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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."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

DUMPOR'S CASE IN MISSOURI

In Garland v. Lisetta Investment Co.,¹ the St. Louis Court of Appeals refused to give effect to a condition against further assignment which was at least fairly implied in the terms of the original lease. The plaintiffs, who sought a declaratory judgment in regard to their right to assign their interest, were assignees of the original lessee. The lease set forth that the lessee could assign his interest freely, further that all provisions were to inure to the benefit of the parties. The defendant landlord sought for a construction of the lease that would limit the term parties to himself and the original lessee, therefore by implication for-
bidding assignment by any subsequent assignee. The plaintiff had attempted to assign his interest, but the prospective assignees insisted that the lessor defendant’s permission be obtained. The defendant had refused. While the court recognized “the undoubted right by the stipulation in a lease to restrict the right of assignment or forbid subletting of the premises,” the view was taken that such covenants are not favored by the courts, and will be construed strictly against the lessor. Thus the court refused to infer from the stipulation that “all provisions are to inure to the benefit of the parties” that further assignments by assignees were forbidden and ruled that permission from the lessor was not necessary to enable plaintiff to assign.

Whether in asserting that such covenants were not favored by the courts and should be strictly construed, the court was influenced by the “Rule in Dumpor’s Case” or by the general policy of the courts to strictly construe conditions and covenants, would be difficult to ascertain. It is, however, at least arguable that the court was swayed to some extent by the rule pronounced by Lord Coke. In the case from which the doctrine draws its name, the lease contained a proviso that the lessee or his assignee should not alien the premises without the special license of the lessor. Afterwards the lessor licensed the lessee to alien or demise the land, or any part of it, to any persons or person. Afterwards the assignee assigned the premises to another, the lessor re-entered to terminate, and an action of trespass was brought by the then assignee. It was held that the alienation by license had determined the condition, “so that no alienation which he might afterwards make could break the proviso or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time and that the same estate should remain subject to the proviso after.” Thus the case is generally regarded as standing for the rule that, where a lease contains a condition subsequent against assignment without the lessor’s license, a single license to assign operates to extinguish the condition as to all future assignments.

The case is still law in many American jurisdictions, but the judicial tendency seems to be to limit, rather than extend the rule.

2. Id. at 348.
5. Sims, Future Interests § 172 (1936).
It is not at all clear from the decisions whether the rule is law in Missouri. Very early, however, in *Tennessee Marine and Fire Insurance Co. v. Scott*, the Missouri court indicated that the "Rule in Dumpor's Case" if law, would be confined to assignments where there was a landlord-tenant relationship and would not be extended to other legal relationships involving assignment. The case involved assignment of a fire insurance policy. Dictum in this early case also indicated that the "Rule in Dumpor's Case" was considered to be law in Missouri even though subject to limitations. The court said in part: "This doctrine in relation to covenants in leases originated in Dumper's Case and although much criticized by eminent judges, is still adhered to as the law." This dictum seemed to be confirmed in *Dougherty v. Matthews*. In this case the plaintiff landlord gave permission to the tenant to assign his term to the defendant. The defendant later sought to assign and plaintiff gave his permission with stipulation that in return defendant would stand good for the rent. Plaintiff then sued for six month's rent based on said agreement and recovery was denied on the ground that there was no consideration for the promise of the defendant to pay rent. The court reasoned that since defendant had this right to assign anyway, without benefit of the permission given by plaintiff, his promise was therefore without consideration and void. Without discussing the "Rule in Dumpor's Case," the court seemed to assume that the restriction against assignment would not apply to an assignee of the leasehold. However, in *Harmon v. Dickerson* the Springfield Court of Appeals held that where a sublease provided that the sublessee could not sublet or allow any other tenant to come in with or under him without the written consent of the original lessor, such restriction was not exhausted by an assignment by the sublessee, and after the transfer by him the provision yet remained as a prohibition against subletting by the assignee without the consent of the lessor. The court discussed cases which generally followed the "Rule in Dumpor's Case," but pointed to certain distinctions which were present in the principal case. There had been a series of assignments of the sublease, but each had contained the restrictive provision. With the exception of the assignment to the plaintiff, the assignor in each instance had secured the written permission of the lessor. The defendant, however, in making the last assignment had not obtained the permission of the lessor. The lessor had asserted his power to terminate the lease, the plaintiff had given up the premises on demand and immediately sued defendant, apparently on a theory of restitution, alleging the defendant's fraudulent representation of authority to assign the sublease. The court placed main emphasis in its decision on the fact that defendant's theory of defense amounted to an admission that he did not have authority to assign, and that he would not therefore be allowed to change this theory on appeal. Although not noted in the opinion of

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9. 14 Mo. 46 (1851).
10. 14 Mo. 46, 47 (1851).
11. 35 Mo. 520 (1865).
12. 184 S.W. 139 (Mo. App. 1916).
the court, it might also have been pointed out that since the restriction was contained in each assignment of the sublease with the exception of the assignment to the plaintiff, the condition could not be said to be extinguished, and the defendant did not therefore have the power or right to assign.

In *Dean v. Lee*, the court indicated by way of dictum that Dumpor's Case in 1603 was only evidence of the common law prior to 1607 and that the court was not bound by this decision but had to determine what the common law was. The fact situation presented by the case only indirectly reflected a problem similar to that found in Dumpor's Case. The lease provided that assignment could only be made by a lessee to a responsible person and through an instrument making the assignee responsible for the covenants of the lease; that if such were made the lessee would no longer be responsible for the covenants under the lease. Numerous assignments were made of the lease, none of them in accordance with the aforementioned provision. The defendant, last in the series of assignees, attempted to assign the lease, notifying the lessor plaintiff of his action. Plaintiff immediately denied defendant's right to assign and demanded the current rent which was refused and for which action was brought. The court construed the provisions as prohibiting assignment, but concluded that the covenant did not run with the land. Therefore, since defendant's liability was based on privity of estate rather than contract, he had divested himself of any possible liability under the lease when he assigned the same. Again while the court stressed that it did not have to follow "The Rule in Dumpor's Case," and while the decision was based on the "covenant running with the land" distinction, the rule laid down by Lord Coke was adhered to. While not stressed by the court, it will be noted even though defendant divested himself of liability by reason of the assignment, his power to assign might well be explained by pointing to the extinguishment of the covenant against assignment.

It thus appears clear that there is sufficient life to be found in this old rule in Missouri that draftsmen of leases will do well to take precautions against its possible application. In *Lindsley v. Schneider Brewing Co.*, the rule was successfully avoided by way of a memorandum on the back of the lease. In essence the memorandum set forth that the lessor consented to the assignment subject to all covenants, and that the assignee accepted the transfer with all its responsibilities. The lease itself contained a covenant against assignment on penalty of forfeiture. This memorandum was signed by the lessor and the assignee. Shortly thereafter the defendant assignee made an attempted assignment, the plaintiff landlord refused to recognize the purported subsequent assignee, demanded rent from the

13. 227 Mo. App. 206, 52 S.W. 2d 426 (1932).
14. *Mo. Rev. Stat.* § 1.010. (1949): "The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state."
15. 59 Mo. App. 271 (1894).

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defendant, brought suit. The court found consideration for the promise of the defendant because of the restrictive covenant and allowed recovery. Emphasis was placed by the court on the privity of contract which was created rather than mere privity of estate, but again the court could have found liability on the ground that the restrictive condition had been effectively preserved, and not extinguished by the first license given by the landlord.

As a practical matter, therefore, in order to avoid the dangers of possible application of the "Rule in Dumpor's Case," it is important that lessors in Missouri should insure that assignees of leaseholds are subject to all of the restrictive covenants of the original lease. As suggested in the foregoing case this can be accomplished very simply by way of a signed memorandum.

Donald Hoy

Material Witnesses in Criminal Proceedings: Securing and Assuring Their Attendance

The inability of the prosecution to produce a material witness at a preliminary hearing, grand jury proceeding, or trial of a person suspected of or charged with the violation of some criminal law may forever free the suspect or defendant and deny to the state a genuine opportunity of determining his guilt or innocence. Hence it becomes important to have effective and expedient means of producing a witness or at least, in a proper case, of producing the witness' testimony in criminal proceedings. There has been some recent criticisms of the procedure available in Missouri. Henry J. Fox, Jr. prosecuting attorney of Jackson County, has said: "The present material witness law in effect in this state is of little or no value. Witnesses are permitted under the existing laws to sign their own bonds. They can go forth to any other state in the Union and remain safe from extradition." Mr. Roscoe Van Valkenburgh, President of the Kansas City Bar Association, expressed a similar opinion, saying: "... Now there is one other thing that makes it very difficult for the guilty to be convicted, and that is that we should have a more stringent material witness law in this state. ..."

Is this criticism justified? Is Missouri lagging in the effective administration of its criminal laws because of inadequate material witness laws? It is the purpose of the writer to examine the provisions available in Missouri, to compare these with the laws of some other jurisdictions, and to offer for consideration possible remedies for such defects as may exist.

There are two general aspects to the material witness problem. One aspect of the problem is to secure a witness from within the state, while the second aspect is to secure a witness from without the state. Each aspect may in turn be subdivided into two situations (1) to secure the initial appearance of a witness

2. Id. at 524.
3. It is beyond the scope of this article to discuss the problems of compelling the witness to testify once he is before the proper tribunal.
before the magistrate, the grand jury or the trial court; (2) to assure the subsequent availability and attendance of the witness at the trial after he has testified at the preliminary hearing or before the grand jury.

I. WITNESSES WITHIN THE STATE

A. Securing the Initial Appearance of a Witness

A material witness may be defined as one who is necessary to prove, or at least substantially aid, the state's case. In Missouri the provisions of the law in civil cases relevant to witnesses extend substantially to criminal cases.\(^4\) In order to secure the attendance of a state's witness, Missouri, as most other jurisdictions, provides for the issuance of a subpoena. A subpoena is "... a writ or order directed to a person, and requiring his attendance at a particular time and place to testify as a witness."\(^5\) Section 544.060\(^6\) provides that "At the time of issuing a warrant, the clerk shall issue subpoenas for the witnesses on behalf of the state, but such subpoenas for the witnesses on behalf of the state, shall not be served until the defendant is arrested or in custody."\(^7\) Section 545.320 contains further conditions before the subpoena can be issued.\(^8\) Section 540.160 provides: "Whenever

\(^4\) Mo. REV. STAT. § 545.360 (1949) provides: "The provisions of law in a civil case, relative to compelling the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations and proceedings for contempt, to enforce the remedies and protect the rights of parties, shall extend to criminal cases so far as they are in their nature applicable thereto, subject to the provisions contained in any statute." See also Rule 26.03, RULES OF CRIMINAL PROCEDURE FOR THE COURTS OF MISSOURI (Published April 14, 1952 and effective Jan. 1, 1953).

\(^5\) BLACK'S LAW DICTIONARY (3rd ed. 1933).

\(^6\) Mo. REV. STAT. § 545.360 (1949) provides: "The provisions of law in a civil case, relative to compelling the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations and proceedings for contempt, to enforce the remedies and protect the rights of parties, shall extend to criminal cases so far as they are in their nature applicable thereto, subject to the provisions contained in any statute." See also Rule 26.03, RULES OF CRIMINAL PROCEDURE FOR THE COURTS OF MISSOURI (Published April 14, 1952 and effective Jan. 1, 1953).

\(^7\) For statutes of other jurisdictions see: FLA. STAT. § 90.11 (1941); IOWA CODE ANN. § 781.1 (1946); OKLA. STAT. ANN. § 703 (1937) ALA. CODE § 289 (1940), a more restrictive type statute, provides: "No subpoena must be issued in a criminal case, unless the defendant is in the custody, or has given bail to answer the charges."

\(^8\) Mo. REV. STAT. § 545.320 (1949) provides: "No subpoena for a witness... shall be issued on the part of the state, unless the name of such witness be endorsed on the indictment or information, or the prosecuting attorney shall order the same to be issued, in writing, or the prosecutor shall file an affidavit that other witnesses ordered by him are positively necessary for a complete adjudication of the case; and no subpoena shall issue for a witness unless the defendant is in custody or on bail, or the clerk or magistrate shall have good reason to believe that he will be apprehended. Subpoenas may be issued to different counties at the same time, but all witnesses ordered at one time, and living in the same county shall be included in one subpoena." See Rule 23.08.
thereto required by any grand jury, or the foreman thereof, or by the prosecuting attorney, the clerk of the court in which such jury is impaneled shall issue subpoenas and other process to bring witnesses to testify before such grand jury; . . ." Section 491.310 provides that "the magistrate shall issue subpoenas for witnesses at the instance of either party, and shall include all the witnesses ordered at the same time by a party in one subpoena." Section 491.320 provides that "A subpoena issued by a magistrate shall be valid to compel the attendance in a magistrate's court of a witness as provided in sections 491.010 to 491.270."—these sections dealing with witnesses generally. Where witnesses are required to attend the trial, Section 491.090 provides that the clerk of the court or a notary public of the county in which the trial is to take place shall issue a summons "stating the day and place when and where the witnesses are to appear." Hence the various sections above provide for compelling the attendance of a witness at a trial of the defendant, at the grand jury proceedings, and at any preliminary hearing in a magistrate's court. No problem is encountered therefore, unless the person to whom a subpoena is directed refuses to comply with the order.

Section 491.150 provides that in such a case, the person refusing to obey the summons "may be compelled by writ of attachment against his body, to appear, which may be served in any county in the state, and the sheriff may serve such writ of attachment . . . in any county adjoining that in which the court is being held." Further, Section 491.160 provides that "where a cause shall be continued on account of the absence" of a material witness a writ of attachment may be issued by the court upon affidavit by a party that a witness is essential to his cause. The writ authorizes the sheriff, or other proper officer, "to take the body of such witness, that he appear and testify in the cause at the next term thereafter." Section 540.180 provides that "If any witness, duly summoned to appear and testify before a grand jury, shall fail or refuse to obey, the court shall cause compulsory process to be issued to enforce his attendance, and may punish the delinquent in the same manner and upon like proceedings as provided by law for disobedience of a subpoena issued out of such court in other cases." Section 491.330 gives the magistrate power to issue an attachment to compel the attendance of a witness, where the party makes oath that a subpoenaed witness is essential to the party's cause. Section 491.340 further provides that every attachment under Section 491.330 "shall be executed in the same manner as a warrant in a criminal case. . . ." Thus in effect it would seem that the sheriff, or other authorized officer, if he can locate the contumacious witness, can insure his attendance by taking him into custody under the above section.

9. Mo. Rev. Stat. § 491.160 (1949) in full reads: "When a cause shall be continued on account of the absence of a witness, duly summoned, and the party for whom such witness shall have been summoned shall make affidavit that such absent witness is material, and that he cannot safely go to trial without his testimony, the court may award a writ of attachment, directed to the sheriff or other proper officer of the proper county, commanding him to take the body of such witness, that he appear and testify in the cause at the next term thereafter; and the clerk shall issue such writ accordingly, stating therein the day on which the cause is set for trial, as the day of his appearance."
However, Section 491.170 provides that the attached witness is to be released by the sheriff upon the witness' entering into a recognizance "in the sum of one hundred dollars, which the officer securing the writ is authorized to take, conditioned for the appearance and due attendance of such witness. . . ." Section 491.170 would apply only to those witnesses attached under Section 491.160 (where a cause is continued on account of the absence of a witness) since the language of Section 491.170 expressly states that it is to apply to a witness attached by a writ "authorized by section 491.160." Similar provisions can be found in other jurisdictions. Nebraska, for instance, expressly provides that if the attachment "be not for immediately taking into custody," the witness may give undertaking.\textsuperscript{10} Oklahoma has a similar provision.\textsuperscript{11} In addition Oklahoma and Nebraska (these states used merely as examples) give more discretion in fixing the amount of the recognizance. Missouri, on the other hand, fixes a definite sum. Professor Orfield says that "In some states the statutes limit the amount at which the recognizance can be kept to a figure so low as to make it ineffective where there is a powerful inducement to refrain from testifying."\textsuperscript{12} Although in some cases one hundred dollars may be a sufficient amount, it seems that more discretion should be given to the magistrate or to the sheriff, especially in criminal cases where the witness has already indicated his unwillingness to comply with the subpoena.\textsuperscript{13}

No provision or case has been found which sets out what is or may be done if the immediate attendance of a witness is desired when such witness has not been previously subpoenaed. As a practical matter such a situation probably would rarely arise. In most cases, sufficient time could be allowed so that the regular procedure as outlined by the above sections could be used.

B. Assuring the Subsequent Attendance of a Material Witness

When a witness has appeared at a preliminary hearing or before a grand jury, how is his presence to be assured at the subsequent trial? It is probably with this aspect, and the Missouri provisions pertaining thereto that the most dissatisfaction exists. The pertinent Missouri provision is Section 544.420, which states that [after a preliminary hearing]:

"If it appears that a felony has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate shall bind, by recognizance, the prosecutory, and all material witnesses against such prisoner, to appear and testify before the court having cognizance of the offense on such day as the prosecuting attorney shall designate in writing duly filed with the magistrate at the time, and not to depart such court without leave."

\textsuperscript{10} NEB. REV. STAT. § 25-1230 (1943).
\textsuperscript{11} OKLA. STAT. ANN § 393 (1937) ("If the attachment be not for the immediate bringing the witness . . . a sum may be fixed . . .").
\textsuperscript{12} ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, pp. 128-129 (1941). Missouri is not cited as an example by Orfield, but is among the more recent states. See note 13, infra.
\textsuperscript{13} For a discussion of some of the problems of the administration of the laws relating to bonds and recognizance see Comment, 41 YALE L. J. 293 (1931).
Rule 23.08 of the new Missouri Rules of Criminal Procedure substantially incorporates this section. No provision can be found in the statutes or in the rules for binding any witness who has appeared before the grand jury. Sections 545.070 and 545.320 provide that the names of the state's witnesses should be endorsed upon the indictment or information in order for a subpoena to issue. A continuance will not be granted if a witness whose name is not endorsed is not present unless upon affidavit of the prosecuting attorney showing good cause.

Section 544.420 used the word "recognizance," while other sections dealing with binding prisoners and witnesses use the word "bond."14 There is a technical distinction between a recognizance and a bond, although the statutes do not always seem to recognize it. In State v. Wilson,16 it was stated:

"While in the main like rules of law are applicable to both of these classes of obligations the primary distinction must be observed that a recognizance is, in all cases, a contract acknowledged by the parties and entered or filed in the records of the court, while a bail bond is an obligation given by the accused with one or more sureties, conditioned that the same may be void upon performance by the accused of such acts as he may thereon be required to perform. . . ."

Rule 23.08 recognizes this distinction and now provides that "... the magistrate may bind any or all material witnesses by bail bonds...", thus avoiding the use of "recognizances." Rule 23.10 provides that the accused in a proper case "shall be admitted to bail upon a bond with sufficient security as provided in these Rules." Rules 32.01 through 32.18 then set forth the various requirements for sureties and the conditions of the bail bond. Rule 23.08 does not add the words "with sufficient security," and whether this is significant or not is speculative.

Rule 32.04 states in part: "A person required or permitted to give bail shall execute a bond for his appearance. One or more sureties may be required; . . . and in proper cases no security may be required of a witness who has been required to give bail for his appearance." It may be argued that the net effect of the rules is to leave it to the discretion of the magistrate as to when, and how much, security is to be required on a bail bond of a witness, as well as the amount of the bond, while as to the accused the magistrate must require security. Mr. Henry Fox, Jr. has recommended that "a material witness in a felony case be placed under bonds of the same type required of the defendants."16 It may be that this has been accomplished by the new rules.17

14. In the proposed Rules of Criminal Procedure for Courts of Missouri (March 28, 1951) at page 30, the committee recommends that there be only one form of obligation, namely a bond as defined in State v. Wilson (see note 15, infra).
15. 265 Mo. 1, 175 S.W. 603 (1915).
16. See note 1, supra.
17. Mo. Rev. Stat. § 544.450 (1940) provides that if the offense charged is a bailable one, the magistrate who issued the warrant shall, at the request of the person arrested, take from him a recognizance in such sum as may seem to be sufficient and proper, with sufficient sureties for his appearance at the next term of the court having jurisdiction of the offense. Rule 23.10 provides: "If the offense for which the accused is bound over is available and the accused..."
In a survey of the statutes of fifteen states, only Illinois has no provision for the taking of an additional security from the material witness in a proper case. The Illinois statute expressly provides that a witness shall be required to give other security for his appearance than his own recognizance.

Although the statutes of the other jurisdictions generally provide that additional security may be required, there is some differences as to when the additional security is to be given. Pennsylvania requires a "positive oath" which is to set forth "sufficient reasons or facts to induce the firm belief on the part of the judge . . . that any witness will abscond" before requiring bail. Iowa provides that the witness is to provide an undertaking with surety when the magistrate is satisfied by "oath or otherwise" that there is reason to believe that the witness will not appear. Florida requires that the magistrate have reasonable grounds that the witness will not appear, while Louisiana insists that it shall appear from the district attorney's affidavit that the witness will not be within the jurisdiction.

What effect does the unlimited requirement of the additional security have in compelling the attendance of the witness? The value of requiring a surety undoubtedly lies in the fact that the surety, having a monetary interest in seeing that the witness complies with the conditions of the bond, will use his efforts to see that the witness appears at the proper time and place. This would greatly aid the prosecuting attorney who hopes to assure the attendance of the witness. However, the witness has problems too. For example, John Q. Witness happens to see a shooting, and is able to identify the assailant, against whom the charge is first degree murder. John Q., a laborer owning no real property, supports a wife and three children. At the preliminary hearing he is determined to be a material witness, but he is unable to provide security or obtain a surety, the amount of his bail bond being set at $5,000. What is to be done to or for John Q. Witness?

Section 544.440 now provides:
"If any witness so required to enter into a recognizance refuses to comply with such order the magistrate may commit him or her to prison until he or she comply with such order or be otherwise discharged according to law."

Rule 23.09 repeats Section 544.440, but substitutes "bond" for recognizance, and adds an additional clause, the significance of which will be discussed below. The statute by using the word "may" seems to give discretion to the magistrate as to whether or not to commit the witness. The magistrate, in exercising his discretion,
could apparently commit John Q. Witness to prison until his testimony is required at the trial. Rule 32.04 states that cash or negotiable bonds of the United States, the State of Missouri, or any political subdivisions of Missouri may be accepted as security. If John Q. has none of these, he would be in a very unfavorable position; his job would be jeopardized; his family would become a burden upon the state; and the state would have the additional expense of maintaining the witness. Finally, the guilty defendant may be free on bail while the innocent witness languishes in jail. Perhaps such a situation was contemplated when the provision for not requiring any security from the witness in a proper case was included in Rule 32.04.

This anomalous situation was recognized and discussed before the Missouri Senate Criminal Law Revision Committee. The committee sent out a questionnaire regarding this and other problems. It sought comment on the following proposal: "(a) Require bond of material witness, with a ninety day limit on time a witness may be held in jail if he cannot furnish bond." It has been suggested that such a time limit would have the beneficial effect of quickly disposing of cases. This may be true in some instances. However, it is likely that a zealous defense attorney on a crowded docket often could successfully avoid trial within the ninety days by using various lawful means, such as requesting a change of venue. Thus the time limit may be ineffectual, and at the end of the period the witness will have gone home, having actually wasted his time and the state's.

Section 544.420 and Rule 23.08 allow a recognizance or bond of the witness where "it appears to believe the prisoner guilty thereof." This is a reasonable condition precedent to the requirement of a recognizance, or bail bond. California provides that an undertaking may be taken "on holding the defendant to answer or on a plea of guilty where permitted by law. . . ." Washington requires that the defendant be arrested or committed to jail before the witness may be compelled to attend the preliminary hearing, while Florida conditions the requiring of a recognizance on the holding of the defendant to answer the charges of kidnapping, murder, rape, robbery, and arson. As pointed out above, some states require a further showing of necessity before additional security may be required.

24. N.J. STAT. ANN. § 2:187-21 (1939) states that all persons detained as witnesses shall be comfortable lodged and provided for, and not further restrained in their liberty than is necessary for their detention.
25. The committee was a Subcommittee of the Judiciary Committee, The Missouri Senate, 66th General Assembly. See the Transcript of Hearings, May 10, 1952, pp. 570-571.
26. Annex I, Questionnaire, To the Report of the Criminal Law Revision Committee, The Missouri Senate, question 23(a). The tabulated answers are: Judges: 9 for, 5 against; Bar Associations and Schools: 3 for, 5 against; Prosecuting Attorneys: 28 for, 13 against.
27. This was substantially the opinion of Mr. Temple H. Morgett, Magistrate, Boone County, in a personal interview, March 28, 1952.
30. FLA. STAT. § 902.15 (1941).
31. See notes 20 through 23 inclusive, supra.
A serious problem thus exists concerning material witnesses. To a certain extent the problem is a conflict between the relative interest of the individual and the interest of the state in the effective administration of its criminal laws. The course to be taken, therefore, depends upon the interest which is to be stressed. The prosecuting attorney, who desires to solve all the criminal cases, would want the strongest possible provisions for binding the witness; the ardent defender of personal rights would rather have some criminals go free than have one man's "liberty" restricted merely because he happened to be a witness; the indifferent citizen would care little of how a witness could be made to attend, unless he happened to be the witness.

In Article I, Section 18 (b) of the 1945 Missouri Constitution, the following provision is found:

"Upon a hearing and finding by the Circuit Court in any case wherein the accused is charged with a felony, that it is necessary to take the deposition of any witness within the state, other than the defendant and spouse, in order to preserve the testimony, and on condition that the court make such orders as will fully protect the rights of personal confrontation and cross-examination of the witness by the defendant, the state may take the deposition of such witness and either party may use the same at the trial, as in civil cases, provided there has been substantial compliance with such orders.

"The reasonable personal and travelling expenses of defendant and his counsel shall be paid by the state or county as provided by law."

Rule 25.13 substantially repeats Article I, Section 18 (b); another sentence is added to the effect that whenever possible the deposition should be taken in the same county where the case is pending, and that in such cases the officer before whom the deposition is to be taken shall have the authority to issue subpoenas for the witness. No cases have been found interpreting Section 18(b), supra, nor is it certain whether the section has ever been used in practice. The significance of Rule 25.13 may come to light when read with Rule 23.09, which states:

"If any witness required to enter into such bond refuses to comply with such order, the magistrate may commit such person until compliance therewith or until otherwise discharged according to law, unless his deposition be taken for use at the trial as provided by law." (Italics supplied.)

Rule 25.12 further outlines in detail when depositions "obtained in accordance with these Rules" may be used, including occasions "when the party offering the depositions, after due diligence, have been unable to procure the attendance of the witness by subpoena." Thus, Missouri may now have available a fair solution to the problem so that, in a proper case, it may protect the witness who is unable to furnish bail bond, and at the same time insure the testimony of the witness, who once testified but who may be unavailable at the time of the trial.

An attempt at a favorable solution has been made in other jurisdictions, an attempt to balance the interests. The Federal Rules of Criminal Procedure, although allowing the detention of a witness who fails to give the required bail, provides that if the witness has been detained for an unreasonable length of time, he may...
be released; furthermore, the requirement for bail may be modified at any time. At least three states, Louisiana, Florida, and Washington recognize the interest of the witness as an individual, but at the same time, realizing the necessity of having his testimony, have provided for depositions in certain cases. These provisions are in effect similar to the Missouri procedure outlined above, although the Louisiana and Florida provisions go into more detail than the Missouri rules on how the depositions should be obtained. The Florida provision is of somewhat less value since the defendant must consent before the deposition may be used in evidence at the trial. The Washington statute, however, is similar to the Louisiana provision in that the deposition may be introduced at the trial irrespective of the defendant's consent, providing the witness is unavailable at the time of the trial. Professor Orfield has referred to the American Law Institute's provision as a "fair solution" to the problem. These provisions prevent the

34. Fla. Stat. § 902.17 (2) (3) (4) (1951) provided in part: "... (2) If the magistrate requires the witness to give security for his appearance, and the witness is unable to give such security, he may move the court having ultimate jurisdiction to try the defendant, for a reduction of said security. (3) When it satisfactorily appears by examination on oath of the witness, or any other person, that the witness is unable to give security, the magistrate in the first instance, and the trial court having jurisdiction in the second instance shall make an order finding such fact, and the witness shall be detained pending application for his conditional examination. Within three days from the entry of the order last mentioned, the witness so detained shall be conditionally examined on behalf of the state or the defendant and answer in the presence of the other party and counsel, and shall be taken down by a court reporter or stenographer selected by the parties and reduced to writing. At the completion of the examination, the witness shall be discharged, and his deposition may be introduced in evidence by the defendant at the forthcoming trial, or if the prosecuting attorney and the defendant and his counsel agree, the deposition may be admitted in evidence at the trial by stipulation. No such deposition shall be admitted on behalf of the state, unless the defendant consents thereto. (4) If no conditional examination is had within the above mentioned period of three days, the witness so detained shall be forthwith discharged. ..."
36. The American Law Institute, Code of Criminal Procedure § 58 (March, 1931): "(1) If a witness required to enter into an undertaking to appear to testify either with or without security refuses compliance with the order for that purpose, the magistrate shall commit him to custody until he complies or is legally discharged. (2) When, however, it satisfactorily appears by examination on oath of the witness or any other person that the witness is unable to give further security as provided in section 57 [which provides that where the defendant is imprisoned or is committed to bail, the magistrate may require each material witness for the defendant or state to enter into a written undertaking to appear and to testify at the trial or else forfeit such sum as the magistrate may fix], the magistrate shall make an order finding such fact and the witness shall be detained pending application for his conditional examination. Within three days from the entry of the order last mentioned, the witness so detained may be conditionally examined on behalf of the State or the defendant on application made for that purpose. Such examination shall be by question and answer in the presence of the other party, or when a witness for the State is being examined, after notice to the defendant if on bail. The examinations shall be conducted by the same
witness from being restricted or imprisoned for an unreasonable length of time, where he is unable to obtain or furnish sufficient security. At the same time the witness’s testimony is preserved and assured the opportunity of introduction at the trial. Although the above provisions are favorable to the witness, and in most cases to the prosecution, objection would possibly be made by the defendant. Defendant may argue that he has the right not only to be confronted by the witness, but also to have the jury present when the witness testifies.\textsuperscript{38} Professor Wigmore refutes the argument that the witness’s presence before a tribunal is constitutionally indispensable. The right to confrontation developed to protect the defendant’s right to cross-examination, and when this right is preserved, there is nothing further that the defendant can ask.\textsuperscript{39} Missouri seems to be generally in accord with the previous statement of Professor Wigmore, although there has been some differences in the cases as to when the testimony taken at preliminary hearings may be introduced at the trial.\textsuperscript{40}

manner as the examination of witnesses before a committing magistrate is required by this Code to be conducted [that is the testimony to be put into writing, there should be right to counsel, right for the defendant to be present and cross-examine the witness]. At the completion of the examination the witness shall be discharged, and his disposition may be admitted in evidence at the trial under the same conditions and for the same purposes as the depositions mentioned in section 53 [“... if for any reason the testimony of the witness cannot be obtained at the trial and the court is satisfied that the inability to procure such testimony is not due to the fault of the party offering it.”] (3) If no conditional examination is had within the above mentioned period of three days, the witness so detained shall be forthwith discharged.\textsuperscript{37}

37. See note 12 \textit{supra}.

38. This argument was recognized in the Constitutional Debates, Nov. 16, 1943, Feb. 14, 1944, in discussing Proposal 183 (now substantially Article I, section 18 (b) of the Missouri Constitution, 1945). Mr. Coe stated, at page 1180: “I think it very important for us to preserve the right of every defendant, not only to confront the witness himself, but to have that witness confront the jury that is trying the case.” It may be doubted if this was an accurate statement of the then law of Missouri. See note 40, \textit{infra}.

39. 5 \textit{Wigmore} \S 1397 \textit{et. seq.} (3rd ed. 1940), and cases cited.

40. State v. McO’Blenis, 24 Mo. 402 (1857) (Testimony from a preliminary hearing, where the witness had subsequently died, held admissible under Common Law, the sole requirements being: (1) a showing that the witness was dead; (2) the presence of the defendant at the time of the taking of the testimony; (3) opportunity by the defendant to cross-examine); State v. Houser, 26 Mo. 431 (1858) (Held that although at common law testimony from a preliminary hearing was admissible if the witness had died, it was not admissible if the witness was merely without the jurisdiction. The court refused the admission of testimony taken from a witness who had recognized to appear, but had disappeared and could not be found); State v. Harp, 320 Mo. 1, 6 S.W. 2d 562 (1929) (The witness was without the state, beyond the reach of process. In expressly overruling State v. Houser \textit{supra}, the court said: “To all intents and purposes his [witness’s] presence at the trial was as unattainable as if he were dead. The appellant was confronted with the witness at the former trial and cross-examined him. The testimony was admitted); State v. Bradford, 324 Mo. 695, 24 S.W. 2d 993 (1930) (Followed State v. Harp, \textit{supra}, but excluded the testimony on the grounds that: (1) at the preliminary hearing the magistrate did not recognize the witness as he might have done; (2) no showing that effort was made to procure the attendance of the witness; (3) no explanation for witness’s failure to attend other then the “bare fact that he resided in Yarbo, Arkansas, almost a mile from the Missouri State
II. Witnesses Without the State

Missouri now has no effective means of obtaining a material witness from without the state at any stage in the proceedings. Whether the witness in the first instance is without the state or whether he has forfeited his recognizance and left the state, the prosecution is in a helpless position. The National Conference of Commissioners on Uniform State Laws, recognizing the need of some method of compelling out-of-state witnesses to attend proceedings within another state, adopted the “Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases” in 1931. In 1936 the provisions of the act were made applicable to grand jury proceedings, and in the title of the act “Criminal Proceedings” was substituted for “Criminal Cases.” Missouri, with its two largest cities located on the east and west boundaries of the state, would be particularly susceptible to witnesses leaving the state to avoid testifying. The Uniform Act has been adopted in some form in forty-one states and Puerto Rico.

In 1948 S.B. 43, 64th General Assembly, which was similar to the Uniform Act, was passed by both houses but was vetoed by Governor Donnelly. In the 66th General Assembly, S.B. 186, which incorporates the Uniform Act, was passed by the Senate, but died in the House.

Lines:
1. State v. Pierson, 337 Mo. 475, 485, 85 S.W. 2d 48, 53 (1935) (“From an early day, we have held that the constitutional right to confrontation is not denied where a witness is dead at the time of trial and the testimony of such witness, given and duly preserved at a former hearing in the same case, at which the defendant was present and was accorded the right to cross-examine, is read to the jury.”).
2. State v. Pagels, 82 Mo. 300, 4 S.W. 931 (1887) (“The right to compulsory process for witnesses does not and cannot extend to non-resident witnesses.”); State ex rel. Suter v. Wilder, 196 Mo. 418, 95 S.W. 396 (1906) (Court held that subpoenas served without the state were without “force” or “vitality”).
3. 9 U. L. A. 37. This act will hereinafter be referred to as the Uniform Act.
4. The following states, in addition to Missouri, remain without any provision for securing witnesses from without the state: Alabama, Georgia, Illinois, Iowa, Kentucky, and Michigan.
6. A comparison of S.B. 43 (64th General Assembly) and S.B. 186 (66th General Assembly) shows the following differences: (1) S.B. 43 provided that a material witness could be obtained from without a state only if he were a material witness in a felony case. S.B. 186 and the Uniform Act, provides that a request can be made for a person as a witness if “there is a criminal prosecution pending” in a court of record, or in “a grand jury investigation [that] has commenced or is about to commence.” (2) S.B. 43 provided for the payment of five cents a mile to the witness, while S.B. 186 and the Uniform Act provides for the payment of ten cents per mile. (3) S.B. 43 provided that where the judge of the requesting state recommended that the witness be taken into immediate custody, “such witness shall be entitled, . . . to offer to enter into a recognizance sufficient in amount and as to sureties conditioned that the witness will appear at the time and place designated . . . and if, in the opinion and discretion of the [judge where witness is], the recognizance so offered be adequate and sufficient, . . . he [judge] may approve and take such recognizance . . . ” S.B. 186 and the Uniform Act have no provision for a recognizance. (4) S.B. 43 outlined in more detail how the witness was to be paid, and specifically stated that if the witness was summoned on behalf...
S.B. 186 provides: (1) that a judge of a court of record of a state which has reciprocal legislation, may certify that a certain person within Missouri is a material witness in a criminal prosecution or grand jury proceeding, and upon presentation of such certificate to "any judge of a court of record in the county in which such person is, "the court shall fix a time for a hearing, and shall order the person to appear." (2) If at the hearing the court determines that the witness is "material and necessary," that there would be no undue hardship upon the witness, and that all states through which the witness must pass would give him protection from arrest and from service of civil and criminal process, then upon being tendered the sum of ten cents per mile and five dollars per day, the witness shall be directed to attend the proceeding without the state. (3) Upon request of the judge of the foreign state that the witness be taken into "immediate custody," notification of a hearing may be waived, and the judge in Missouri may direct that the witness be brought immediately before the court for a hearing; upon satisfaction "of the desirability" of such immediate custody, the Missouri judge may order the witness to be delivered "to the officer of the requesting state." The tender of ten cents per mile and five dollars per day applies in this provision also. (4) Upon refusal "to attend and testify as directed in the summons," the witness may be treated as any person who "disobeys a summons" of the court of the State of Missouri. (5) Judges of courts of records of Missouri desiring a person from without the state as a material witness, may use the procedure outlined above to secure such witness, providing the witness is within a state which has similar legislation. (6) If a witness enters this state but refuses "to attend and testify as directed in the summons," he may be treated as any witness who "disobeys a summons issued from a court of record in this state."

An act similar to S.B. 186 would insure Missouri the means of obtaining key out-of-state witnesses who might be necessary for the successful prosecution of a defendant. Although some restraint on the liberty of those persons who are forced to comply with the statute is self evident, the act seems to be grounded on the theory that it is the duty of every man to give testimony, and that state boundaries should be no bar to such a duty. However some question has arisen as to the validity of the act on constitutional grounds, and Governor Donnelly's veto message strongly questioned the constitutionality of S.B. 43. Specifically, Governor Donnelly objected on the basis: (1) that orders and judgments of a foreign court have no validity in a sister state; (2) that there is a denial of due process of law when no provision is made for notification of a hearing in case the immediate custody of the witness is desired, especially since the act made express provision for notification of a hearing, and for assurance of freedom from arrest and civil process when

of the defendant, the defendant was to tender the proper amount, but if the defendant was acquitted, he was to be reimbursed.

46. In Annex I, Questionnaire, To the Report of the Criminal Law Revision Committee, The Missouri Senate, question 23(c), the following question was posed: "Extradition of witnesses in criminal cases?" The tabulated answers are: Judges: 15 for, 1 against; Bar Associations and Schools: 3 for, 7 against; Prosecuting Attorneys: 31 for, 5 against. See note 26 supra.
in the foreign state, in situations where the immediate custody of the witness is not requested.

Not many courts have passed on the validity of the act. In re Cooper and Commonwealth of Massachusetts v. Kaluss are two cases upholding the validity, while People of New York v. Parker, and In re People of New York, Matter of Commonwealth of Pennsylvania are cases denying the constitutionality of the act. However, People of N.Y. v. Parker, supra, was decided on the narrow issue of the title being defective.

The leading case of Commonwealth of Massachusetts v. Kaluss, supra, which upheld the validity of a New York Act upon which the Uniform Act was based, expressly overruled Matter of Commonwealth of Pennsylvania, supra, and clearly discussed the pertinent constitutional issues involved. Regarding the contention that the act did not afford the witness due process, the court in Commonwealth of Massachusetts v. Kaluss supra, stated at page 716:

"... the proposed witness is afforded more protection in the way of due process than is a witness summoned to testify within the state for he must be given notice, and an opportunity to be heard before a subpoena can be issued, and in addition is assured of ample indemnity for expenses, and immunity from the service of process while in the foreign state. This would seem to be due process of law in every real sense."

The dissenting opinion contended there was an attempt at due process in form only. In the Klaus case, however, the "immediate custody provision" of the Uniform Act was not involved. It may be seriously questioned whether the taking of a resident witness into immediate custody, without notice, upon the request of a foreign jurisdiction, is reasonable within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution. However, there is still the requirement for a hearing, and the Missouri judge must be satisfied as "to the desirability of such custody and delivery." Furthermore, although the same safeguards are not expressly provided for as when there is a "normal" request (such as there should be no hardship on the witness, and he shall have immunity from process within the state he is to attend), perhaps it may be presumed that the judge will condition the immediate turning over of the witness to the requesting state upon the same circumstances as when witness is not to be immediately turned over to such state. If this be true then it would seem that there would be sufficient safeguards to comply with due process.

47. See note 44 supra.
48. 127 N. J. 312, 22 A. 2d 532 (1941).
49. 145 App. Div. 798, 130 N.Y. Supp. 713 (1st Dep't. 1911).
50. 16 N. J. Misc. 411, 1 A. 2d 54 (1936).
51. 103 Leg. Intell. 1055 (Ct. of Quarter Sessions, County of Phila. Pa. 1940).
53. Governor Donnelly objected vigorously in his veto message to the "immediate custody" provision, stating at page 2070-2076 of the Senate Journal, note 44, supra: "... the provision is neither made for notice of hearing nor for issuance of summons. The witness is thereby denied the right of notice of a hearing which may result in the removal from the state of a citizen to undergo the hazards of any eventuality that might occur in his absence in the foreign state."

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However, to avoid any doubt on this point, the legislature should spell out the details, and make it clear that the same safeguards, except notice, are to be applicable in the “immediate custody” cases as in those cases where simply a request is made for a witness. The concept of “notice” is incompatible with “immediate custody.” It is pertinent to point out that no similar provision was found for procuring the “immediate” attendance of witnesses at local proceedings as discussed above.

Regarding the objection that there is an abridgement of the privileges and immunities in violation of the Fourteenth Amendment of the United States Constitution, the court in Commonwealth of Massachusetts v. Klauss, supra, disposed of this contention by pointing out that the privileges and immunities clause only prohibits a state from discriminating between a person who is not a citizen within a state, and a person who is a citizen of the state. The provisions of the Uniform Act apply to all persons whether citizens or not, with the only requisites being that the person be within the state and that he be desired by a reciprocating state in a criminal proceeding as a material witness.

It may be argued that reciprocal legislation as provided by the Uniform Act is in effect an “agreement or compact with another State,” in violation of Article I, section 10 of the United States Constitution. However, in 1934 a federal statute was enacted which gave states permission to enter into agreements “for cooperative effort and material assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies . . .” Hence even if the Uniform Act were to be considered a compact or agreement, it, nevertheless, would seem to be valid under the federal statute.

It was the opinion of at least one writer that the most difficult aspect of the act was that State 1 is compelling a witness of State 1 to do an act in State 2. However, the same writer went on to say that there is a “tendency to adopt the view that when a court obtains valid jurisdiction over any person, that jurisdiction exists for all purposes and includes the power to order an act done beyond the state’s borders.” This theory has the support of other writers on the subject.

Thus, although there may be some doubt as to the validity of the act, careful analysis shows that most of the questions may be resolved in favor of the constitutionality of the Uniform Act. Therefore, perhaps the more desirable and

54. This section provides in part: “No state shall enter into any treaty, alliance or confederation; . . . No state shall, without the consent of Congress . . . entering into any agreement or compact with another state, . . .”

55. 48 STAT. 909, c. 406, § 1, 4 U.S.C.A. 111 (1934) provides: “The consent of Congress is given to any two or more States to enter into agreement or compacts for cooperative effort and material assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, just or otherwise, as they may deem desirable for making effective such agreements and compacts.”


57. Id. at page 722.

58. WALSH, EQUITY § 18, pp. 79-80 (1930); Notes, 10 GEO. WASH. L. REV. 345 (1941), 19 N. C. L. REV. 391 (1941). See Salton Sea Cases, 172 Fed. 792 (9th Cir. 1909).
sensible thing to do would be to enact legislation similar to S.B. 186, and wait for the supreme court to decide some of the tenuous questions regarding the validity of the act, especially since forty-two jurisdictions have now enacted this measure, apparently believing that it is constitutional.59

III. CONCLUSION

An analysis of the provisions available in Missouri and a comparison with the procedure available in some other jurisdictions has shown that there is a need for the strengthening of the material witness law in Missouri. Undoubtedly, the most important need is a law which will enable Missouri to obtain out-of-state witnesses. The statutes and rules seem to adequately insure, by the use of bail bonds, the attendance of the witness once he has appeared, although there is perhaps a need for the combining and the weeding out of some sections to get a more logical and understandable procedure. In addition there should be an integration of the present statutes with the new rules to avoid confusion which is now likely to result. There should be some protection offered to the witness, however, who is unable to obtain bond.60 This should be in the form of allowing the taking of a deposition which should be admissible at the trial, but only when it appears that the witness is bona fide unavailable. It is possible that the rules adequately cover this phase of the problem. The subpoena power should be used, and if the witness leaves the state, use of the Uniform Act should first be made


60. N. Y. CODE CRIM. PROCED. § 618-b provides: “Whenever a judge of a court of record in this State is satisfied, by proof on oath, that a person residing or being in this state is a necessary and material witness for the people in a criminal action or proceeding pending in any of the courts of this state, he may . . . order such person to enter into a written undertaking. . . .” People v. Doe, 261 App. Div. 501, 26 N.Y.S. 2d 458 (1st Dep’t 1941) (“The requisite facts [as stated in the above section] must be present before an individual may be held in bond. . . . In the absence of such, the fixing of bail or the alternative imprisonment are without warrant in law.”). People ex. rel. Ditchick v. Sheriff of Kings County, 171 Misc. 248, 12 N.Y.S. 2d 341 (1939), aff’d, 256 App. Div. 1081, 12 N.Y.S. 2d 232 (2nd Dep’t. 1939). (Witness under § 618-b held on $50,000 bail. Held: Bail not excessive. At p. 252: “The bail herein must be substantial to avoid the farce of having some interested individuals supply the funds and to effect the relator’s release knowing that the money would be forfeited, but hoping in return for the investment, the prosecution would be hampered, if not defeated, by his absence from the trial.” The sufficient safeguards for the witness are: (1) a hearing; (2) satisfaction on part of the court by proof on oath that the witness possessed information and that he would not appear; (3) Writ of habeas corpus.) Ex parte Prall, 208 P. 2d 960 (Okla. 1949) (Under Oklahoma statutes, OKLA. STAT. ANN. §§ 270-275 (1937), a material witness may be compelled to enter into a recognizance for a reasonable amount for his appearance at the trial. The witness was a transient, unemployed, hitchhiker and no permanent address. Bail of $3,000 was fixed in connection with the crime of sodomy. The court said at page 960: “Under such circumstances, this court felt that the undertaking to require the attendance of a witness at the preliminary examination should be large enough so that sureties would see that the witness would appear at the preliminary examination.”)
before the testimony contained in the deposition should be allowed. Finally the rigid provision of allowing only a one hundred dollar recognizance where a writ of attachment has been issued within the terms of Section 491.170 should be changed to allow the magistrate or sheriff more discretion in setting the sum.

It should be remembered that "a witness is often an unfortunate person. He has to make a troublesome journey, is kept wasting his time in unpleasant places, can be cross-examined to tears," and is often paid a small sum for expenses. Therefore, in the administration of the witness laws, care should be taken not to abuse the witness. Some of the considerations in fixing the amount of bail of a material witness, which perhaps can be applied generally, were expressed as follows in the recent case of People ex. rel. Richards v. Warden of City Prison:

"...the seriousness of the crime under investigation, the character of the relator (witness), his relationship to those against whom he may be called to testify, the possibility of flight to avoid giving testimony, and the difficulty in procuring relator's return to the state if he should leave the state. . . ."

With the strengthening of the laws along the lines suggested, together with a careful administration of those laws, it is submitted that there will be a more effective administration of criminal justice for all concerned.

BERNARD SILVERMAN

THE RYLANDS v. FLETCHER DOCTRINE AND ITS STANDING IN MISSOURI

The decision in the English case of Rylands v. Fletcher and the doctrine it set forth has probably received as much discussion as any other English rule of law. It seems proper, therefore, first to set forth exactly what was announced in that case.

Rylands v. Fletcher involved a defendant mill-owner who employed competent engineers and contractors to build a large water reservoir upon lands which he held under a lease. The reservoir was constructed directly over an abandoned mine shaft, which, when the reservoir became filled with water, collapsed and caused the water to flow into connecting mines, located beneath the adjoining property, of which the plaintiff was the lessee. In holding the defendant liable for the damage, in the Exchequer Chamber, Mr. Justice Blackburn wrote this rule:

"The person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all damage which is the natural consequence of its escape."

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2. L.R. 1 Exch. 265 (1865).
Lord Cairns, writing the affirming decision in the House of Lords,\(^3\) qualified the above rule to some extent. He dealt with the question as to what extent \textit{prima facie} actionable things done may be justified because done by the defendant in the course of putting his land to "natural" use, as contrasted with what he called "non-natural" use. Thus the opinion of Lord Cairns seems to deal with the question of social and economic expedience, whereas Mr. Justice Blackburn dealt purely with a question of law.

These judges used as authority for their decisions the analogy to earlier cases concerning animals and noxious odors. In their use of this analogy, a new conception of liability without fault came into being.

Almost immediately limitations to the doctrine arose, and it was held that liability without fault would not be imposed where the escape was due to an act of God,\(^4\) or \textit{vis major}.\(^5\) Later it was decided that, if the substance was brought on the premises for the "common benefit" of the parties concerned;\(^6\) for the use of the plaintiff;\(^7\) or required by law or incidents of tenure,\(^8\) the doctrine would not apply to hold the defendant liable.

Also it should be observed that in England today the doctrine is no longer limited to the escape of substances brought on the land by the defendant, nor to cases that involve adjacent landowners. It has been extended to situations where the plaintiff holds a license in the site of injury, such as a water main or electric cables.\(^9\)

The present day conception of the rule in England is perhaps best stated as an "excessive use of some private right (whereby) a person has exposed his neighbor's property or person to danger."\(^{10}\) Professor Bohlen observes\(^{11}\) that the rule as it is now stated "does not impose exceptional obligations upon owners of real property, but is itself an instance of the general principle that every excessive use of a private right which in its nature threatens harm to others, who are themselves in the enjoyment of their own independent rights, is a nuisance or cognate thereto."

The majority of jurisdictions in the United States had at least two analogies upon which to base the doctrine of \textit{Rylands v. Fletcher}. In the "blasting cases" the courts generally held that if a substance was cast upon plaintiff's land as a direct result of the defendant's intentional acts, then the defendant was liable in trespass, regardless of the degree of care used by him.\(^{12}\) The nuisance cases

\begin{itemize}
\item[4.] Nichols v. Marsland, L.R. 10 Exch. 255 (1875), where an unprecedented flood caused defendant's ornamental ponds to overflow.
\item[5.] Lambert v. Corporation of Lawestoft, 1 K.B. 590 (1901), where gnawing rats broke defendant's tanks.
\item[6.] Anderson v. Oppenheimer, L.R. 5 Q.B.D. 602 (1880).
\item[7.] Blake v. Woof, 2 Q.B. 426 (1898).
\item[8.] Box v. Jubb, L.R. 4 Exch. 76 (1879).
\item[11.] Bohlen, \textit{Torts} 344, 414 (1926).
\item[12.] Scott v. Buy, 3 Md. 431 (1853); Hay v. Cohoes Co., 2 N.Y. 159 (1849).
\end{itemize}
were treated in much the same manner, and the defendant was held liable irrespective of the lack of negligence on his part. In spite of these analogies, the Rylands v. Fletcher doctrine at first met with vigorous opposition in the United States. The case was rejected almost immediately in New Hampshire, New York and New Jersey. These cases repudiated the doctrine, either expressly or by implication, mainly on the grounds that it would impose a liability upon growing industry which would tend to impede its progress. Dangerous enterprises, involving a high degree of risk to others, were clearly indispensable to the industrial and commercial development of a new country, and it was considered that the interests of those in the vicinity of such enterprises must give way to them, and that too great a burden must not be placed upon them.

For these reasons the doctrine of Rylands v. Fletcher was rejected, at least in name, in the majority of American jurisdictions. However, it should be noted, that many of the courts which have rejected the doctrine by name repeatedly have imposed strict liability for nuisances, which were called "nuisances" only because the activity was a highly dangerous one. Under this disguise Rylands v. Fletcher has received more recognition than has generally been admitted or realized by the courts.

It seems that in recent years there has been a tendency to recognize and accept the doctrine. This is evidenced by the Restatement of Torts approving the doctrine in the altered form of providing absolute liability for damage caused by ultrahazardous activities. It would seem that opposition to the doctrine is now based to a great extent on adherence to the earlier cases. The reasons for disapproval of absolute liability set forth in the earlier cases, i.e., the fear of retarding industrial development, have to a great extent been eliminated. Our society has now reached a more mature stage in technical development and it seems the desirability of protecting the adjoining owner now outweighs the fear of retardation of growth and development. In order to obtain order and symmetry in the law, it would seem satisfactory to recognize the ultra-hazardous doctrine set out in the Restatement of Torts.

15. Prosser, Torts 452 (1941).
17. Section 519. "One who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."
18. Ibid.
then cease to use the common law actions of trespass and nuisance in situations which do not always include their traditional elements.

MISSOURI CASES

A. Liability when Damage is Caused by Concussion or by Rocks Being Blown Onto Plaintiff’s Property

Missouri decisions have generally held in the blasting cases that a defendant is liable, irrespective of negligence. The paramount principle involved is that one may not so use his own property as to injure the property of another. Even though the defendant exercised the utmost care, it was he, nevertheless, who set in motion the agency which caused the damage and he, not the plaintiff, who did nothing, should be liable therefor.

In arriving at liability irrespective of negligence, the decisions use various terms in explaining their outcome. The most common explanation is the common law doctrine of nuisance. Other times the courts feel the situation fits the common law action of trespass. Then there are a few cases that do base the liability on neither nuisance nor trespass, but rather talk in terms much like those used in Rylands v. Fletcher. However, the courts never in express terms follow that case. This last view is clearly stated in Schaefer v. Frazier-Davis Constr. Co., supra, where, in indicating liability of the defendant, the court said: “Blasting is not under all circumstances to be regarded as a nuisance per se. This was a lawful work which one may lawfully do providing he avoids injuring persons or property and defendant must pay damages for all these injuries regardless of the degree of care exercised by him.”

Chronological development has been from the use of nuisance and trespass to the more recent view that there is liability irrespective of negligence in such cases. This is not based on any particular common law action but simply is justified because of the extremely hazardous nature of the activity.

Since the courts so loosely interchange the terms trespass, nuisance, and extremely hazardous in these cases, there is generally no differentiation between damages caused by concussion from the blasting and the damage caused by rocks thrown upon the land by the blast. In both instances there is liability irrespec-

tive of negligence. In the first instance, because of the inherent right of the neighboring landowner, and in the second the presence of a physical trespass that is immediate and direct, and the issue of negligence being foreign in an action of trespass.

B. Liability for Injury to Persons by Blasting

Besides the liability without fault discussed above as to property damage in the case of blasting, it is the general view in Missouri that where one discharges blasts on his own land and thereby throws rock, earth, or debris on the premises of his neighbor then the liability also extends to personal injuries sustained by such adjoining landowner, or anyone lawfully upon his premises. The rule extends also to injuries suffered by persons lawfully traveling upon a public highway.

Again the courts vary with the circumstances as to applying nuisance or trespass and also at times the decisions take a view much like that set forth in the Restatement of Torts—applying absolute liability because of the hazardous nature of the activity. Carson v. Blodgett Constr. Co. clearly illustrates this view: "It seems to be well established that the use of high explosives in blasting, especially in a populous neighborhood or near a public highway, is so fraught with danger that the person using same for that purpose is held liable for injury done thereby to either the person or property of another, without proof of negligence." This again indicates a trend of applying an ultrahazardous doctrine rather than using trespass or nuisance.

C. Absolute Liability for Damage or Injury From Explosion of Stored Explosives

This classification deals generally with storing of such explosives as powder, dynamite, and nitroglycerin and not with storage of such substances as gasoline, oils or gas, which are usually regarded as combustibles rather than explosives. In Missouri it has been held that the storage of explosives in large quantities and in proximity to houses, and in buildings in general, so that injury to either persons or property is likely to result, renders the person storing them absolutely liable for all damages caused by any such explosion, and negligence is not a relevant issue. The grounds for this liability are usually that the act of storing constituted a public or private nuisance. These nuisances, however, are based on such grounds as: extremely hazardous circumstances; storing unnatural substances on the


27. Sections 519-520.


http://scholarship.law.missouri.edu/mlr/vol18/iss1/8
land; and due to the activity's ultra-hazardous character. This again indicates the use of an absolute liability doctrine under the name of common law nuisance. This illustrates the courts' desire to apply such a doctrine and it also illustrates the reluctance to set up such a doctrine as a separate rule apart from and in addition to the common law actions of nuisance and trespass.

D. Liability Imposed on a Defendant for Having Combustibles on His Land That Cause Damage to the Plaintiff

It seems that in Missouri generally a defendant is only held on a negligence theory for having combustibles on his land that cause harm to plaintiff on his land. This does not seem too logical when one views the decision above on explosives, but nevertheless the courts seem to find some significant distinction between the two. It would appear that many combustibles are just as dangerous as dynamite and nitroglycerine and are of an equally explosive nature. There are some decisions that have recognized this fact, and the courts have many times gotten around the general requirement of negligence by calling the situation a nuisance. These decisions seem to use nuisance in the traditional sense and to find this nuisance the courts demand that there be a continuous and habitual handling of the combustibles in a negligent manner. When this nuisance is established then it does away with the requirement of negligence as to the immediate situation that resulted in injury to a plaintiff. This thought was clearly set out in Green v. Spinning, in which the court said: “A distinction has been made between acts lawful in themselves, done by one upon his premises, which may result in injury to another if not properly done or guarded, and those which in the nature of things must so result in injury; in the first case the person could be liable for actual negligence, while in the latter he would be liable for all consequences of his acts, whether guilty of negligence or not. The one can only become a nuisance by reason of the negligent manner in which it is performed, while the other is a nuisance per se.”

The first situation mentioned is that given to combustibles, whereas the second is that generally given to explosives that are used in populated areas. This distinction must be kept in mind as the cases are viewed, for at times the court will call the keeping of combustibles a nuisance, and the explanation for this is the continuous negligent manner in which they have been handled. Missouri courts have generally repudiated Rylands v. Fletcher and refused to follow it in

33. Shelley v. Ozark Pipe Line Corp., 327 Mo. 238, 37 S.W. 2d 518 (1931); Green v. Spinning, 48 S.W. 2d 51 (Mo. App. 1932); Combs v. Standard Oil of Indiana, 296 S.W. 817 (Mo. App. 1927); St. Marys Mill Co. v. Illinois Oil Co., 254 S.W. 735 (Mo. App. 1923).
34. Buchholz v. Standard Oil, 211 Mo. App. 397, 244 S.W. 973 (1922).
36. Supra, note 33.
this situation,37 but they arrive at the same result when traditional nuisance will apply.

There is another line of cases which may appropriately be included under this section, although they should be segregated from the above line of cases. These are the gas pipe line cases that generally concern municipal utilities. These cases can be considered as analogous to the Rylands situation if the easement where the pipes are laid can be considered the gas company's land. The analogy seems close enough to justify pointing out the thought followed in these cases. Almost every such case in Missouri follows a strict negligence theory38 and does not bring in nuisance even when the negligent operation is continuous and abiding. This result may be justifiable, however, when one considers the possible results to a utility company if they were held absolutely liable for all their pipe lines.

E. Liability When a Dam Backs Water Off of Dam Owner's Land Onto Another's Land

As a general statement it may be said that the Missouri courts have not accepted or applied the Rylands v. Fletcher theory in this situation of water backed onto another's land, but it should be added that they arrive at the same result by applying the action of nuisance39 or trespass.40 Thus the courts again fall back on the common law actions to accomplish the same result that would be obtained by calling the backed up water an unnatural gathering that has escaped to plaintiff's land. It is not surprising that this is the result arrived at because of the reluctance in accepting outright the Rylands v. Fletcher theory and in this case such a theory is not at all necessary to obtain liability without negligence. The physical encroachment of water upon another's land can easily be fitted into the action of trespass or nuisance. The development in the cases mentioned shows a tendency to use trespass more frequently than nuisance as grounds for this liability and this would seem to be the most desirable and logical way of handling this particular situation since it does have the elements of a common law trespass.

F. Liability of Owners of Dams When Damage Is Caused by the Dam Bursting; by Overflow or Seepage of Water, Including Seepage From Reservoirs

As to the problem of damage caused by the bursting of a dam, there seems to be very little litigation. Evidently this is because the factual situation seldom

40. Kennedy v. Union Electric, 221 S.W. 2d 758 (Mo. App. 1949), discussed in 15 Mo. L. Rev. 166 (1950); Grace v. Union Electric Co., 239 Mo. App. 1210, 200 S.W. 2d 364 (1947); Reed v. Cullor, 32 S.W. 2d 296 (Mo. App. 1930); Schalk v. Inter-River Drainage Dist., 226 S.W. 277 (Mo. App. 1921); McGhay v. Woolston, 162 S.W. 292 (Mo. App. 1914); Brill v. Missouri, K. & T. Ry., 144 S.W. 174 (Mo. App. 1912).
arises. Missouri, however, has taken a clear stand on this problem in the case of Murphey v. Gillum and this case has stood as authority on this question. In this case there was an action for damages to plaintiff's land caused by water escaping from defendant's pond. The defendant was held liable only if there was negligence shown in the building of the embankment forming the pond. The decision went further than this, however, and stated that a defendant would not be liable for the bursting of his dam, unless the bursting was caused by defendant's negligence. This case specifically repudiated the doctrine of Rylands v. Fletcher in this situation and declared firmly that negligence must be shown.

As the above case sets up the negligence requirement for bursting dams, also it sets up the requirement of negligence for liability as to seepage of water. This has been followed generally in water seepage cases including water pipes, reservoirs and ponds, and basement excavations. The water pipe cases take the general view that water in pipes is not an unnatural gathering of a dangerous agent and thus distinguish them from the Rylands v. Fletcher doctrine, leaving no necessity of stating definitely whether the doctrine would or would not be followed. The pond and reservoir cases, however, generally point out that Rylands v. Fletcher will not be followed, and there must be a showing of negligence in the building or maintenance of the pond or reservoir.

CONCLUSION

As has been emphasized in the discussion above, Missouri generally does not follow the doctrine set forth in Rylands v. Fletcher. Many times this doctrine is not necessary to apply liability without negligence for the factual situations will often contain the elements of trespass or nuisance. There are other times, however, when the courts have felt it desirable to apply strict liability, yet the true elements of common law trespass or nuisance were not present. This is when the word "trespass" or "nuisance" is used in a manner which is contrary to normal historical usage. It would seem that if the courts feel that liability without fault is the most desirable end in these cases then, for the sake of symmetry, understandability and a fair application of strict liability, a rule such as set forth in Rylands v. Fletcher and reiterated in the Restatement of Torts should be recognized. This would prevent the undesirable overuse of trespass and nuisance and at the same time would provide a clear cut rule as to what actions would make a person liable without a showing of negligence. This is assuming, of course, a highly controversial question—is absolute liability now desirable in such cases?

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41. 73 Mo. App. 487 (1898).