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LAW SERIES

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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—MR. JUSTICE HOLMES, Collected Legal Essays, p. 269.

NOTES ON RECENT MISSOURI CASES

MASTER AND SERVANT—INDEPENDENT CONTRACTOR—
INHERENT DANGER. *Privitt v. Jewett et al.*¹ The defendants were owners of a lot in a town of two to three hundred inhabitants. They contracted for the erection of a brick building thereon. During the progress of the work a part of the wall fronting on the main street of the village fell outward and plaintiff, a pedestrian on the sidewalk below, was injured.² Despite the fact that the work was in the exclusive charge of an independ-

1. (1920) 225 S. W. 127 (Opinion by Trimble, J.).

2. "There was evidence that the wall, being a 'green wall', might fall or be jarred down merely by the vibration of the joists from the workmen walking over the building, carrying materials. The brick being wet and not having set, the pressing

of a foot scaffold or the like might cause it to bulge outward and fall, and in building such wall adjacent to a public sidewalk it is usual and customary to place barriers so as to keep persons off the sidewalk, and thereby avoid the danger of their being hurt." 225 S. W. 1. c. 128.

ent contractor (apparently) defendants were held liable because they failed to take proper precautions to erect guards or barriers or build a covering over the sidewalk. The erection of the building was said to produce a situation of "inherent danger."

One of the most famous of the early English cases on this subject is *Bush v. Steinman*.³ In that case the owner of real estate was held liable for the negligence of an employee of a sub-contractor in leaving some material in a public highway which caused an injury to the plaintiff. The theory of the court was that the injured party could recover either against the one who did the act or the one for whose benefit it was done. The court also seemed to base the liability of the defendant on a supposed rule of law which held the owner of fixed property liable as an insurer against all tortious acts committed in connection with it on the principle of *sic utere tuo ut alienum non laedas*. The mistaken theory in that case was followed in England until *Milligan v. Wedge*⁴ which states a different doctrine.

The first English case which marks the beginning of the modern theory of independent contractor is *Laugher v. Pointer*.⁵ Two justices out of four held that the hirer of a job coachman and a team of horses to be used in connection with his own carriage did not thereby become the master of the job coachman. *Bush v. Steinman*⁶ was distinguished because "the same principle does not apply to personal movable chattels as to the permanent use and enjoyment of land or houses." In course of time the broad principle of *Bush v. Steinman* was entirely abandoned in England.⁷

In America the principle had only a brief acceptance.⁸ Many decisions have laid down the general proposition that an employer is not liable for the negligence of an independent contractor or the latter's servants.⁹

There are certain well recognized exceptions to this rule. One is that an employer is responsible if the contract calls for work which is inherently and intrinsically dangerous. The decision under review is based upon this exception alone. Obviously the exception is one that is somewhat intangible and must be handled with care and judgment. Otherwise, under the guise of an exception the general principle may be undermined.

In Missouri the doctrine of *Bush v. Steinman* was disapproved in *Barry v. City of St. Louis*.¹⁰ The latter case was probably overruled in *Welsh v. City of St. Louis*¹¹ but the rule of independent contractor as a general doctrine still remains.

3. (1799) 1 Bos. & Pul. 404.

4. (1840) 12 A. & E. 737. See also *Reedie v. London and North Western Ry. Co.* (1849) 4 Exch. 244.

5. (1826) 4 L. J. (o. s.) K. B. 309, 5 B. & C. 547, 8 D. & R. 556.

6. *Supra*, note 3.

7. *Overton v. Freeman* (1852) 11 C. B. 866.

8. *Lowell v. R. R.* (1839) 23 Pick. 24; distinguished in *Hilliard v. Richardson* (1855) 3 Gray (Mass.) 349. (good review of English cases.) *Stone v. R. R.* (1849) 19 N. H. 427, questioned in *Wright v. Holbrook* (1872) 52 N. H. 120.

9. See 14 R. C. L. 79, n. 8.

10. (1852) 17 Mo. 121.

11. (1880) 73 Mo. 71.

How far have the later Missouri cases qualified the rule? This question is one difficult to answer. As is so often true in the law, the abstract statement causes no difference of opinion but the application of the statement to ever changing facts causes a wide variance of opinion. Therefore, in such a situation, the most satisfactory solution, i. e. the greatest assistance in applying the rule, comes from a consideration of cases which involve facts which resemble the facts under discussion as nearly as possible. Unfortunately, the writer has found no case in Missouri which is strikingly similar to the case under review.

What is an act of inherent danger? It is hardly to be doubted that setting out a fire is such an act.¹² The Supreme Court of Missouri once held that blasting rock in the construction of a sewer was subject to the rule of independent contractor.¹³ The opinion, however, was later disapproved in a dissenting opinion¹⁴ by certain judges of the Supreme Court. Still later the Springfield Court of Appeals rendered an opinion which does not mention but seems certainly to be inconsistent with the first blasting case.¹⁵ Aside from the actual results there would seem to be satisfactory reasons for holding that the blasting of rock near a public street is a work of inherent danger.

Are building operations matters of inherent danger? Excavations seem in general not to be so considered. In *Wiese v. Remme*¹⁶ a landlord contracted for digging a privy vault and the erection of a privy. The vault was dug but negligently safeguarded by the contractor. A rain filled the vault with water and the tenant's two year old son fell in and was drowned. The contractor was held to have been exercising an independent employment and the landlord was not held responsible.

In *McGrath v. St. Louis*¹⁷ the defendant was not liable for the conduct of a contractor who excavated for an alley which went up to the foundation of plaintiff's house which fell into the excavation. There was evidence that the contractor excavated four to six inches beyond the line.¹⁸

*Wiggin v. St. Louis et al*¹⁹ may be thought to be a decision contrary to these cases. The action was against the City of St. Louis, the owner of a lot and the contractor of the owner who was employed to build a house. In constructing an entrance to the basement the contractor excavated be-

12. 8 Harv. L. R. 58.

13. *Blumb v. City of Kansas* (1884) 84 Mo. 112.

14. *Salmon v. Kansas City* (1911) 241 Mo. 1. c. 69, 145 S. W. 16.

15. *Carson v. Blodgett Construction Co.* (1915) 189 Mo. App. 120, 174 S. W. 447.

16. (1897) 140 Mo. 289, 41 S. W. 797.

17. (1908) 215 Mo. 191, 114 S. W. 611.

18. See *Schweickhart v. St. Louis* (1876) 2 Mo. App. 571.

19. (1896) 135 Mo. 558, 37 S. W. 528.

yond the property line and into the sidewalk space about two feet. He negligently failed to properly guard the opening and the plaintiff fell in. The City of St. Louis was held responsible on the theory, apparently, that it knew or might have known of the dangerous situation through reasonable attention. The trial court directed a verdict for the owner of the lot. This was disapproved by the Supreme Court. It was assumed that the plans called for the excavation and it was held that this was "inherently dangerous."²⁰ Two decisions were cited as authority.²¹ One is rather an authority to the contrary since the defense of independent contractor was allowed under circumstances not wholly dissimilar. The other²² was not a case of a work inherently dangerous but one where the owner furnished defective plans.²³

What should be said concerning the erection of objects which may fall? In *Dillon v. Hunt*²⁴ the question arose upon demurrer to the petition. Defendant was the owner of a five story building which had been damaged by fire. It was held that a cause of action had been stated by alleging that the walls left standing were a nuisance and that defendant knew or had good reason to know that a dangerous method had been adopted in removing the building.

*Horner, Admr., v. Nicholson*²⁵ involved damage resulting from the fall of a wall but it is not a very definite decision. The evidence conflicted as to whether the fault was that of the defendant owner because of defective plans, or because of defective work done prior to the appearance of the contractor in question, or because of the fault of the contractor himself. In any event there was a final judgment for plaintiff. The fair inference from the opinion is that if the contractor had been the one at fault the defendant would have been excused. There seems to be no suggestion that extensive building repairs constitute a work of inherent danger as a general proposition though there was evidence that the particular wall was left in a condition of inherent danger.

In *Lancaster v. Connecticut Mutual Life Ins. Co.*²⁶ the defendant in making repairs contracted for building a wall which was attached to the rear wall of plaintiff's building. After the new wall had been built or nearly completed it fell and pulled down a part of plaintiff's wall. The Supreme Court in affirming a judgment for plaintiff stated that the con-

20. Compare *O'Hara v. Gas Light Co.* (1912) 244 Mo. 395, 148 S. W. 884.

21. *City of Independence v. Slack* (1896) 134 Mo. 66, 34 S. W. 1049.

22. *Lancaster v. Connecticut Mutual Life Ins. Co.* (1887) 92 Mo. 460, 5 S. W. 23.

23. *Larson v. Metropolitan St. Ry. Co.* (1892) 110 Mo. 234, 19 S. W. 416.

24. (1881) 11 Mo. App. 246; s. c. (1891) 105 Mo. 154, 16 S. W. 516, 24 Am. St. Rep. 374.

25. (1874) 56 Mo. 220.

26. (1887) 92 Mo. 460, 5 S. W. 23, 1 Am. St. Rep. 729.

flicting evidence justified instructions that (a) defendant was responsible if he failed to provide proper plans and specifications and (b) that defendant was not responsible if the work was insufficiently done by independent contractors.

In *Scharff v. Southern Ill. Const. Co.*²⁷ the Buckingham Investment Company contracted with the Southern Illinois Construction Company for the erection of a seven story hotel. One wall (about one hundred eighty-eight feet long and about ninety feet high) was practically completed when it fell on plaintiff's house only thirteen feet way. The wall was a *green wall* and it fell in a windstorm but the jury found that the falling was not solely the result of an act of God. There was evidence of negligence in the construction of the wall. The trial court directed a verdict for the investment company and from this no appeal was taken. The construction company sought to relieve itself in the court of appeals by arguing that it was not²⁸ an independent contractor. The St. Louis Court of Appeals in affirming judgment for plaintiff held that "it was clearly an independent contractor." There was no suggestion that the work was inherently dangerous.

There have been other decisions in Missouri where the injury was caused by a falling object. Two²⁹ held the doctrine of independent contractor applicable but it would seem that *Loth v. Columbia Theatre Company*³⁰ in effect denies the defense. The reasoning is unsatisfactory but it may be that lowering an electric sign hanging over a public street and weighing from two hundred to three hundred and fifty pounds was a work of inherent danger.

What should be said concerning the facts in the case under review? Is the building of an ordinary brick wall along "main street" a work of inherent danger?

The opinion states that there was evidence that the fall *might* have been caused from the vibration of the joists or the pressing of a foot scaffold in the ordinary course of the work. The most that can be said for this is that it is pure conjecture and surely a money judgment should not be rendered on the basis of speculation.

It appears also that there was evidence that it was customary to place barriers to prevent injury to pedestrians along a sidewalk. It is submitted, however, that this is done not in anticipation that a wall will fall but to prevent injuries from the falling of a tool or a piece of material. If a wall falls an overhead protection would likely be crushed

27. (1905) 115 Mo. App. 157, 92 S. W. 126.

28. How the defendant construction company hoped to advance its interests by this argument is not seen by the writer.

29. *Press v. Penny & Gentles* (1912) 242 Mo. 98, 145 S. W. 458; *Jackson v. Butler* (1913) 249 Mo. 342, 155 S. W. 1071 (good opinion by Faris, J.).

30. (1906) 197 Mo. 328, 94 S. W. 847.

and the pedestrian caught in a trap; and a barrier would have to extend into a street so far that in many places traffic would have to be stopped.

The decision, then, seems to be a declaration that the construction of an ordinary brick wall or one which is to be a "false front" is a work of inherent danger. It is submitted that this decision unwisely qualifies the doctrine of independent contractor and is further evidence of the tendency to "place it more and more in line with the rules governing master and servant."³¹ If the rule is worth keeping this tendency must be checked.

Of the decisions relied upon in the opinion under review *Dillion v. Hunt* and *Wiggin v. St. Louis* have been discussed, *supra*. The other two are not in point. One, *Johnson v. J. I. Case etc. Co.*,³² dealt with responsibility for fire set out by a traction engine with a defective spark arrestor. In other words, the defendant furnished a defective appliance to its contractee. The other, *Cedarland v. Thompson*,³³ is not a case of independent contractor. There the court expressly stated: "The doctrine of independent contractor has no application in this case." *Horner Admr. v. Nicholson*, *Lancaster v. Connecticut Mutual Life Ins. Co.*, *Scharff v. Southern Ill. Const. Co.* were not cited.

K. C. S.³⁴

NEGLIGENCE—CONDITION OF PREMISES—TURNTABLE DOCTRINE—RULE IN MISSOURI AND UNITED STATES SUPREME COURT. *United Zinc and Chemical Co. v. Britt*.¹ This was a suit to recover for death of children poisoned in a pool of water containing sulphuric acid and zinc sulphate in the basement of defendant's abandoned factory. The danger was not apparent but the defendant knew of the condition. The children came on the land from a travelled way not far distant but it was not proved that they were attracted upon the land by the pool of water. The children were strangers in the community and it was not shown, apparently, that they were attracted to the pool by the fact that it was frequented by residents of the community.

The court through Mr. Justice Holmes stated the so-called "turntable" doctrine thus, * * * "while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of any age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an *invitation* to them although not to an adult."² (Italics supplied.)

31. See 14 Harv. L. R. 62.

32. (1916) 193 Mo. App. 198, 182 S. W. 1089.

33. (1919) 200 Mo. App. 618, 209 S. W. 554.

34. The author acknowledges assistance rendered by W. E. Miller, LL. B., U. of Mo., 1922.

1. (1922) 42 Sup. Ct. Rep. 299.

2. (1922) 42 Sup. Ct. Rep. 299.

There was a dissenting opinion which seems to ignore the distinction, made in the majority opinion, that the children were not attracted upon the land by the thing which caused their death.

There seems to be but one reason for the "turntable" doctrine although other theories are advanced by courts.³ This is that it is good policy to impose the duty. All other reasoning seems open to objection. Despite all precautions of parents, the state, and the landowner himself, a child will trespass on private property and will often be injured. So, it may be reasonable to require an owner to take certain precautions although the children are, in a strict sense, trespassers. Since each maimed and crippled child is a liability to society as well as a suffering, handicapped human being, and since, ordinarily, the dangerous condition can be guarded, it is not too great a burden to require the owner to provide a reasonable safeguard,⁴ or give effective warnings.⁵

Some courts have considered the turntable doctrine too severe and unfair and have refused to establish it.⁶ Others apparently have extended it to very wide limits.⁷

It is a matter of satisfaction to record that the Missouri courts, under the direction of the Supreme Court of Missouri, have been uniformly con-

3. There is often an application of the maxim "*sic utere tuo ut alienum non laedas.*" *K. C. Ry. Co. v. Fitzsimmons* (1879) 22 Kan. 477, 31 Am. R. 203. (A boy of twelve was injured on a turntable.); *Chicago etc. Ry. Co. v. Fox* (1904) 38 Ind. App. 268, 70 N. E. 81. ("Not an undue application of the maxim" even though attraction is on owner's premises.); *Walker v. Potomac etc. Ry. Co.* (1906) 105 Va. 226, 53 S. E. 113. (The maxim "refers only to acts of the landowner, the effects of which extend beyond the limits of his property."); *Berry v. Railroad* (1908) 214 Mo. 1. c. 604, 114 S. W. 27. See excellent opinion by Faris, J., in *Buddy v. Union Terminal Ry. Co.* (1918) 276 Mo. 276, 207 S. W. 1. c. 824.

4. *Edgington v. B. C. R. & N. Ry. Co.* (1902) 116 Ia. 410, 90 N. W. 95, 57 L. R. A. 561; University of Mo. Bulletin, Law Series 2 p. 41; *Berry v. Railroad Company* (1908) 214 Mo. 593, 114 S. W. 27.

5. *Smalley v. Ry. Co.* (1908) 34 Utah 423, 98 Pac. 311; *Twist v. Ry. Co.* (1888) 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402.

6. *Ryan v. Tower* (1901) 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 A. S. R. 481; *Frost v. E. Ry. Co.* (1887) 64 N. H. 220, 9 Atl. 790, 10 A. S. R. 396; *D. L. & W. R. R. Co. v. Reich* (1898) 61 N. J. L. 635, 40 Atl. 682, 68 A. S. R. 727; *Daniels v. N. Y. & N. E. Ry. Co.* (1891) 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 A. S. R. 253; *Walsh v. Fitchberg Ry. Co.* (1895) 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 A. S. R. 615; *Walker v. Potomac etc. Ry. Co.* (1906) 105 Va. 226, 53 S. E. 113. See citations in *Buddy v. Union Terminal Ry. Co.* (1918) 276 Mo. 276, 207 S. W. 821.

7. *Roman v. City of Leavenworth* (1913) 90 Kan. 379, 133 Pac. 551 (city dump); *Dublin Cotton Oil Co. v. Jerrard* (1897) 91 Texas 289, 42 S. W. 959 (cotton oil mill); *Price v. Water Co.* (1897) 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625 (reservoirs of water); *Kansas City v. Siese* (1905) 71 Kan. 283, 80 Pac. 626 (pond, Cunningham, J., dissenting); *Done Brothers Coal and Coke Co. v. Leavitt* (1903) 109 Ill. App. 385 (cistern); *Kinchlow v. Elevator Co.* (1896) 57 Kan. 374, 46 Pac. 703 (exhaust steam barrel).

servative in applying the "turntable" doctrine. There is good basis for saying that in Missouri, though the language of the opinions is often broader, the doctrine has been limited to dangerous machinery. At least so far as has been discovered recoveries have been allowed only in cases involving turntables and small push cars.⁸ The one discordant opinion⁹ (though not as discordant as sometimes assumed) has been disapproved.¹⁰

There has been the same difficulty, however, in Missouri in setting forth a sound basis for recovery as has been experienced by other courts. The favorite reason in Missouri seems to be that there exists an implied invitation.¹¹ Faris, J., however, in a splendid opinion pointed out the weakness of that theory and stated that the "turntable" doctrine is *sui generis*, rested solely upon the humane sentiment of putting humanity above property and that the doctrine should not be further extended.¹²

A case precisely like the case being reviewed has not yet arisen in Missouri, it appears. There have, however, been several cases wherein children have lost their lives in pools of water and in all but one, which has been disapproved, liability has been denied.¹³

It seems reasonably safe to predict, therefore, that the Missouri courts will in the future find themselves wholly in accord with the Supreme Court of the United States in its limitations upon a rule which it brought into prominence in this country.¹⁴

G. E. WOODRUFF.¹⁵

8. *Koons v. St. Louis & Iron Mt. R. R.* (1877) 65 Mo. 592 (turntable); *Nagel v. The Mo. Pac. Ry. Co.* (1882) 75 Mo. 653 (turntable); *Berry v. Railroad* (1908) 214 Mo. 593, 114 S. W. 27 (turntable); *Morrison v. Phelps Stone Co.* (1920) 203 Mo. App. 142, 219 S. W. 393 (push cars).

9. *Schmidt v. K. C. Distilling Co.* (1886) 90 Mo. 284, 2 S. W. 417 (small hole made by boiler discharge pipe and containing hot water).

10. *Barney v. Railroad* (1894) 126 Mo. 372, 28 S. W. 1069 (moving railway cars); *Kelly v. Benas* (1909) 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (n. s.) 903 (lumber negligently piled; good opinion); *Rallo et al. v. Heman Const. Co.* (1912) 236 S. W. 632 (pool of water in abandoned quarry).

11. *Witte v. Stifel* (1894) 126 Mo. 295, 28 S. W. 891 (loose stone on cellar window frame); *Houck v. Railroad* (1906) 116 Mo. App. 559, 92 S. W. 738 (pumping machinery in building); *Compton v. Railroad* (1910) 147 Mo. App. 1. c. 419, 126 S. W. 821 (string of cars); *Kelly v.*

Benas (1909) 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (n. s.) 903 (lumber negligently piled); *Berry v. Railroad* (1908) 214 Mo. 593, 114 S. W. 27 (turntable).

12. *Buddy v. Union Terminal Ry.* (1918) 276 Mo. 276, 207 S. W. 821.

13. *Moran v. Pullman Car Co.* (1896) 134 Mo. 641, 36 S. W. 659; *Smith v. Packing Co.* (1899) 82 Mo. App. 9; *Overholt v. Vieths* (1887) 93 Mo. 422, 6 S. W. 74; *Rallo et al. v. Heman Const. Co.* (1912) 236 S. W. 632. In *Carey v. Kansas City* (1905) 187 Mo. 715, 86 S. W. 438, and *Capp v. St. Louis* (1913) 251 Mo. 345, 158 S. W. 616, the turntable doctrine was held inapplicable for other reasons.

14. Cases in Missouri other than those mentioned, *supra*, are: *Rushenberg v. St. L., I. M. & S. Ry. Co.* (1892) 109 Mo. 112, 19 S. W. 216 (unloading ice from

Continued on p. 35.

15. Student, School of Law, University of Missouri.

CRIMINAL LAW—SELF DEFENSE—BURDEN OF PROOF.

State v. Roberts.¹ In this case Higbee, J., stated by way of *dictum*: "The burden is not on the state to prove that the killing was without justification. It is upon the defendant to prove any affirmative matter in excuse, justification or extenuation of the offense, and he must show to the satisfaction of the jury that he acted in self defense."²

Kelley on Criminal Law and Practice³ was the only authority cited for the statement. This work purports to deal with the criminal law of Missouri and no doubt has obtained some vogue. It is not a most satisfactory and scientific work and the section cited in the case under review is believed to be inaccurate.

The proposition is simply this: a man is accused of homicide for instance. The plea is not guilty. In truth, he wishes the jury to believe that his conduct was in necessary defense of his person. Who has the burden of convincing the jury on the issue of self defense?

The problem is no different from any other problem dealing with the burden of proof. The confusion (and it is great) lies in the fundamental failure to distinguish two very different things which unfortunately are grouped in many opinions under the same general term, "burden of proof."⁴ The two things are: (1) burden of convincing or risk of non-persuasion, and (2) burden of going forward with the evidence.

If there is any single principle which will inform one which party in a law suit has the burden of convincing, judges and scholars have not yet discovered it.⁵ The solution in any given case may be the result of various factors, i. e. the state of the pleading, the history of the action, the con-

1. (1922) 242 S. W. 669.

2. (1922) 242 S. W. 1. c. 674.

3. Third edition, section 253.

4. 19 L. R. A. (N. S.) 483 (note);

Wigmore on Evidence, sections 2485 and 2487.

5. Wigmore on Evidence, section 2486;

Phipson on Evidence (6th ed.) pp. 30-37.

Continued from p. 34.

freight car); *Arnold v. St. Louis* (1899) 152 Mo. 173, 75 Am. St. Rep. 447, 53 S. W. 900. (skating); *Butz v. Cavanagh* (1896) 137 Mo. 503, 38 S. W. 1104 (smouldering fire in abandoned quarry); *Hight v. Baking Co.* (1912) 168 Mo. App. 431, 151 S. W. 776 (slowly moving display wagon); *State ex rel. v. Ellison* (1919) 281 Mo. 667, 220 S. W. 498 (retaining wall; if case had been presented on theory of *Capp v. St. Louis*, *supra*, would result have been the same?); *O'Hara v. Gas Light Co.* (1912) 244 Mo. 395, 148

S. W. 884 (iron pipes).

United Zinc and Chemical Co. v. Britt has been reviewed and commented upon in 1 Texas Law Review, 6, 18; 36 Harv. L. R. 113; 32 Yale L. J. 200; 8 Cornell L. Quar. 85. See also 8 Iowa L. Bulletin 61.

United Zinc and Chemical Co. v. Britt has been followed in *New York, New Haven & Hartford R. R. Co. v. Fruchter* (1922) 43 Sup. Ct. Rep. 38, reviewed in 71 Penn. Law Rev. 183, 32 Yale Law J. 298, and 36 Harv. L. R. 350.

venience with which one party or the other may produce evidence of certain facts. There is no rule of thumb unless it be that of *stare decisis*. Even this is subject to change. Prosecutions for criminal offenses present no peculiar problem except for the general tendency in the common law of caution in favor of the accused.

Primitive law was formal and unmoral. A student of legal history can readily understand the point of view which would place the burden of convincing upon a defendant that he acted in self defense.

"Did the early English law so completely ignore the moral quality of the act of killing in self defense as to make it a crime? Strictly speaking, yes. An official reporter of the time of Edward III and Lord Coke were doubtless in error in stating that prior to 1267 a man was 'hanged in such a case just as if he had acted feloniously.' But such a killing was not justifiable homicide. The party indicted was not entitled to an acquittal by the jury. He was sent back to prison, and must trust to the King's mercy for pardon. Furthermore, although he obtained the pardon, he forfeited his goods for the crime. But the moral sense of the community could not tolerate indefinitely the idea that a blameless self-defender was a criminal, or that he should have to make compensation to his culpable assailant. By 1400 self-defense had become a bar to an action for a battery. Pardons for killing in self-defense became a matter of course; ultimately the jury was allowed to give a verdict of not guilty in such cases, and the practice of forfeiting the goods of the defendant died out." Thus is the subject dicussed by a competent scholar of legal history.

Perhaps, then, the notion that the burden of convincing of self-defense is on the defendant is only a survival in a changed form of an earlier rule. If so, it seems to demonstrate what a learned man has stated.⁶ "Learning, my learned brethren, is a very good thing. I should be the last to undervalue it, having done my share of quotation from the Year Books. But it is liable to lead us astray. The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."

The decisions in this country seem fairly well divided. Some place the burden of convincing on the prosecution; some place this burden on the

6. Ames, Lectures on Legal History, 435-436.

7. Mr. Justice Holmes, Collected Legal Essays, p. 138-139.

defendant; some are not clear, chiefly because they confuse the burden of convincing and the burden of going forward.⁸

It is difficult to prove that the Supreme Court of Missouri has clearly placed itself on either side. There are decisions in Missouri which favor both points of view. The writer has come to the same conclusion as the writer of a note in *Lawyers' Reports Annotated*.⁹

"The cases in Missouri are contradictory, but the decisions which apparently are the most carefully considered hold that the defendant is entitled to the benefit of a reasonable doubt of his guilt arising on the whole case."

One of the best reasoned opinions in Missouri is *State v. Wingo*.¹⁰ It clearly stated the fundamental difference between the burden of convincing and the burden of going forward with the evidence and then held the following instruction improperly placed the burden of convincing on the defendant:

"If defendant shot and killed Gamble, the law presumes that it is murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant, Wingo, to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense.

The conviction was reversed. Of the five judges, two Norton and Hough, concurred in the result only.

It is rather curious that such a splendid opinion should have failed in making itself a decisive factor in the Missouri decisions. Perhaps this may be explained by the opinion of the same judge at the same term in *State v. Alexander*.¹¹ That opinion is far from satisfactory and seems to be something of a compromise. Nevertheless, *State v. Wingo, supra*, was expressly approved. It was held, apparently, that an instruction on reasonable doubt would cure an error in an instruction such as that condemned in *State v. Wingo*. This seems a doubtfully sound doctrine.

The holding in *State v. Wingo, supra*, was approved and followed in *State v. Hill*.¹² Again, however, there was some indefinite discussion as to the effect that an instruction on reasonable doubt would have in neutralizing the error.

In a prosecution for an assault with intent to kill it was held error to instruct the jury that "it devolves upon the defendant to show to the satisfaction of the jury, some satisfactory grounds for making such assault, and unless he has so done, the jury should find him guilty."¹³

8. Wigmore on Evidence, section 2512;
19 L. R. A. (N. S.) 483 (note); 21
Cyc. 883; Wharton's Criminal Evidence,
pp. 1818-1820.

9. 19 L. R. A. (N. S.) 491.

10. (1877) 66 Mo. 181.

11. (1877) 66 Mo. 148.

12. (1879) 69 Mo. 451, 1. c. 453.

13. *State v. Hickam* (1888) 95 Mo.

322, 8 S. W. 252.

The contrary point of view seems to find its genesis in *State v. Hays*,¹⁴ where, in a case of murder, it was stated that "it devolves upon the defendant to show from the evidence in the cause, *to the reasonable satisfaction of the jury*, that he was guilty of a less crime, or acted in self-defense." (Italics supplied.) However, the point under discussion seems not to have been considered in that decision.

In *State v. Holme*¹⁵ is the statement that every homicide is deemed malicious unless justified, excused or palliated and that the proof of the justification, etc., rests upon the accused unless evolved in the testimony produced by the state. There seems to be no objection to such a statement. It refers to the duty of going forward with the evidence and not with the burden of convincing.

In *State v. Underwood*¹⁶ the statement quoted from *State v. Hays*, *supra*, is repeated but again the opinion does not discuss the proposition whether thereby the burden of convincing was fairly placed on defendant.

In *State v. Brown*¹⁷ it was held that it was not error to refuse to instruct 'that the burden of proof was on the state to prove a case against defendant, not only that he killed Long, but that he did so without any justifiable or legal excuse, or extenuating circumstances.' There was no discussion and the authorities cited were *State v. Hays* and *State v. Underwood*, *supra*.

It is worth mentioning that the judge who wrote the opinion in *State v. Brown*, *supra*, also wrote the opinion in *State v. Wingo*, and that he wrote both opinions in the same year. Furthermore, *State v. Wingo* does not mention any of the Missouri cases which seem to stand for the opposite rule. Apparently, the only way to reconcile the *Brown* and *Wingo* cases is to state that in the *Brown* case the term, "burden of proof" was used in the sense of the burden of going forward with the evidence.

State v. Tabor restates the proposition obtained from *State v. Hays* and *State v. Underwood*, *supra*. There is reason to believe, however, that the court was only attempting to state the law with reference to the duty of going forward with the evidence of self-defense and not the law concerning the burden of convincing of the existence of self-defense. The court had already stated that it did not believe that there was any self-defense in the case. The statement by the court as a proposition of the duty of going forward with the evidence would seem sound if the phrase "to the reasonable satisfaction of the jury" had been omitted.¹⁸

14. (1856) 23 Mo. 287, 1. c. 323.

15. (1873) 54 Mo. 153, 1. c. 163.

16. (1874) 57 Mo. 40, 1. c. 49.

17. (1877) 64 Mo. 367, 1. c. 375.

18. (1888) 95 Mo. 585, 8 S. W. 744.

19. Compare *State v. Jennings* (1883) 81 Mo. 185 (larceny; defense of alibi; duty of convincing apparently on defendant; two of five judges dissent on authority of *State v. Wingo*, *supra*.)

*State v. Jones*²⁰ and *State v. Beckner*²¹ deal with the proposition herein discussed but not in a very decisive way.

Enough appears to demonstrate that the Missouri Supreme Court apparently has been on both sides of the question. Either view can be supported. It is not merely a matter of logic but of experience. Is a defendant to have the benefit of self defense if the jury has a reasonable doubt as to its existence? Is the defendant bound to convince the jury to its reasonable satisfaction that he acted in self-defense? Such are the alternatives. In any event the *dictum* of Higbee, J., seems not to be an accurate statement of the existing Missouri law.

Frank Doyle.²²

20. (1883) 78 Mo. 278.

21. (1905) 194 Mo. 281, l. c. 299, 91 S. W. 892.

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