of the doctrine that the contract of bailment is not extinguished by a wrongful sale, but merely broken; and that the pawnee or his vendee may retain the pawn until the debt is satisfied or satisfaction offered, notwithstanding such breach." The transfer in this case was to the son of the pledgee, and the court in its opinion says it was in the power of the pledgee to restore. This has been offered as a distinguishing fact.[14] There being a sale it is doubtful whether the possibility of regaining control

7. *Robinson* v. *Hurley* (1860) 11 Iowa 410; *Loomis* v. *Stove* (1874) 72 Ill. 623; *Ainsworth* v. *Bowen* (1859) 9 Wis. 320.

8. Sedgwich on Damages (9th ed.) § 492a.

9. *Johnson* v. *Stear* (1862) 15 C. B. (N. S.) 330, 33 L. J. C. P. 130; *Halliday* v. *Holgate* (1868) L. R. 3 Ex. 299; *Rosenzweig* v. *Frazer* (1882) 82 Ind. 342; *Work* v. *Bennett* (1872) 70 Pa. St. 484; *Baltimore Ins. Co.* v. *Dalrymple* (1866) 25 Md. 269; *Fisher* v. *Brown* (1870) 104 Mass. 259; *Richardson* v. *Ashby* (1895) 132 Mo. 238, 30 S. W. 806.

10. *Work* v. *Bennett* (1872) 70 Pa. St. 484; *Baltimore Ins. Co.* v. *Dalrymple* (1866) 25 Md. 269; *Feige* v. *Burt* (1898) 118 Mich. 243, 77 N. W. 928.

11. In *Johnson* v. *Stear*, *supra*, Erle, C. J., says: "On these authorities we hold that the damages due to the plaintiff for the wrongful conversion of the pledge by the defendant, are to be measured by the loss he has really sustained; and that in measuring these damages, the interest of the defendant in the pledge at the time of the conversion is to be taken into the account. It follows that the amount is merely nominal."

Also in an action for money had and received, when the pledged goods have been sold, the measure of damages should be the amount of the debt. *Belden* v. *Perkins* (1875) 78 Ill. 449. Jones, Pledge and Collateral Security (2d ed.) 580.

12. 132 Mo. 238, 33 S. W. 806. See 9 Harvard Law Review 540.

13. 90 Mo. App. 111.

14. 24 L. R. A. (N. S.) 511, note.

if a tender were made, should be looked into. The language, at any event, is *contra* to that of the supreme court in *Richardson* v. *Ashby*.

In the recent case of *Union Cold Storage & Warehouse Co.* v. *Pitts*[15] a pledgee refused to sell to a purchaser presented by the pledgor. The court held that this amounted to a conversion of the pledged property, and cited *Schaaf* v. *Fries*. The act being a conversion, the pledgor could properly counterclaim the conversion in an action on the note. There was perhaps sufficient tender in presenting a purchaser ready and willing to buy. If this is so the decision in this case is correct, even under the doctrine of *Schaaf* v. *Fries*, which holds a tender necessary to support a claim of conversion.[16]

K. B.

METHOD OF OUSTING PUBLIC OFFICER WHO HAS FORFEITED OFFICE THROUGH MISCONDUCT.—The constitution of Missouri[1] prohibits passes, or tickets at a discount to members of the general assembly, the state board of equalization or any state, county or municipal officer, and makes the penalty for the acceptance of passes or tickets at a discount by such officers a forfeiture of office. The question at once presents itself as to whether or not this clause is self-executing—that is, as to whether, by the mere acceptance of such pass or discounted ticket, the office of the acceptor is automatically forfeited.

It is declared in an Arkansas case that "when the organic law is silent as to the mode of declaring a forfeiture, the legislature possesses the inherent power to prescribe the means to ascertain the same."[2] The constitution of Missouri is silent with regard to ouster from office, but there is a statutory provision[3] as follows: "Any member of the general assembly of the state of Missouri, or member of the state board of equalization of any state, judicial, county or municipal officer, who shall accept use or travel on any free passes, . . . or tickets at a discount . . ., shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars for each offense, and upon conviction thereof, forfeit his office, and if there be no provisions made by law for the removal of such officer by impeachment, the court trying the cause shall adjudge the defendant to have forfeited his office and declare the same vacant; *Provided*, that no court other than the circuit court or criminal court of record shall have power to adjudge any such office to be forfeited and vacant."

After a conviction, then, what course of procedure may be followed to remove the officer? In the case of *Wells* v. *State*,[4] which arose under a

15. (1914) 161 S. W. 1182.
16. As to the question discussed by Farrington, J., regarding the liability of a pledgee for loss through his negligence, see 31 Cyc. 836, and authority cited in note 38.

1. Art. XII, § 24. See Revised Statutes 1909, p. 131.
2. *State* v. *Hixon* (1872) 27 Ark. 398, 402.
3. Revised Statutes 1909, § 4814.
4. (Ind., 1911) 94 N. E. 321.

statute[5] providing that on conviction of an officer of acts sufficient to cause a forfeiture the court may oust such officer so convicted, the court said: "It can hardly be supposed that the legislature intended the remedy thus specifically provided to be concurrent with *quo warranto*. . . . The statute was enacted with the two-fold purpose of affording the accused in all such cases the right of a speedy trial by jury, and of relieving the courts invested with original jurisdiction in *quo warranto* of the trial of that class of cases." In fact it seems well established that the existence of any other remedy will prevent *quo warranto* from lying.[6]

The questions discussed above have been raised in the recent case of *State ex rel. Letcher v. Dearing*,[7] which is an action of prohibition. In that case it appears that Letcher accepted a pass from the Missouri Pacific Railroad. An information in the nature of *quo warranto* was filed against him. Later a criminal information was also filed against him. The *quo warranto* case was set for hearing June 16, 1913, and the criminal case was continued until August, 1913.

Letcher brought a writ of prohibition against the respondent Dearing, as judge of the Washington County Circuit Court to prevent the respondent from trying the relator upon the information in the nature of *quo warranto*. Relator, Letcher, claims that he is entitled to a trial by jury under Revised Statutes, 1909, section 4814,[8] and that a trial of the *quo warranto* proceeding in June may prevent his obtaining a trial by jury in August.

The writ of prohibition was granted by the Supreme Court, Woodson and Brown, J. J., dissenting. The court says in part: "The constitution provides no method for the determination of the forfeiture. An officer cannot be deprived of his office without some kind of a judicial hearing, and the constitution provides no method for such hearing. The constitutional provision is broad enough to be a foundation for a legislative act prescribing a method of determining a forfeiture, but is not so far self-executing as to render legislation upon the question unnecessary." The court then notices Revised Statutes 1909, section 4814,[9] and says: "Here we have a clear statutory provision for a determination of the question of forfeiture. . . . It locates the jurisdiction to determine the forfeiture in a court having jurisdiction over criminal cases and none other. Not only so but it requires a conviction, before there can be a judgment of forfeiture." The court then sets out the statutory provision with regard to removal by *quo warranto* of one who *usurps* an office,[10]

5. Burn's Ann. St. 1908, § 1188.
6. High, Extraordinary Legal Remedies, §§ 616, 618, 637, 643, 645; *Malone* v. *N. Y., N. H. & H. R. Co.* (N. Y., 1908) 83 N. E. 408; *Gladish* v. *Lovewell* (Ark., 1910) 130 S. W. 579; *City of North Birmingham* v. *State* (Ala., 1910) 52 So. 202.
(7). (1913) 162 S. W. 618.
8. *Supra.*
9. *Supra.*
10. "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the Attorney General of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an in-

and proceeds as follows: "In a case like the one at bar it cannot be said that relator has usurped, intruded into or unlawfully held his office, until there has been a trial and judgment of forfeiture. It stands conceded that he is rightfully in the office, unless he has forfeited that right by conduct subsequent to his induction into office. The question then is: Who shall try the matter of forfeiture, a court of equity, or the courts named in the statute? If the constitutional provision is not self-executing, as we have held, than it is clear that the forfeiture must be determined in the method pointed out by the statute. In other words, that the judgment of forfeiture can only follow a conviction under the criminal charge."

The position taken by the majority of the court seems entirely sound. The constitution provides that a public officer who takes a free pass or ticket at a discount shall forfeit his office, but says nothing about the enforcement of the forfeiture. It would seem, then, that the legislature was quite justified in providing the procedure for enforcing the forfeiture, and that that procedure and no other should be followed.[11]

C. B. R. Jr.

MUST AN AFFIDAVIT BE SIGNED?—The case of *Robertson v. Robertson*[1] has been certified by the Springfield Court of Appeals to the Supreme Court,[2] because Robertson, P. J., deemed the decision in conflict with two previous cases. The question involved is whether the absence of the affiant's signature to an affidavit supporting a divorce petition was fatal to the original court's jurisdiction. The Court of Appeals held that it was fatal. The decision at first glance seems insupportable in light both of the reluctance courts have to setting aside divorce proceedings under any circumstances, and especially in light of the fact that in this case two years had elapsed since the granting of the divorce.

The field for the use of affidavits is so extensive that it would be hazardous to lay down an inflexible rule to be applied in every case. The practice of requiring the deponent's signature arose in Chancery in 1661, founded on an order issued by the Chancellor.[3] Obviously this facilitates identification; and the statements contained in the affidavit being under oath, and before an officer of the court, a prosecution for perjury may be based upon it. However, an affidavit may be identified without an appending signature, and if false it may still support a prosecution for

formation in the nature of *quo warranto*, at the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney." Revised Statutes 1909, § 2631.

11. See in accord with the principal case *State* v. *Wilson* (1883) 30 Kan. 673, 2 Pac. 828.

1. (1914) 163 S. W. 266.

2. Under the authority of section 6 of the constitutional amendment of 1884, see Vol. 1, p. 101, Revised Statutes 1909.

3. Beam's Orders, 210; 2 Har. Pr. 2; Wyatt's Pr. Reg. 8; 1 Grant's Pr. 240; 1 Newl. Pr. 237.

perjury.[4] Answering its function, then, without a signature, the overwhelming majority of courts have held that, while a signature may be a formal requisite, in the absence of statute or positive rule of court its omission does not invalidate an affidavit.[5]

However, the peculiar facts of *Robertson* v. *Robertson*, demand careful consideration. When the decree for divorce was applied for, the present plaintiff was a non-resident of the state. Service was had upon him by publication, which was never brought to his notice until the case had been disposed of. Since such a proceeding partakes of an *ex parte* character, it is reasonable that the petitioner stand before the court "in the most satisfactory way known to our system of jurisprudence," as is said by the court in the principal case.[6] Not only must he verify the facts, which the statute requires to be set forth in the affidavit, but he must solemnly swear to them. And it is indisputable that a signature helps to accomplish the statutory purpose. It is further to be noted in this case that in the two years intervening, there had been no remarriage, so that certain serious considerations, which might have had weight if there had been a remarriage, were not here before the court. Had it been necessary to declare children illegitimate, and upset property rights acquired in good faith under the former decree, such considerations might well have influenced the decision.

It will be interesting to note the disposition of the case by the Supreme Court. That court may dispose of the case on its special facts, or may adjudicate the general question, whether a writing under oath before an authorized officer, without a signature, is an affidavit, since the supporting paper to a divorce petition is labelled by our statute merely an affidavit.[7]

Our courts have undoubtedly held that a signature is a substantial element of an affidavit. The precise point has been squarely before three of our higher courts, and all disposed of it in the same way. The earliest decision is that of the Supreme Court in the case of *Hargadine* v. *Van Horn*.[8] Plaintiff, in an ejectment suit, relied upon title obtained at an attachment sale. The affidavit in the proceeding was not signed. "In the present case," said the court, speaking through Napton, J., "there was no affidavit at all, that is, the paper described and referred to by the clerk as the one upon which the writ of attachment issued, was not signed by anyone, and was therefore no affidavit."[9] The next case, *Norman* v. *Horn*,[10] which came up before the St. Louis Court of Appeals, was a case of conversion, based upon an attachment, supported by an affidavit, signed by the defendant in the partnership name of his firm. The court

4. *Bates* v. *Robinson* (1859) 8 Iowa 318; *Commonwealth* v. *Carel* (1870) 105 Mass. 582.
5. See Fletcher's Equity Pleading & Practice 464, for collection of cases on this point; 2 Cyc. 26, and cases cited.
6. Page 270.
7. Revised Statutes 1909, § 2371.
8. (1880) 72 Mo. 370.
9. Sherwood, J., dissented, contending that the absence of the signature made the oath merely defective, and it could not be attacked in a collateral proceeding.
10. (1889) 36 Mo. App. 419, 424.

said: "The affidavit cannot be regarded as the oath of the individual members of the firm, or of either of them, because the affidavit is not signed by them." In both of these cases, the writing was held void in a collateral proceeding. It is not surprising then, that the same result was reached in an original proceeding in the case of *The Third National Bank of Sedalia* v. *Garton*.[11]

Richardson v. *Richardson* seems to be in harmony with the cases just discussed. Nor do the cases, which Robertson, P. J., deems inconsistent with the decision in the principal case, really seem to be in conflict with it.

In both *Barhyst & Co.* v. *Alexander & Co.*,[12] and *State* v. *Headrick*,[13] the question of the sufficiency of an affidavit without a signature was not under consideration. The courts, incidentally and very generally defining an affidavit, omit a signature as an element. However the dissent of Robertson, P. J., is not without force. It is properly directed toward the sufficiency of the statutory divorce affidavit. The decided cases have dealt with affidavits in attachments and foreclosure proceedings, and in the various steps of ordinary legal proceedings. Divorce proceedings stand in a class by themselves. These proceedings affect so vitally the status of individuals as well as important classes of rights, that a decree, once granted, should, whenever possible, be considered once and for all closed. At least, no trivial technicality should be a ground for setting it aside. In the words of Robertson, P. J.[14], "I do not believe there should be a rule of law established that necessitates children being declared illegitimate, that requires the readjustment of property rights, or that permits perjurers to escape simply because a name is not subscribed to an oath which is reduced to writing and otherwise authenticated so as to leave no doubt as to what facts are sworn to and as to who made the affidavit." Though the decision in the principal case is in accord with previous adjudications of the subject in Missouri, it should be borne in mind that the great weight of authority is *contra*, the position of the majority being supported on the ground that the real purpose of a signature to an affidavit is to make more conclusive the identification of the affiant. The argument that the original divorce proceedings were really *ex parte*, and that the petitioner should, therefore, establish his case in the most solemn and conclusive manner, is perhaps met by the consideration that a divorce decree once granted should not be set aside except for very good reasons.

R. BURNETT.

THE HUSBAND'S LIABILITY FOR NECESSARIES SUPPLIED TO THE WIFE.—It is a well-established rule of common law that the husband

11. (1890) 40 Mo. App. 133 Smith, P. J., dissented, holding that under our liberal amending provision, the application for amendment should have been allowed. See Revised Statutes 1909, § 1848.
12. (1894) 59 Mo. App. 188, 192.
13. (1899) 149 Mo. 396, 403.
14. *Robertson* v. *Robertson* (1914) 163 S. W. 266, 270.

is bound to furnish necessaries for the support of his wife.[1] Where he fails to perform this duty the wife is said to have authority to pledge his credit for necessaries suitable to her situation and his condition in life.[2] It is frequently stated that under such circumstances the law creates an irrevocable agency based upon status.[3] This theory sufficiently explains the class of cases which hold that the husband is liable for the necessaries purchased by his wife when he has given the dealer express orders not to furnish them to her.[4] It is also applicable to the case where the husband is compelled to pay the reasonable legal expenses of his wife in defense of a prosecution instituted by himself;[5] and, the so-called agency being irrevocable, the liability of a husband who becomes insane for necessaries bought by his wife[6] may be explained in terms of the doctrine of agency stated above,

However, difficulty in explaining the husband's absolute liability in terms of agency begins to arise when we get cases where the husband is an infant, and could, therefore, only make voidable contracts. Granted that the agency of the wife is irrevocable, still that does not explain the infant husband's unavoidable liability to one who furnishes her with necessaries. And yet such a husband has been held liable both in England,[7] and in this country.[8]

We are confronted with another difficulty when we attempt to apply the doctrine to such cases as *Wray* v. *Coxe*,[9] where the necessaries were furnished the wife while she was an inmate of an asylum, or to the case where the wife was unconscious at the time the necessaries were furnished. If this is agency it is agency without a conscious agent—an absolute anomaly. Under the common law it is the duty of the husband to give a suitable burial to the body of his deceased wife.[10] One who performs this duty in the absence of the husband, or upon the husband's failure to perform it can recover from him the expenses incurred thereby,[11] and the courts assert that this liability is similar to the obligation of the husband to supply his wife with necessaries in life.[12] It is clearly impossible logically to apply any doctrine of agency to such cases, for, as was stated

1. *Montague* v. *Benedict* (1825) 3 B & C. 635; *Rutherford* v. *Coxe* (1848) 11 Mo. 347.
2. *Montague* v. *Benedict* (1825) 3 B. & C. 635; *Ross* v. *Ross* (1873) 69 Ill. 569; *Pierpont* v. *Wilson* (1881) 49 Conn. 450; *Cromwell* v. *Benjamin* (N. Y., 1863) 41 Barb. 558; *Sauter* v. *Scrutchfield* (1887) 28 Mo. App. 150; *French* v. *Burlingame* (1911) 155 Mo. App. 548, 134 S. W. 1100.
3. *Easland* v. *Burchell* (1878) 3 Q. B. D. 432; *Johnson* v. *Sumner* (1858) 3 H. & N. 261; *Barker* v. *Carter* (1890) 83 Me. 132, 21 Atl. 834; *Sautet* v. *Scrutchfield* (1887) 28 Mo. App. 150; *Rutherford* v. *Coxe* (1848) 11 Mo. 347.
4. *McGrath* v. *Donnelly* (1889) 131 Pa. 549, 20 Atl. 387; *Cromwell* v. *Benjaminh* (N. Y., 1863) 41 Barb. 558.
5. *Warner* v. *Heides* (1871) 28 Wis. 518.
6. *Read* v. *Legard* (1851) 6 Exch. 636; *Thedford* v. *Reade* (1898) 54 N. Y. Supp. 1007.
7. *Turner* v. *Trisby* (1792) 1 Str. 168.
8. *Cole* v. *Seeley* (1853) 25 Vt. 220.
9. (1854) 24 Ala. 337.
10. *Jenkins* v. *Tucker* (1788) 1 H. Bl. 90.
11. *Bradshaw* v. *Beard* (1862) 12 C. B. (N. S.) 344; *Gleason* v. *Warner* (1899) 78 Minn. 405, 81 N. W. 206; *Seyhold* v. *Morgan* (1891) 43 Ill. App. 39.
12. *Cunningham* v. *Reardon* (1868) 98 Mass. 538; *Gleason* v. *Warner* (1899) 78 Minn. 405, 81 N. W. 206.

in *Sauter* v. *Scrutchfield*,[13] "It would present the singular aspect of an agency without an agent."

But the most significant element of these recoveries is that the amount recovered is *the reasonable value* of the services rendered, or necessaries furnished.[14] This illustrates another difficulty of establishing such a liability on the theory of agency, and exemplifies one of the chief characteristics of quasi-contractual obligations, which is that the plaintiff shall be compensated only for the benefit which he has conferred upon the defendant.

Since there are so many serious objections to this so-called theory of agency, one is not surprised to find that a few jurisdictions have indicated a tendency to disregard it, and to adopt a doctrine far more reasonable and consistent.[15] They treat the liability as, "an original and direct liability in the husband created by marriage,"[16] and regard the real basis of the obligation as the quasi-contractual doctrine of dutiful intervention.[17] Broadly speaking, this means the performance of another's legal obligation by an appropriate person under peculiar circumstances which justify or require his intervention. To this doctrine as applied to the cases in hand there seems to be no serious objection, for if we apply it to the cases discussed above which proved difficult to explain on the agency theory, we encounter no difficulties. And, in addition to that fact, we find that it applies more satisfactorily to the cases which could be worked out on the basis of agency. Furthermore it is perfectly consistent with a recovery for the reasonable value, which is universally allowed.

In the recent case of *Moran* v. *Montz*,[18] decided by the Kansas City Court of Appeals, it appears that the plaintiff had been employed under a written contract by Joseph Montz to defend certain criminal cases against him and his wife. During this employment and while Joseph Montz was in jail, his wife Mary Montz became violently insane. The plaintiff was informed of her insanity. He went to the police station and took charge of her, and had her committed to an asylum. Later, when her condition became better, the plaintiff got her released on parole. Plaintiff brought action against Joseph Montz and his wife to recover $200 for the above described services, but expressly asserted that he did not base his claim on the written contract of employment. The court said in part: "Montz did not know of these services nor of the necessity for them, until after they had been performed, and Mrs. Montz, being insane, was incapable of becoming a party to an express contract. But it does not follow that the plaintiff should be turned away empty-handed

13. (1887) 28 Mo. App. 150.
14. See cases cited above, and Woodward, The Law of Quasi Contracts, § 203.
15. *Black* v. *Bryan* (1857) 18 Tex. 467; *Woodward* v. *Barnes* (1871) 43 Vt. 330; *Bergh* v. *Warner* (1891) 47 Minn. 250, 20 N. W. 77; *Rea* v. *Durkee* (1861) 25 Ill. 414.
16. *Sauter* v. *Scrutchfield* (1887) 28 Mo. App. 150, 157.
17. Woodward, The Law of Quasi-Contracts, § 203; Huffcutt on Agency, § 55.
18. (1914) 162 S. W. 323.

as a mere volunteer, or as an intermeddler in the affairs of another." The court then pointed out that Montz was in prison where he could not care for his wife who needed immediate legal services to procure for her the necessary medical attention, and referred to *Gabriel* v. *Mullen*[19] which held that medical services for a sick wife are necessaries which a husband is bound to provide. The court concluded as follows: "The law will imply a contract on the part of the husband to pay the reasonable value of necessary medical attention voluntarily bestowed upon his wife under exigent circumstances, and we think that legal services which are indispensable to securing the admittance of an insane women to an asylum for the insane, and for the performance of which there is an immediate and most exigent necessity, should also be classed as necessaries." Mrs. Montz was held not liable.

It is clear from the language quoted above that the court conceived of the husband's liability as being entirely quasi-contractual. Under the particular circumstances of this case the defendant received a benefit, the retention of which would have unjustly enriched him. "This may be a negative enrichment but it is the tendency of the courts to permit a recovery for negative enrichment in quasi-contract."[20] Prompt performance of defendant's duty of care for his wife was of public concern, and since performance by the defendant was impossible we have only to decide whether the plaintiff was an appropriate person to intervene. If so, which was not questioned in this case, then the defendant is obligated to reimburse him to the extent of the reasonable value of the services performed. The conclusion reached in this case is reasonable and consistent, and consititutes a proper application to the facts here involved of the law which regards the basis of the liability as the quasi-contractual doctrine of dutiful intervention earlier discussed.

R. BURNS.

SUBROGATION.—"Subrogation is the substitution of one person in place of another, whether as creditor or as possessor of any other rightful claim, so that he who is substituted succeeds to the right of the other in relation to the debt or claim and its rights, remedies or securities."[1] Three classes of persons are said to be entitled to subrogation:[2] (1) Those who act in performance of a duty arising by agreement or law. (2) Those who act for self-protection. (3) Those who act at the request of a debtor directly or indirectly, or upon invitation of the public, and where payments are favored by public policy. In the Missouri case of *Capen* v.

19. (1892) 111 Mo. 119, 19 S. W. 1099.
20. *McSorley* v. *Faulkner* (1892) 18 N. Y. Supp. 460.

1. *Jackson* v. *Boylston Ins. Co.* (1885) 139 Mass. 508, 2 N. E. 103. See also *Aetna Ins. Co.* v. *Middleport* (1888) 124 U. S. 534; *Evenson* v. *Halleck* (1900) 108 Wis. 249, 83 N. W. 1102.
2. 6 Pomeroy's Equity, §§ 921 *et seq.*
3. (1909) 193 Mo. 335, 92 S. W. 368. See also *Evans* v. *Halleck* (1884) 83 Mo. 376; *Norton* v. *Highleyman* (1886) 88 Mo. 621; *Bunn* v. *Lindsay* (1888) 95 Mo. 250, 7 S. W. 473.

Garrison[3] it is said that "subrogation is usually applied where a person at the request of the debtor pays the mortgage debt, or where one interested in property pays an encumbrance to protect his own interest, or where he stands in the relation of surety for the debt."

The doctrine of subrogation, as borrowed from the civil law, was decidedly limited in its scope, but it "has been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons."[4] Every doctrine of law or equity must, of course, have its limitations, and in fixing the limits for the application of the doctrine of subrogation the courts have laid down varying rules.[5] In a general way it may be said that the doctrine of subrogation will not be invoked where inherent justice does not concur with some well-established principle of equity jurisprudence, or where the party seeking it is a mere volunteer.[6]

The Missouri cases have in the past confined the application of this equitable doctrine within rather narrow limits, as will be seen by a brief chronological consideration of them. In *Wooldredge* v. *Scott*[7] it was held that a creditor of an estate who discharged a vendor's lien at the request of the vendee was not entitled to the benefits of the doctrine of subrogation. In *Price* v. *Courtney*[8] there was a devise of all the testator's property in trust for minor children to a trustee with full power and control. Under the mistaken belief that he had power to encumber the land the trustee executed a mortgage on part of it and claimed to have used some of the money for payment of taxes. The court, in declaring the mortgage void, said that, even had the money been loaned for the specific purpose of removing a tax lien, such application would have created no equity of subrogation in favor of the one who loaned the money. The court, in *Norton* v. *Highleyman*,[9] refused relief by subrogation to one who paid a mortgage under a mistake of law, holding that subrogation is limited in its application to cases where one pays a debt at the debtor's request or to protect some interest of his own. *Bunn* v. *Lindsay*[10] was a case in which it was held that the demand of a creditor, which is paid with the money of a third person without an agreement for subrogation, is extinguished, but will be revived in favor of one who has been compelled to pay it in order to protect his own rights. In *Kleinman* v. *Gieselmann*[11]

4. *Home Savings Bank* v. *Bierstadt* (1897) 168 Ill. 618, 48 N. E. 161. In *Arnold* v. *Green* (1889) 116 N. Y. 566, 23 N. E. 1, it is said: "The remedy of subrogation is no longer limited to sureties and quasi-sureties but includes so wide a range of subjects that it has been called the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it." See also *Crippen* v. *Chappel* (1886) 35 Kan. 495. 11 Pac. 453; *Emmel* v. *Thompson* (1892) 49 Minn. 386, 52 N. W. 31; *Meeker* v. *Larson* (1902) 65 Neb. 158, 90 N. W. 958.
5. 5 L. R. A. (N. S.) 838.
6. *Meeker* v. *Larson* (1902) 65 Neb. 158, 90 N. W. 958; *Rachel* v. *Smith* (1900) 101 Fed. 159. See also cases cited in note 4, *supra*.
7. (1879) 69 Mo. 669.
8. (1885) 87 Mo. 387, 56 Am. Rep. 453.
9. (1886) 88 Mo. 62.
10. (1888) 95 Mo. 258, 7 S. W. 473.
11. (1892) 114 Mo. 444, 21 S. W. 800.

it was held that one who paid an encumbrance on land and took a mortgage on it from one whom he believed had authority to encumber it, but who in fact did not, was not entitled to subrogation. In *Capen* v. *Garrison*[12] the court declared that one who advances money to pay an encumbrance on a ward's property upon security of a deed of trust executed by the curator with the sanction of the probate court, which proves to be without justification of law, is not, in case the old encumbrance is cancalled from the record, entitled to be subrogated to the benefits of it.

In the recent Missouri case of *Berry* v. *Stigall*[13] the doctrine of subrogation was extended beyond the limits set by the cases cited above. In that case a testator devised to his wife full power and control over all his realty until his youngest child should become of legal age, so that she might support and maintain the children from the rents and profits. The wife died during the minority of the children and another person was appointed trustee. Before his death the testator had executed a note, and, as security, a deed of trust upon this land. Upon this note falling due the trustee, in order to save the land, gave his own note as such and attempted to execute a mortgage on the property. In this action by the *cestui que trustent* to have the mortgage executed by the trustee declared void, it was held, with Bond, Graves, and Faris, JJ., dissenting, that, the proceeds of the loan having been used to discharge a valid obligation, the present mortgagee, not being a volunteer, was subrogated to the rights of the original mortgagee.

The decision was put on the ground that equity seeks to prevent the unearned enrichment of one at the expense of another, Brown, C., saying that the right to subrogation exists in all cases where payment is favored by public policy, and that, just as a purchaser at a void judicial sale is protected, so those having charge of the interests of minors should be protected in their efforts to protect their estate. There was also a suggestion in the concurring opinion of Woodson, J., that the trustee in this case had authority to encumber the land, but this point is fully answered by Bond, J., in his dissenting opinion.

That the court was influenced in its decision by the hardship which cancellation of the mortgage would have involved is evidenced by Brown, J.'s, statement in his concurring opinion that "the judgment *nisi* [for defendant] is so clearly for the wrong party that I would vote to reverse it though it were supported by every case adjudicated since the days of Justinian." However, there is much to be said for the decision on its merits. The objection that the original mortgage has been removed from the record and extinguished, and that the parties had no intention of keeping it alive, should not prove a very formidable barrier to a court of equity in applying a doctrine which is "a creation of equity for the furtherance of substantial justice." And as for the objection that a person paying money under a mistake of law is not entitled to equitable re-

12. (1909) 193 Mo. 335, 92 S. W. 368, 5 L. R. A. (N. S.) 838.

lief, it may be said that there is very respectable authority, which, for purposes of a case like this, makes no distinction between mistake of law and mistake of fact.[14] The able dissenting opinion of Bond, J., is such as to cast considerable doubt upon the rule laid down, but in the light of the modern tendency to widen the scope of application of subrogation, as has been shown,[15] it is not easy to say that the court went too far in allowing subrogation in this case.

E. L. W.

13. (1913) 162 S. W. 126.
14. 24 Harvard Law Review 161, and cases there cited.
15. See notes 4, 5, and 6 *supra*.