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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

CONTRACTS—INSANITY. *Doty et al. v. Mumma.*[1] Plaintiff brought an action to have two promissory notes, which he had signed for the accommodation of another, cancelled on the ground that he was insane at the time he executed them. The fact of insanity was duly established, and, for this reason, the court released plaintiff from his obligation without requiring a return of any consideration to defendant, although the latter, the payee of the notes, was not aware of plaintiff's incapacity at the time that he took them, had fully performed his side of the agreement. Plaintiff had not then been adjudged insane or committed to custody. The reason for the decision was that the consideration, moving from defendant for the notes, had gone to a party other than plaintiff. Upon an appeal being taken to the Missouri Supreme Court, the judgment of the circuit court was affirmed, the court saying, "where the insane person has not received the benefit of the consideration, the contract will be set aside without a return of the consideration, although it was made in good faith, before an adjudication of insanity."[2] The decision presents one phase of the broader problem, to what extent will an insane person be held to a contract which he has entered into prior to his having been judicially found incapable of managing his own affairs? It is the purpose of this note to deal with this question.

1. (1924) 264 S. W. 656.
2. 264 S. W. l. c. 657.
3. *Walker v. Winn* (1905) 142 Ala. 560, 39 So. 12; *Van Pattan v. Beals* (1877) 46 Iowa 62; *Campbell v. Campbell* (1913) 35 R. I. 211, 85 Atl. 930. See also *Dexter v. Hall* (1872) 15 Wall. (U. S.) 9, 21 L. Ed. 73. In *Collins v. Trotter* (1883) 81 Mo. 275, there is a holding that the note of a lunatic is a nullity, but the payee thereof apparently knew of the insanity. See also *Tolson v. Garner* (1852) 15 Mo. 494.

It is easy to say, as some courts have, that the essence of a simple contract is mutual assent; that if one party to an agreement is a lunatic there can be no such assent, and that, therefore, a contract under these conditions cannot exist. The transaction, under such a theory, will be a nullity and neither party will have any rights. If we adopt this line of reasoning, it makes no difference whether the contract be fair in its terms or otherwise; executory, or executed. Under all conceivable circumstances, the insane person, even though he appeared entirely rational when he made the agreement, or his duly qualified custodian, thereafter appointed, can treat the contract as void, repudiate any obligation assumed, and recover any consideration parted with in performance of the bargain. There are decisions which go this far.[3]

Of course, a genuine meeting of the minds—real mutual assent—is not essential to the existence of the ordinary contract. If a man appears to make an offer, and his offeree accepts, there usually will be a contract, regardless of whether or no the offeror intended to make the offer that he did make. So, also, if an offeree appears to meet the terms of an offer and to accept the same, his real state of mind is of no importance at all. In each instance there will be a contract because, as Mr. Justice Holmes expresses the proposition, a man's "obligations must be measured by his overt acts."[4] In short, the question is, did the promisor appear to his promisee to assume a contractual obligation? If such be the fact, the courts will not ordinarily concern themselves with the promissor's real state of mind.[5]

Should the above doctrine be applied to the case where an insane contractor's mental incapacity is latent, so to speak, and unknown to his promisee the former appearing to be rational and *compos mentis?* It is certainly hard upon the innocent party, if he has changed his position relying upon the lunatic's promise, or has performed his side of the contract, to hold that he has no contractual rights and cannot hold his insane promisor to his obligation. A few cases, proceeding upon an objective theory and analysis of transactions, have held that, in the absence of fraud, a contract, if it has been performed by the innocent party, is valid, and the insane contractor must live up to its terms, and will have no right to avoid it.[6]

On the other hand, a lunatic should be protected from his bargain, if this can be done without inflicting undue hardship upon the innocent party to the transaction. It is probably good public policy to excuse an insane person from performance of his contract under such conditions. Accordingly, some courts say, that an incompetent person may escape from and avoid his obligation, but only if this result can be reached on terms, which, under the circumstances of the particular case, will be substantially just to the other innocent party to the agreement. This statement in substance can be found in many of the American decisions. But it appears doubtful whether this principle has been adhered to strictly in dealing with all types of cases. Insane persons have been permitted sometimes to avoid their contracts *only* upon conditions that have not protected the innocent contracting party from unjust losses, which have been brought about through the latter's *bona fide* performance of his side of the transaction. Usually the other contracting party has been saved from loss, but the writer believes that, in some cases, some courts

4. *Mansfield v. Hodgdon* (1888) 147 Mass. 304, 306, 17 N. E. 544.

5. Williston, Contracts, secs. 94, *et seq.*

6. *Rhoades v. Fuller* (1897) 139 Mo. 179, 40 S. W. 760 (but see Missouri cases *contra* cited *infra* note 10); *Mathews v. Nash* (1911) 151 Iowa 125, 136 N. W. 196 (*dictum*); *Imperial Loan Co. v. Stone* (1892) 1 Q. B 599.

have been too liberal with the lunatic, rescinding contracts without affording adequate protection to the other party, upon the ground that, in the last analysis, the lunatic is a kind of special "ward" of the court. These courts have been willing to shield the lunatic even at the expense of the other contractor, if the infliction of such a loss is essential in accomplishing this desired end. Such courts are willing to protect the innocent party if this can be done without injury to the incompetent person, but when a case has arisen, where the latter cannot be safeguarded without injuring the other party to the agreement, they have preferred to place the burden of loss upon him rather than to cause injury to the incompetent person. It is believed that there is no real justification for courts to assume this position. Unless the result of a rescission of a contract is to place the parties in *status quo ante*, cancellation ought not to be permitted. Preferably, the lunatic should be held to his original undertaking, and the contract enforced as made.

Whenever the contract has been entered into merely, and is entirely executory, there is authority that the insane person may avoid his obligation at will, and without any condition being imposed upon him.[7] This is entirely proper. In such a case the other party has not changed his position and due protection of the lunatic requires a rescission. Sometimes, however, the contract is executory only in the sense that no performance has been rendered to the lunatic, but the other contracting party has changed his position substantially in preparing to perform as agreed upon. Suppose that the insane person has made a bilateral contract to pay for articles to be manufactured and delivered to him; that the articles have been partially manufactured, and that time and labor has been consumed in and about the work partially done. Is such a contract to be regarded as executory, and is avoidance thereof to be allowed without any compensation being given to the innocent manufacturer? There is authority so holding,[8] but such a decision seems manifestly unjust, and loses sight of the fact that the other party to the agreement, if he has acted honestly, is entitled to just as much consideration as the lunatic.[9] After all, the incompetent person has been the moving party, and if it had not been for his apparent sanity the real loss would not have resulted to the other contracting party.

If the contract has been executed in the sense that the lunatic has received all or part of the consideration bargained for, and if he has not wasted or lost the same, the generally prevailing rule is that it can be avoided only upon condition that the insane party return whatever he has received.[10] This rule seems to be sound. It places the parties in *status quo*, and that is all that the other contracting party should be entitled to. For the sake of the lunatic, it is reasonable enough to hold, upon grounds of public policy, that the other

7. *Cundall v. Haswell* (1902) 23 R. I. 508, 51 Atl. 426; *Chew v. Bank* (1859) 14 Md. 299. See *Baldwin v. Smith* (1900) 1 Ch. 588; *Imperial Loan Co. v. Stone*, *supra*, note 6.

8. *Feigenbaum v. Howe* (1900) 66 N. Y. Supp. 378.

9. "How is he (*i. e.* the other contracting party) to know a person is a lunatic, and incapable of transacting business, when there are no outward manifestations of such condition, and the records do not show that his estate and affairs are in the hands of a conservator?" *McCormick v. Littler* (1877) 85 Ill. 62, 65. See also *Imperial, etc. Co. v. Stone*, *supra*, note 6; Williston, *op. cit.*, sec. 254.

10. *Jamison v. Culligan* (1899) 151 Mo. 410, 52 S. W. 224 (*dictum*); *McKenzie v. Donnell* (1899) 151 Mo. 431, 52 S. W. 214; *McAnaw v. Tiffin* (1898) 143 Mo. 669, 45 S. W. 656; *Wells v. Covenant, etc. Ass'n* (1894) 126 Mo. 630, 29 S. W. 607; *Catler v. Zollinger* (1893) 117 Mo. 92, 22 S. W. 895; *Blount v. Spratt* (1892) 113 Mo. 48, 20 S. W. 967; *Brann v. Missouri, etc. Co.* (1920) 226 S. W. 48 (*dictum*); *Ronan v. Bluhm* (1898) 173 Ill. 277, 50 N. E. 694. See also *Hill, etc. Co. v. Loomis* (1909) 140 Mo. App. 62, 119 S. W. 967.

contracting party should be required to lose any possible profit that he might otherwise have derived from the bargain. That is a burden which may well be demanded of all.

Suppose, however, that in the last assumed case the incompetent person, after receiving the consideration from the other party, dissipates or loses the same. Should this fact make any difference and entitle him to a rescission without returning the equivalent in value of that received? It is believed that it should not, yet opinions can be found advancing the proposition that, under the assumed facts, the lunatic may unconditionally avoid the contract without returning any value.[11] Such courts as adopt this principle are willing, in order to protect the lunatic, to penalize the innocent contracting party, and, if necessary, to cast the burden of loss upon the latter. These cases do not seem just. The other contracting party should be placed in his original position.[12]

Occasionally one meets with a case like that under review, viz., where the defendant has performed his side of the bargain but the consideration has not moved to the lunatic but to another party. Obviously in such a case the incompetent person has received no benefit. On the other hand, the innocent party has suffered a loss which as he believed the insane party, who appeared to be sane, agreed to pay for. Again, if justice is to be done, it is difficult to see why the lunatic should be permitted to avoid his contract without making restitution of value, but sometimes this is allowed.[13] The problem is usually dismissed by saying that the lunatic has received no benefit from the defendant's performance and that such relief is essential to protect him. But why protect him at the expense of the innocent party?[14] The Supreme Court of Illinois, in dealing with this situation, has said that where the lunatic has received the benefit there must be restitution, because, if avoidance were otherwise allowed,

11. *Hudson v. Union, etc. Co.* (1921) 148 Ark. 249, 230 S. W. 281; *Bank v. Tribble* (1922) 155 Ark. 264, 244 S. W. 33; *Hovey v. Hobson* (1866) 53 Me. 451.

12. ". . . . in no case will relief be granted to such insane person or his representatives unless restitution is made of the benefits received by him from the contract and unless the *status quo* of both the parties can be restored. The doctrine contended for by the plaintiffs . . . . that they should not be required to make restitution of the benefits received as a condition precedent to a recovery of the land, because these benefits were lost, or squandered by Jedediah (the insane contractor), is therefore untenable. . . . . ." Marshall, J., in *Mc Kenzie v. Donnell, supra,* note 10, 151 Mo. l. c. 458, 52 S. W. 214 (*dictum*). The court's whole argument in this phase of the case proceeds upon the ground that the sole justification for the rescission of the contract, is the fact that the parties *can* be put in their former positions. If this cannot be done it is argued that a grave injustice will be done the defendant.

13. *Jordon v. Kirkpatrick* (1911) 251 Ill. 116, 95 N. E. 1079; *Williams v. Williams* (1914) 265 Ill. 64, 166 N. E. 476; *Wirebach v. Bank* (1881) 97 Pa. St. 543. See also cases cited by Ragland, J., in the case under review, 264 S. W. l. c. 657.

14. In the principal case Ragland, J., quotes with approval (264 S. W. l. c. 657) the following passage from *Northwestern etc. Co. v. Blankenship* (1883) 94 Ind. 535: "Here nothing was received by the insane woman, and it would be inequitable to hold her bound by a mortgage executed for the sole benefit of her husband, she having no contracting mind. *The insane are under the protection of courts,* and ought not to be bound by contracts not beneficial to them, *to which they never assented and could not assent.*" (The italics are the writer's.) It, of course, is not essential to the existence of a contract that the minds of the parties should actually meet. (See *supra,* note 5, and text in connection therewith.) If rescission is to be granted the incompetent person without requiring a return of the consideration, it must be because a proper policy demands such relief, and because, as suggested in the quotation set out above, insane persons are entitled to unusual protection at the hands of the courts, even at the expense of innocent parties, who have actually been misled by the incompetent person's apparent sanity. There is authority, which appears to be *contra,* holding that no contract can be avoided where the other contracting party is unaware of the insanity without restitution, even though the consideration has not accrued to the benefit of the incompetent person. In *Blount v. Spratt,* 113 Mo. 48, 20 S. W. 967, *supra,* note 10, plaintiff, an insane woman, executed a deed of trust on her property to secure her husband's debt. Plaintiff

the lunacy would be a means of fraud. But, said that court, where the lunatic is not benefited, this is not the case.[15] It is difficult to follow the learned court on this occasion. The lunacy would seem to be an instrument of fraud in every case, where it, not being apparent to the other party, is allowed to cause loss to him, and loss does occur in this kind of case.

Turning to the case where the insanity is known or should have been known to the other contracting party, avoidance obviously should be allowed.[16] It is in fact a species of fraud to contract with a person known to be *non compos mentis*. The only question in such a case is, should the lunatic, when he seeks to rescind, be compelled to restore the consideration which the other party has given up, or its equivalent in value? In such a situation restitution might well not be exacted as a condition to cancellation.[17] The defendant should not have contracted with an incompetent person. It is not too much to demand knowledge of this from all. A proper penalty for making such a contract might be the loss of any value parted with.

J. L. Parks.

EVIDENCE—PRIOR CONSISTENT STATEMENTS—REHABILITATION. *Jones v. St. Louis San Francisco Railway Co.*[1] In an action for personal injuries the plaintiff testified that he was knocked from the train by a brakeman. The defendant introduced witnesses to prove that at a doctor's office where the plaintiff was taken immediately after the injury, he gave an entirely different explanation as to how he got hurt, namely, that he fell or jumped off on a sand pile and slid under the train. The plaintiff then offered to show by another doctor that on the day following the injury and shortly after the plaintiff came off an operating table he was asked how he was hurt and that he said a brakeman knocked him off the train.

The lower court held that this evidence was inadmissible and this ruling was held to be proper by the Supreme Court of Missouri. It was stated that the general rule is that where a witness is impeached by proof of his statements made at other times contradictory of his testimony, especially where such is offered to show that the evidence given at the trial was a fabrication, it is competent to prove statements made by him consistent with his testimony for the purpose of *rehabilitation*. It was held, however, that this rule has no application unless the consistent statement offered to rehabilitate *was made prior in point of time to the contradictory statement.*

The legal proposition above set forth seems first to have been considered

prayed an injunction against foreclosure and for cancellation of the deed, but the court denied relief because no restitution was offered. The fact that the benefit of the consideration received for the deed of trust did not move to plaintiff was not mentioned by the court, but this fact was in the record and must have been conceded by all. See also Groff v. Stitzer (1910) 77 N. J. Eq. 260, 77 Atl. 46; *Imperial, etc. Co. v. Stone, supra*, note 6. In view of the authority of the *Blount* case, *supra* and the *dictum* in *Mc Kenzie v. Donnell*, quoted *supra*, note 12, the decision in the principal case might have gone the other way, and, it is submitted, had it done so, a more just result would have been reached.

15. *Williams v. Williams* (1914) 265 Ill. 64, 166 N. E. 476.

16. See *Ronan v. Bluhm, Jamison v. Culligan, Mc Kenzie v. Donnell, supra*, note 10, and *Collins v. Trotter, supra*, note 3. The cases generally assume this proposition, and rightly so.

17. *In Halley v. Troester* (1880) 72 Mo. 73, it was held that no tender to the defendant of the consideration received by the insane contractor was essential. See also *Ronan v. Bluhm, supra*, note 10. But *cf. Jefferson v. Rent* (1910) 149 Iowa 549, 128 N. W. 954.

1. (1923) 253 S. W. 737. See the same case on first appeal (1921) 287 Mo. 64, 228 S. W. 780.

in Missouri in *State v. Grant.*[2] There appears an opinion stating the general rule that evidence in corroboration "prior to attack or impeachment" is inadmissible and also a *dictum* that in case of "such attack" it is "then admissible to prove that the witness has made statements consistent with those made as a witness."[3]

The judge who wrote the opinion in *State v. Grant, supra*, withdrew this broad *dictum* in *State v. Taylor.*[4] It was there held that *mere* self contradiction of a witness was not sufficient to justify corroborative evidence in the form of consistent statements. There was a suggestion that if in addition to self contradiction the "motives" of the impeached witness had been questioned the result would have been otherwise.

In *State v. Hendricks*[5] a dying declaration had been admitted. Then the defendants brought forward witnesses who testified to inconsistent utterances of the dying declarant. Then the trial court permitted the prosecution to corroborate the dying declarant by testimony of statements by declarant consistent with the dying declaration. The last ruling was held to be erroneous. The decision must be taken to mean that mere self contradiction is not a sufficient justification for corroboration by consistent statements.[6]

State v. Sharp[7] is not clear. Everett Dooley was a witness for the prosecution and testified to certain facts. On cross examination he was confronted by a deposition he had given and he admitted that he did not testify as to these particular facts in his deposition. Then the trial court permitted the prosecution to show by Mrs. Margaret Dooley that Everett had stated these alleged facts to her shortly after the occurrence and before the deposition was taken. The theory of the trial court does not appear. The Supreme Court of Missouri upheld the action of the trial court. The reasoning seems to be that in case a witness is impeached through a self contradiction he may be corroborated by means of consistent statements. Among other cases *State v. Taylor, supra*, was cited as an authority for this holding but it is submitted that it holds precisely to the contrary. Nevertheless, it seems that the decision in *State v. Sharp* may be supported on another basis. The argument would be that the failure of the witness to state important facts in his deposition would lead the jury to believe that his testimony in court was a recent contrivance.

2. (1883) 79 Mo. 113. *State v. Hatfield* (1880) 72 Mo. 518, is a rape case and testimony in rape cases for historical reasons needs separate treatment.

3. The court recognized the latter utterance as a *dictum* because it stated that the corroborative evidence "seems to have been introduced anticipatory of an attack on the character of Canfield by the state, and, therefore was clearly inadmissible."

As a matter of fact the statement of facts (l. c. 115) in the case seems inconsistent with the above conclusion. It appears that defendant read the deposition of Martha Canfield. State impeached her by an affidavit she had made prior to her deposition and by other means. "In rebuttal of this testimony the defendant was allowed to show by several witnesses that before her deposition was taken the witness made statements to them consistent with the deposition."

Wigmore (2nd. ed. sec. 1131) thinks that this case stands for the loose and improper rule that consistent statements may be shown after impeachment "of any sort,"

In *State v. Whelehon* (1890) 102 Mo. l. c. 21, 14 S. W. 730, there is a colorless remark as to the holding in *State v. Grant.*

4. (1896) 134 Mo. 109, l. c. 154, 35 S. W. 92.

5. (1903) 172 Mo. 654, l. c. 675, 73 S. W. 194.

6. Fox, J., in writing this opinion stated that if the corroborative statements were admissible, "they are entitled to the same weight and force as the statements themselves." But the purpose of admitting corroborative statements after a dying delcarant has been impeached by inconsistent statements should be to aid the jury in determining whether the dying declaration is worthy of belief.

7. (1904) 183 Mo. 715, 82 S. W. 134.

If so, statements made before the deposition was given would certainly show that there was no recent contrivance.[8]

The decision in *State v. Maggard*[9] was placed on the same grounds as that in *State v. Sharp, supra*, i. e., a witness impeached by self contradictions may be corroborated by consistent statements. It is therefore inconsistent with *State v. Taylor, supra*. The decision may be supported from another point of view. It is stated that the defense had "fully developed" the theory that the impeached witness was himself guilty of the theft for which defendant was on trial. Therefore the witness may be said to have been presented to the jury as one biased or interested. If so, it should be possible to refute the bias or interest by showing consistent statements prior to that which caused the bias or interest. In this case the witness might not have been laboring under a bias or interest until he was aware that defendant was charging him with being the thief.[10]

Kelly v. Insurance Co.[11] is an example of the proposition stated by Mr. Wigmore:[12] "A consistent statement, at a *time prior* to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence." Evidence admitted for this purpose should be distinguished from consistent statements admitted after a witness has been impeached by self contradictions and nothing more.[13]

This distinction does not appear to have been made in *Flach v. Ball.*[14] From all that is set out the impeachment, if any, was by self contradiction and by that alone. The court seems to have assumed that the witness was impeached by a showing that he was laboring under an interest or corruption. The trial court refused to allow the witness to be corroborated by testimony he had given at another trial *after* he had made the contradictory statement, if any. The ruling was affirmed by the St. Louis Court of Appeals because the record before it failed to show that the witness had ever been impeached. The court, however, added a *dictum* that if there had been an impeachment there could be no corroboration by a consistent statement uttered subsequent in point of time to the contradictory statement. This seems to be the first appearance of this qualification in Missouri. It is proper enough where the impeachment is based on bias, interest, corruption, recent contrivance or fabrication. It is unnecessary where the impeachment is based on self contradiction and that alone.

Wills v. Sullivan[15] presents interesting problems. The decision is not clear and seems to have confused hearsay and non-hearsay use of utterances. If a statement is used for the purpose of corroborating a witness who has been impeached, one need not worry about the hearsay rule because a hearsay use is not being made of the statement.

It seems that the plaintiff was impeached in two ways: (1) Swan, witness for defendant, "testified to alleged statements of plaintiff prior to the institution of the suit"; (2) Thompson, witness for defendant, "testified that he

8. See Wigmore on Evidence (2nd. Ed.) sec. 1129.
9. (1913) 250 Mo. 335, 157 S. W. 352.
10. See Wigmore on Evidence (2nd. Ed.) sec. 1128.
11. (1915) 192 Mo. App. 20, 178 S. W. 282.
12. Wigmore on Evidence (2nd. ed.) sec. 1128.
13. The cases are divided on the solution of this question. See Wigmore, *supra*, sec. 1126.
14. (1922) 209 Mo. App. 389, 240 S. W. 465.
15. (1922) 242 S. W. 180.

had held numerous conversations with plaintiff during the time plaintiff was at defendant's home, and that the boy had never made any complaints of ill treatment by defendant." While the nature of Swan's testimony is not specified, yet it seems fair to assume that he tesified to a statement by plaintiff inconsistent with the latter's testimony. If so, the impeachment was by self contradiction and, so far as appears, by that alone. The trial court permitted the plaintiff to be corroborated by consistent statements, but whether they were made *after* the inconsistent statement is not clear. The Kansas City Court of Appeals affirmed the judgment for plaintiff. This action may be inconsistent with the *dictum* in *Flach v. Ball*, *supra*.[16]

It is to be noticed, however, that the impeachment by Thompson was not of the same sort. He did not hear plaintiff make inconsistent statements; he testified that plaintiff failed to make any statements on the subject. The inference from his testimony would be that plaintiff's testimony was a recent contrivance or fabrication. If that is true then it would be proper to corroborate plaintiff with consistent statements made prior to the contrivance or fabrication. It is not always possible to state accurately the date of a contrivance, and a discretion should be left with the trial court. From that point of view there seems to be no serious objection to the evidence that was admitted in the instant case to corroborate plaintiff, so far as he was impeached by Thompson. Even if this much should not have been permitted, in any event plaintiff should have been allowed to explain why he remained silent concerning defendant's mistreatment.

State v. Creed[17] is another complicated case. One Edna Brooks was an important witness for the state. She was impeached in the process of her cross examination by admitting that she had testified differently before the coroner and on her first appearance before the grand jury. The state then corroborated her by showing that she had given to the police department a statement consistent with her testimony in circuit court. This was held to be error and apparently there are two reasons for this holding.

Considered on the basis of a self contradiction and nothing more the court approved the ruling in *Flach v. Ball*, *supra*, that the corroborating statement must have been made prior in point of time to the inconsistent statement. There is argument in the opinion, however, that would prevent the use of even a *prior* consistent statement.[18] Many courts so hold and Missouri has been on both sides of the question.[19]

The court also stated that the corroborative statement was made by Edna Brooks while she had an interest and motive "to escape punishment and obtain sleep and peace." From this point of view it logically follows that a consistent statement will not show the absence of such "interest and motive" unless it was made previous to the existence of that which caused the interest or motive.

To sum up, there is a considerable body of law that in case of an attack by self contradictions merely, supporting consistent statements are limited to those made before the inconsistent statement. The reason given for this in

16. It is possible that the ruling may be justified because no proper objection was made to the corroborative evidence.

17. (1923) 252 S. W. 678.

18. "Her impeachment was not disproved by the use of the supplementary statement, and that was all it offered to establish; nor was it admissible as substantive proof, for it was hearsay. The only way to meet evidence of a contradictory statement is to prove the witness did not make it. In the present case she admitted making it."

19. See Wigmore on Evidence, sec. 1126, and cases cited.

one of the earliest cases to make the distinction is that the admission of a subsequent consistent statement "would enable the witness at any time to control the effect of the former declarations, which he was conscious that he had made, and which he might now have a motive to qualify or weaken or destroy."[20] A Texas court in taking the opposite point of view answered the above argument by saying "that the objection made applies to the weight and not to the admissibility of the evidence."[21]

It is certain that the legal problem considered in this note is a complicated one and therefore difficult to apply in the average trial. This fact should result in vesting a discretion in a trial court. From this point of view it is easy to agree with the Supreme Court of Missouri in refusing to reverse in the principal case under consideration. But it should not necessarily follow that there would have been a reversal if the trial court had made a different ruling and thus admitted the supporting evidence.

O. D. Newlon[22]

SALES—IMPLIED WARRANTY OF FITNESS FOR FOOD. *Smith v. Carlos*.[1] The plaintiff contracted ptomaine poisoning from fish ordered and eaten in defendant's restaurant. Plaintiff sued on the implied warranty of fitness of the food and recovered. In affirming the judgment, the Springfield Court of Appeals held that the transaction was in the nature of a sale and that there was an implied warranty of fitness. The question had not previously come before an appellate court in Missouri.

In this type of case recovery may be sought on either of two grounds: (a) tort, for the negligence; (b) contract, for the breach of warranty implied in law. The basis of tort is allowed by all courts,[2] for every manufacturer or dealer in foodstuffs is under a common law duty to a purchaser to use reasonable care to make and keep the goods wholesome.[3] But the standard imposed by different courts varies from that of a duty to use due care to that of an insurer.[4] When the duty is less than that of an insurer, there is difficulty in proving negligence of the seller,[5] where he testifies as to his care in the selection, preparation and service of the food.[6] So, the doctrine of tort liability is varying and uncertain of application.

20. *Ellicott v. Pearl* (1836) 10 Peters 432. It is to be noted that in this case the court disapproved of supporting statements in general where there has been self contradictions.

21. *Taylor v. State* (1920) 87 Tex. Cr. 330, 221 S. W. 611.

22. LL. B., U. of Mo. School of Law, 1923, and now a member of the Ralls County Bar.

1. (1923) 247 S. W. 468.

2. *Bishop v. Weber* (1885) 139 Mass. 411, 1 N. E. 154; *Greenwood Cafe v. Lovingood* (1916) 197 Ala. 34, 72 So. 354; *McPherson v. Capuano & Co.* (1924) 31 Ga. App. 82, 121 S. E. 580; *King v. Davis* (1924) 296 Fed. 986.

3. *Ketterer v. Armour & Co.* (1912) 200 Fed. 322; *Flessher v. Carstens Packing Co.* (1916) (Wash.) 160 Pac. 14.

4. Some courts extend the doctrine beyond the duty to use due care, and make the dealer an insurer. *Parks v. Yost Pie Co.* (1914) 92 Kan. 353, 144 Pac. 202. In *King v. Davis, supra*, n. 2, negligence is said to be "due to the want of reasonable care in ascertaining the truth."

5. Some require that it be expressly averred and proved. *Sheffer v. Willoughby* (1896) 163 Ill. 518, 45 N. E. 253; *Farrell v. Manhattan Market Co.* (1908) 198 Mass. 271, 84 N. E. 481, states that there is no liability for negligence when the dealer offers several articles from which the buyer selects.

The better view here allows the application of "*res ipsa loquitur*," *McPherson v. Capuano, supra*, n. 2. Massachusetts and the Federal Courts refuse to allow its application, *King v. Davis, supra*, n. 2; *Tonsman v. Greenglass* (1924) (Mass.) 142 N. E. 756.

6. *Crocker v. Baltimore Dairy Lunch* (1913) 214 Mass. 177, 100 N. E. 1078; *Pantaze v. West* (1913) 7 Ala. App. 599, 61 So. 42.

Coming to the facts as presented by the instant case, i. e., where a seller prepares food to be served on the premises, there is found a marked difference of opinion as to whether or not the transaction is a sale. At the outset it is urged that the patron does not become the owner of the food, but purchases only the privilege of eating all that he can out of what is served.[7] Doubtless this was true in the early days of the common law when the guest paid for his lodging and board in a lump sum, but changing conditions of modern life have altered this relation, until a steadily growing minority, including the instant case, have held the transaction to be a sale.[8] The restaurateur of today serves not only his roomers, if he has them, but also those from outside who may care to come in. Also, a lump sum is not charged as formerly, but a separate price is set upon each article. Thus, the court in the instant case says: "We think the element of a sale of food enters into the transaction where one goes into a restaurant, makes an order from a menu card upon which are marked different prices for different dishes."[9] This seems to be a sound recognition of changed conditions, and is a view which is supported by respectable authority.[10] In holding this to be a sale, some courts have relied on cases where hotel and restaurant keepers have been criminally prosecuted for selling partridge, quail and oleomargarine, under statutes forbidding their sale.[11]

An implied warranty as to the wholesomeness of food seems to rest upon public policy, and the question resolves itself into the court's viewpoint on this subject. In *Jones v. Just*, the doctrine of implied warranty was stated to be: "Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied."[12] However, courts have differed as to whether or not a dealer in foodstuffs is liable to his vendee on this warranty.[13] Where he is a mere dealer the prevailing view imposes a warranty.[14] Courts holding that there is a warranty, base it on the fact that the article is for a particular use, known to the seller, and that the buyer relied upon the skill of the vendor as to the selection of the article,[15] though, as stated above, consideration of public policy appears to be the real basis.

When the goods are purchased in the original package, the courts again

7. *Beale on Innkeepers*, sec. 169; *Parker v. Flint*, 12 Mod. 254; *Merrill v. Hodson* (1914) 88 Conn. 314, 91 Atl. 533; *Rowe v. Louisville & N. R. Co.* (1922) (Ga. App.) 113 S. E. 823; *Loucks v. Morley* (1919) (Calif. App.) 179 Pac. 529; *Valeri v. Pullman Co.* (1914) 218 Fed. 519.

8. *Race v. Krum* (1918) 222 N. Y. 410, 118 N. E. 853; *Temple v. Keeler* (1924) (N. Y.) 144 N. E. 635; *Friend v. Childs Dining Hall Co.* (1918) 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100. So, under Civil Code, *Doyle v. Fuerst & Kramer* (1911) 129 La. 838, 56 So. 906.

9. (1923) (Mo. App.) 247 S. W. 468.

10. *Cases cited, supra*, n. 2.

11. *People v. Clair* (1917) 221 N. Y. 108, 116 N. E. 868; *Commonwealth v. Miller* (1890) 131 Pa. 118, 18 Atl. 938; *Commonwealth v. Phoenix Hotel Co.* (1914) 162 S. W. 823, 157 Ky. 180.

12. L. R. 3 Q. B. D. 197, l. c. 202.

13. Blackstone said: "In contracts for provisions, it is always implied that they are wholesome." This was founded, however, not on warranty, but on ancient criminal statutes making a dealer in unfit food criminally liable, and its extension into a civil warranty is criticized. See *Burnby v. Bollet* (1847) 16 M. & W. 644; Y. B. 9 Hen. 6, 53.

14. *Barfield v. Heinemann* (1918) 136 Ark. 456, 207 S. W. 62; *Wiedeman v. Keller* (1897) 171 Ill. 93, 49 N. E. 210; *Chapman v. Roggenkamp* (1913) 182 Ill. App. 117; *Ward v. Great Atlantic & Pacific Tea Co.* (1918) (Mass.) 120 N. E. 225; *Hoover v. Peters* (1869) 18 Mich. 51.

15. *Farrell v. Manhattan Market Co.*, *supra*, n. 5; *Hoover v. Peters*, *supra*, n. 14.

divide, some holding a warranty to exist,[16] while others deny it on the ground that there is no reliance upon the seller's skill in selection.[17] But if the manufacturer of foodstuffs is sued on the warranty, the courts almost unanimously allow recovery on the basis of public policy, even though the purchase by the plaintiff was from a middleman.[18] Many of the above cases arose under the Sales Act,[19] but as this is merely a codification of the common law as it existed previously, this does not alter the fact of a warranty, if once the existence of a sale is admitted. So, once having decided that the serving of food in a restaurant is a sale, the better view would seem to demand the existence of an implied warranty as to its fitness for the intended purpose. Further, in cases such as the one under discussion, the restaurateur may also be considered a manufacturer as well as a dealer, since he selects the ingredients, supervises their blending and exercises his judgment in selecting the portion to be served.[20]

It has been suggested that instead of a sale of food there is a sale of the privilege of consuming food, in connection with which a warranty should be implied.[21] This seems objectionable only in that it assumes that the courts would extend the doctrine of warranty to this class of licenses, though they do not so extend it to other licenses.

Recently the New York Court of Appeals, on a set of facts identical with the instant case, allowed recovery, saying: "We hold also that under such circumstances, the buyer does by implication make known to the vendor the particular purpose for which the article is required, and where the buyer may assume that the vendor has had an opportunity to examine the articles sold, it appears conclusively that he relies upon the latter's skill or judgment. . . . Consequently there is an implied warranty that the food is reasonably fit for consumption."[22] The court in the instant case ignores this point entirely, merely saying that the warranty should attach and that the defendant should be held liable as an insurer.

It is believed that, for the reasons above advanced, the result reached in the case is sound, and that due to modern conditions of life, and the demands of public policy, which is, after all, the reason for any implied warranty of fitness for an intended purpose, the court is well justified in reaching the conclusion that it does.[23]

L. C. O.

16. *Chapman v. Roggenkamp, supra,* n. 14; *Ward v. Tea Co., supra,* n. 14; *Jackson v. Watson & Sons* (1909) 2 K. B. 193, l. c. 202.

17. *Tomlinson v. Armour & Co.* (1908) 75 N. J. L. 748, 70 Atl. 314; *Julian v. Laubenberger* (1896) 38 N. Y. S. 1052; *Mazetti v. Armour & Co.* (1913) 75 Wash. 622, 135 Pac. 633.

18. *Parks v. Yost Pie Co., supra,* n. 4 (sale through middleman); *Rainwater v. Hattiesburg Coca-Cola Bottling Co.* (1923) (Miss.) 95 So. 444 (sale through middleman); *Flessher v. Carstens Packing Co.* (1916) (Wash.) 160 Pac. 14; *Walters v. United Grocery Co.* (1918) (Utah) 172 Pac. 473; *Catani v. Swift & Co.* (1915) 251 Pa. 52, 95 Atl. 931.

19. Sales Act, sec. 15: "Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." This act has never been adopted in this state.

20. *Walters v. United Grocery Co., supra,* n. 18, l. c. 474; *Friend v. Childs Dining Hall Co., supra,* n. 8, l. c. 410, and cases cited; *Race v. Krum* (1918) 222 N. Y. 410, 118 N. E. 853; see also cases cited n. 18.

21. 27 Yale L. J. 1068.

22. *Temple v. Keeler* (1924) (N. Y.) 144 N. E. 635.

23. 23 Columbia Law Review, 590.

CRIMINAL LAW—INTOXICATION—SPECIFIC INTENT. *State v. Comer.*[1] Defendant, convicted of assault with intent to commit rape, excepted to an instruction which positively denied that drunkenness was any excuse or extenuation and which in addition used these words; " . . . neither can you consider such intoxication in determining whether or not such assault was made with intent to commit a rape, or whether or not it was made on purpose . . . ". The Supreme Court of Missouri upheld the instruction, stating that "the law is too well settled in this state to admit of discussion." This seems to have been unnecessary for the decision inasmuch as the only testimony concerning intoxication was that while defendant was under the influence of intoxicating liquor, "he knew what he was doing." In other words there was no evidence that he was intoxicated to the extent that would negative the existence of the specific intent.

Until the early part of the nineteenth century, it was settled by the common law that drunkenness was no defense to a crime. In fact there was some disposition to treat it as an aggravation.[2] Between 1800 and 1835 the doctrine that drunkenness could be taken into consideration in behalf of the accused began to creep into the law. *Rex v. Grindley*[3] was the first decision "that drunkenness put forward as a defense to a charge of crime was a circumstance proper" to be taken into account. Park, J., in *Rex v. Carrol*,[4] stated that this was not the law as the judge had later reversed himself. The English cases are reviewed in *Director of Public Prosecutions v. Beard*,[4a] which at least seems to state that the English law sanctions the idea that drunkenness is to be considered in determining whether a specific intent existed. Therefore the Missouri doctrine was in line with the common law at that time.

At an early day Ryland, J., in reflecting whether the habit of gross intemperance might cause one without any apparent motive to commit perjury, observed that drunkenness is no excuse for crime.[5] In *State v. Harlow*,[6] Ryland, J., held that drunkenness was not to be taken into consideration in determining the intent with which defendant did the act. He further held that on a charge of murder the accused is not to be excused even though "he was so much intoxicated as not to be able to act as a sane and rational man."

Likewise in *State v. Cross*,[7] he delivered a strong opinion and part of his language follows: "It is not perceived how drunkenness can be held to be a circumstance proper to be considered by the jury in determining the question of premeditation and malice, and at the same time be considered as no mitigation of the crime. It is said there is no inconsistency in the two doctrines

1. (1922) 247 S. W. 179.

2. *Reniger v. Fogossa* (1550) 1 Plowd. 19; Hale's Pleas of the Crown, vol. 1, page 32; Coke upon Littleton, vol. 2, page 247a; see a discussion of earlier authorities in *People v. Rogers* (1858) 18 New York 9.

3. (1819) 1 Russell on Crimes (9th ed.) p. 12; *Rex v. Grindley* was the subject of comment in *Director of Public Prosecutions v. Beard* (1920) A. C. 479, 483, 495. It appears that Grindley was charged with murder and that Holroyd, J., told the jury that intoxication should be considered in determining whether the act was premeditated or done only in the stress, heat or impulse of the moment. See also *Marshall's Case* (1830) 1 Lewin C. C. 76.

4. (1835) 7 Car. & P. 145.

4a. See note 3, *supra.*

5. *Schaller v. State* (1851) 14 Mo. 502 (perjury).

6. (1855) 21 Mo. l. c. 458. Defendant appealed from a conviction of manslaughter.

7. (1858) 27 Mo. 332. Defendant appealed from a conviction of murder in the first degree, alleging that since the quality and grade of the offense depended upon the state of mind of the accused at the time of the commission of crime, his drunkenness might be taken into consideration by the jury in determining whether he was in a state of mind as would be unfavorable to the commission of a crime requiring deliberation and premeditation.

because the fact of drunkenness may show that the crime charged was not committed. If the crime charged was not committed then it is immaterial whether the defendant was drunk or sober; he is, in either event, entitled to an acquittal. But if all the circumstances in the case, except drunkenness, show that the crime charged was committed, and drunkenness alone is the circumstance to show that by reason of its intervention among the circumstances of the case, the crime was different from what it would have been in the absence of this circumstance, then it is manifest that this circumstance alone has produced the mitigation, and the old principle of the common law, which pronounces drunkenness to be no mitigation, is overturned.

In dissenting, Richardson, J., expressed the same point of view as did Holroyd, J., in *Rex v. Grindley*, *supra*, *viz:* "But the inquiry is, whether, in fact, the crime has been committed; and as the essence of the crime of murder is made by law to depend upon the condition of the criminal's mind at the time, all the circumstances ought to be heard in evidence to enable the jury to decide whether such wilful, deliberate and premeditated design existed; and drunkenness is a proper subject to be considered by the jury for whatever it is worth in determining the state and condition of the mind."

In *State v. Jordan*,[8] the rule in Missouri was baldly stated to be "that the defense of voluntary drunkenness cannot be interposed to an offense committed as the immediate result of such drunkenness, and, although there may be no criminal intent, the law will by construction, supply same."[9]

The Missouri doctrine has been applied, usually without discussion, until it has become a rule of thumb. The courts have been consistent inasmuch as not a case has been found to be out of line.[10] As a corollary, it was early established[11] that evidence of drunkenness is not admissible nor competent for the jury's consideration on the question of defendant's deliberation, premeditation or wilfulness. This rigid rule has been followed in prosecutions for other crimes requiring a specific intent, *viz:* attempt to rob,[12] assault,[13] attempted rape,[14] and robbery.[15]

The common law has changed since 1835 in most jurisdictions on this point. It is generally held that if at the time of the commission of such an offense the accused was by intoxication so entirely deprived of his mental faculties that he did not have the mental capacity to entertain the necessary specific intent which is required to constitute the crime, he must necessarily

8. (1920) 285 Mo. 62, 225 S. W. 905 (assault with intent to kill, a crime requiring a specific intent).

See also *State v. Duestrow* (1896) 137 Mo. 44, 73, 88, 38 S. W. 554; *State v. Woodward* (1905) 191 Mo. 617, 90 S. W. 90; *State v. Church* (1906) 199 Mo. 605, 98 S. W. 16; *State v. Bobbst* (1916) 269 Mo. 214, 190 S. W. 257; *State v. Riley* (1890) 100 Mo. 493, 13 S. W. 1063 (evidence insufficient to show defendant either drunk or insane at time in question); *State v. Murphy* (1893) 118 Mo. 7, 25 S. W. 95.

9. *State v. Bushong* (1922) 246 S. W. 919 (accord).

10. *State v. Hays* (1856) 23 Mo. l. c. 323, has been cited as inconsistent but the instruction was given by the trial court at defendant's request. See *State v. Hundley* (1870) 46 Mo. 414 (temporary insanity as immediate result of intoxication).

11. *State v. O'Reilly* (1895) 126 Mo. 597, 29 S. W. 577; *State v. Edwards* (1879) 71 Mo. 312 (Henry, J., dissented.); *State v. Ramsey* (1884) 82 Mo. 133; *State v. Sneed* (1885) 88 Mo. 138 (Henry, J., dissented.); *State v. West* (1900) 157 Mo. l. c. 318, 57 S. W. 1071 (attempt to rob); *State v. Brown* (1904) 181 Mo. 192, 79 S. W. 1111; *State v. Dearing* (1887) 65 Mo. 530.

12. *State v. West* (1900) 157 Mo. 309, 57 S. W. 1071.

13. *State v. Pitts* (1874) 58 Mo. 556; *State v. Jordan* (1920) 285 Mo. 62, 225 S. W. 905; *State v. Lloyd* (1919) 217 S. W. 26 (assault with intent to kill).

14. *State v. Alcorn* (1896) 137 Mo. 121, 38 S. W. 548.

15. *State v. Stebbins* (1905) 188 Mo. 387, 87 S. W. 460.

be acquitted;[16] and in like manner the fact of defendant's drunkenness should be considered in certain instances in determining the degree of the crime. This is so, not because drunkenness excuses crime but if the mental status required by law to constitute crime be one of specific intent or of a definite mental status, and drunkenness excludes the existence of either, then the particular crime charged has not in fact been committed. This conclusion seems logical.

But law is not merely a matter of logic; experience is the final test. There is danger that undue weight will be attached to the fact of drunkenness or that it will be used as a cloak or excuse for crime. This has led to some confusion among the courts which have adopted the rule that drunkenness may be shown to negative the existence of a specific intent. Many courts allow drunkenness to negative facts which will reduce the homicide from first to second degree murder.[17] A few will permit the same process to reduce it to manslaughter.[18] Drunkenness may be shown to negative the specific intention without which there may be no robbery,[19] larceny,[20] attempt to rape,[21] assault[22] with intent to kill, burglary,[23] or attempt to commit suicide.[24] This leads to an anomaly. If one is charged with an assault to commit rape (requiring specific intent) he would be entitled to an acquittal in most jurisdictions if the jury could be persuaded that he was so completely intoxicated as to be incapable of forming any purpose to seek sexual connection with the female. If, however, the same individual had under the same circumstances succeeded in having sexual connection, the jury would have no right to return an acquittal. Such a distinction seems perfectly logical but an unfortunate one, nevertheless.

On the other hand, the hard and fast Missouri rule would lead to questionable results. It so happens that in Missouri (so far as the writer has discovered) there has never been a "hard" case; that is, a case where the facts strongly showed that a defendant charged with a crime requiring a specific intent was intoxicated to the extent that he could not have had the particular state of mind required. In a New Zealand case a prisoner was charged with (1) stealing tobacco and cigarettes in a store, and (2) breaking into the store with intent to steal. The trial court in charging the jury, instructed, (among other things) as follows: "If the prisoner blundered into the store through a drunken mistake, and under such circumstances as to indicate inability to form any definite purpose, and especially to form the purpose of committing

16. See Bishop on Criminal Law (9th ed.) secs. 408-413; 36 L. R. A. 465 (note); 11 Harv. L. R. 341; 34 Harv. L. R. 78; 12 A. L. R. 861 (note).

17. *People v. Leonardi* (1894) 143 N. Y. 360, 38 N. E. 372 (under New York penal code); *People v. Methever* (1901) 132 Cal. 326, 64 Pac. 481 (under California code; *dictum*); *State v. Roan* (1904) 122 Iowa 136, 97 N. W. 997 (*dictum*); *Com. v. Cleary* (1892) 148 Pa. 26, 23 Atl. 1110; *Gustavenson v. State* (1902) 10 Wyo. 300, 60 Pac. 1006; *Hopt v. People* (1881) 104 U. S. 631, 26 L. Ed. 873 (under Utah code.).

18. *Rex v. Meade* (1909) 1 K. B. 895; *Tubby v. State* (1919) 15 Okla. Crim. Reps. 496, 178 Pac. 491 (apparently murder was not divided into degrees). *State v. Corrivau* (1904) 93 Minn. 38, 100 N. W. 638 (statute involved; *dictum*); *Hill v. State* (1913) 9 Ala. App. 7, 64 So. 163.

19. *Terhune v. Commonwealth* (1911) 144 Ky. 213, 175 S. W. 355.

20. *Ryan v. U. S.* (1905) 26 App. D. C. 74 (*dictum*).

21. *Reagan v. State* (1889) 28 Tex. Crim. App. 227, 12 S. W. 601.

22. *State v. Pasnau* (1902) 118 Iowa 501, 92 N. W. 682; *Booher v. State* (1901) 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391.

23. *Bruen v. People* (1903) 206 Ill. 417, 69 N. E. 24; *People v. Eggleston* (1915) 186 Mich. 510, 152 N. W. 944.

24. *Reg. v. Moore* (1852) 16 Jur. 750.

a larceny, then he ought to be acquitted."[25] Under the same circumstances would the Missouri Supreme Court say that the instruction was wrong? Would the Supreme Court of Missouri affirm a conviction of a fe.ony because a drunken man "blundered" into a store building? If so, burglary may be nothing more than drunkenness plus a trespass.

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25. *R. v. Matheison* (1906) 25 N. Z. L. R. 879. The information set forth in this note was obtained from 1 Russell on Crimes, 8th ed., p. 91. See note on page 92, where it is stated: "The jury found that the prisoner had blundered into the store under a drunken mistake, and without intention to commit any offence, but that while in the store he appropriated the cigarettes, and knew then and there that he was taking the cigarettes of another person. On this finding, a verdict of guilty of larceny was directed."