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The state of mind of a party is often an important element in determining his guilt, his liability, or the effectiveness of his transfers or other acts affecting his property. Since problems concerning state of mind pervade the great majority of the branches of the law and cut across nearly all of them, the field is of tremendous scope—much too great for detailed examination in one article. Nevertheless there is a relatively small number of principles running through the cases dealing with the problem. This article will attempt to discuss the main principles concerning the legal effect of different states of mind and will include a brief study of specific applications of these principles to a few fields of the law of torts, including slander and libel, malicious prosecution, fraud and deceit and the question of liability for punitive damages, and will also consider state of mind as an element in fraudulent conveyances.

This discussion will be confined, however, to normal states of mind and will not include states of mind created by insanity or other mental incapacity, or the effect of duress upon an otherwise normal mind.

Although illustrative criminal cases will be referred to, no detailed examination will be made of state of mind as affecting criminal responsibility, where state of mind is usually specifically involved; not because it is not an important area but because it is a specialized field of more limited application than the great body of civil cases. In the field of taxation also, while illustrative cases will be referred to, no attempt will be made to make a detailed study of the application of states of mind to tax liability.

I. Definition of Terms

The words "state of mind" have been used to describe all types of normal mental states wherever significant in the law. The words which designate these different states of mind vary with different fields of the law. In the law of torts a word in very common use is "malice"; the law of fraud and deceit uses the word "scienter"; in the law of fraudulent conveyances the statute speaks of "intent to hinder, delay or defraud creditors." In the criminal law the courts speak of "criminal intent," which covers various types of general or specific intent required to constitute the particular crime. In the field of taxation, several cases of specific intent are referred to as a basis of tax liability, for example, contemplation of death in the case of inter vivos

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gifts. In fact there is a tendency on the part of the courts to examine transactions to determine whether the true intention of the parties is to do what they appear to do formally, and whether the tax consequences are different.

Many decisions use the words "malice," "intent," "purpose," and "motive" without defining their exact meaning; this gives rise to much of the difficulty in reconciling cases. True conflicts among the cases are not too common if the real meaning of the courts in the use of the words chosen is analyzed and understood. In this field, as indeed in every field of speech and writing, the exact meaning of words necessarily varies with the context. As the late Mr. Justice Holmes said in the case of *Towne v. Eisner*,

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.[1]

It will be particularly helpful to consider the meaning of the words "intent," "purpose" and "motive." First and most important is the word "intent." Associated and sometimes confused with this word are the words "purpose" and "motive." The three words mean different things, although "purpose" and "motive" frequently blend into each other and are sometimes hard to distinguish. Intent means simply the volition or willingness to do an act. The only essential element of an intentional doing of an act is that the doer do it knowingly or willingly. Purpose, however, is the result sought, while motive is the subjective reason for doing the act.[2] To take a simple example, *A*, after learning that *B* has been attentive to *A*'s wife, meets *B* on the street, walks up to him and strikes him in the jaw with his fist, knocking him down. The blow was intentional; he intended to hit him. His purpose was to cause him pain, humiliation and injury. His motive was revenge.

In considering the legal consequences of these three states of mind, the important rule in the field of intentional torts is that ordinarily motive or purpose is not essential—only intent. The intentional doing of a wrongful act without legal justification or excuse is actionable although done without either bad motive or purpose to injure. That is the principal rule of tort liability so far as concerns state of mind, and is the rule in Missouri.[3]

This does not mean, of course, that evidence of motive or purpose, or lack of evil motive or evil purpose, is not admissible. Such evidence will always be relevant if punitive damages are sought and will usu-

1. 245 U.S. 418, 425 (1918).
2. 52 AM. JUR., *Torts* § 5, at 363 (1944).
3. McDonald v. R. L. Polk & Co., 346 Mo. 615, 142 S.W.2d 635 (1940); Boehm v. Western Leather Clothing Co., 161 S.W.2d 710 (Mo. App. 1942).

ally be relevant for the jury to consider on the merits, although lack of evidence of evil motive or purpose will not take the case from the jury.

The converse of this proposition is also true, namely that a lawful act is not made actionable by reason of motive or intent to injure. This rule was established by the leading case of *Allen v. Flood.*[4] In that case forty boilermakers, members of the Boilermakers Union, were employed in repairing a ship at their employer's dock. They objected to the employment of two shipwrights who were engaged by the employer in repairing the woodwork of the same ship. The boilermakers discovered that these shipwrights had been employed by another firm in doing iron work on another ship. Allen, the business agent of the boilermakers, induced the employer to discharge the shipwrights by threatening a strike of the boilermakers. Flood and Taylor, the two shipwrights, brought suit against Allen for maliciously, wrongfully and with intent to injure the plaintiffs inducing the employer to discharge them and to refuse to re-employ them. The court held that since it appeared that the plaintiffs were employed subject to discharge at the will of the employer, no actionable wrong had been done them and that the coercion was not actionable whatever might be the motive of the defendant, and that the plaintiffs could not recover, notwithstanding the jury's verdict.

Another example of the same rule is the erection of a spite fence by a landowner upon his own land. This has generally been held not to be actionable regardless of the motive behind its erection.[5]

So also absolute privilege in slander and libel gives immunity from liability no matter how evil the motive. For example, allegations in a pleading which have any relevancy to the case are absolutely privileged and no liability is incurred by the plaintiff regardless of the untruth of the allegations or the motive of the pleader.[6] This for the obvious reason that there is an overriding public policy of the law that parties to a law suit must be free of liability in respect of allegations in the pleadings.

There are, however, a few cases where it has been held that acts otherwise not unlawful are made actionable by a bad motive. One of these rare cases, against the weight of authority, is *Flaherty v. Moran,*[7] in which an injunction was granted to remove a fence erected by a landowner on his own property where it served no useful purpose but only satisfied the malicious ill-will of the owner against his neighbor.

4. [1898] A.C. 1.
5. Letts v. Kessler, 54 Ohio St. 73, 42 N.E. 765 (1896).
6. Laun v. Union Electric Co., 350 Mo. 572, 166 S.W.2d 1065 (1942).
7. 81 Mich. 52, 45 N.W. 381 (1890).

It is the rule that emotional disturbance or mental anguish alone is not actionable when not accompanied by physical contact or injury;[8] yet it is also well established in cases involving ejection of passengers from railroad trains, that abusive and insulting language when used in connection with the otherwise lawful conduct of the conductor or brakeman will render the railroad liable even in the absence of physical acts.[9] Even in these cases, however, the malice and ill-will must be evidenced by verbal acts.

The foregoing definitions of intent, purpose and motive are not always—or even often—followed by the courts. The word "intent" is quite commonly used in the sense of purpose, as we have defined it. It is common for the courts to speak of "intent to defraud" or "intent to injure," meaning thereby not only that the act was voluntary but that the purpose was also bad. The Missouri statute avoiding fraudulent conveyances speaks of an "intent to hinder, delay or defraud creditors."[10] In the criminal law the word "intent" is commonly used in the sense in which we have used "purpose"; for example, intent to kill, or intent to steal. However, in the civil cases involving intentional torts and fraudulent conveyances, when confronted with absence of evil purpose or ill-will, the courts say that the absence of an intent to injure or an intent to defraud is no excuse since every person is deemed to intend the consequences of his own voluntary act. What they actually mean is that if the act is intentional, the evil purpose is not essential.

Another famous word in the law of torts is "malice," which is used with so many different meanings that confusion results unless its various uses are understood. The word came from France with the Norman Conquest and is derived from the mediaeval Latin *malitia,* which in turn came from the Latin adjective *malus,* meaning bad or evil, and it means, in plain English, malevolence and ill-will. No one is in doubt as to its common meaning, but confusion comes from the various meanings the courts have given it. The trouble has been that "malice" is said to be an essential element of a number of torts such as slander and libel and malicious prosecution. However, cases have arisen and continue to arise in which the defendant has been guilty of no actual ill-will at all and yet for reasons of legal policy the courts have held him liable. But instead of re-defining the elements of the cause of action in such cases so as not to require malice, the courts have kept the old definition of the tort and have either given a different meaning to malice, or have conclusively presumed malice. Courts

8. See PROSSER, TORTS § 37, at 180 (2d ed. 1955).

9. Boling v. St. Louis & S.F.R.R., 189 Mo. 219, 88 S.W. 35 (1905); Smith v. Atchison T. & S.F. Ry., 122 Mo. App. 85, 97 S.W. 1007 (1906).

10. MO. REV. STAT. § 428.020 (1949).

are very reluctant to change the elements of a tort. It seems to be more attractive to the judicial mind to change the meaning of the word with the result that malice need no longer really be malicious; today it usually means no more than intent—the intentional doing of a wrongful act without just cause or legal excuse, and that is the law in Missouri.[11]

However, the courts have endeavored from time to time to re-define malice in order to describe its various meanings. Malice is said to be either actual or implied, *i.e.*, malice in fact or malice in law. Implied or legal malice is a presumption from other facts; for example, the publication of false and defamatory words which are libelous per se[12] creates a conclusive presumption of malice.[13]

The phrase "actual" adds but little to the word "malice" since it must include intent, but need not include motive or evil purpose. The phrase "express malice" is sometimes used as requiring motive or purpose to injure. It has become necessary to have some way of expressing malice in its original and true sense, so the courts have rephrased it by preceding it with the adjective "express."

The confusion in the cases as to the meaning of the word "malice" is set out in the pithy opinion of the late Judge Goode, former dean of the Washington University School of Law, in the case of *Farley v. Evening Chronicle Publishing Co.*,[14] a libel suit involving mistaken identity. He writes in the opinion:

> The theory of defense at this point opens into a field of controversy as to how far the intention of the publisher of an alleged libel to injure the particular plaintiff is material to the latter's recovery, if in fact the publication was false and defamatory. This inquiry extends into a wider field, and one fruitful in judicial disagreements regarding the necessity and influence of malice as an element of libel. The cases present subtle and elusive phases of reasoning on this subject, and are so conflicting that the law of libel has been denounced as vague, fluctuating, and incomprehensible. . . . Likely its uncertainty is due

11. Peak v. Taubman, 251 Mo. 390, 158 S.W. 656 (1913).

12. As used in the law of defamation, "per se" ordinarily has two meanings. If the words on their face defame the plaintiff, they are defamatory "per se," and the plaintiff need not plead an inducement, innuendo and colloquium. Words are also said to be defamatory "per se" in those cases in which actual damage to the plaintiff is conclusively presumed and plaintiff is relieved of the burden of proving special damages.

At common law, and in a majority of jurisdictions still, defamation "per se" in the latter sense given above was applicable only to slander, since damages were conclusively presumed in all libel cases. See PROSSER, TORTS § 93 (2d ed. 1955). But in Missouri and a few other jurisdictions the two meanings have been confused. One of the results of this confusion is that plaintiff now must prove special damages even in case of a libel unless the words would have been slander "per se" (in the second sense given above) at common law. See *id.* §§ 92, 93 at 582, 588; text supported by notes 24—27 *infra*.

13. *Ex parte* Nelson, 251 Mo. 63, 157 S.W. 794 (1913).

14. 113 Mo. App. 216, 87 S.W. 565 (1905).

> to the retention by the courts of the doctrine that malice is essential to a libel, more than to any other tort. The word "malice" has been declared by an eminent jurist rarely to have any meaning in law, except a misleading one. Justice Stephen, as quoted in Newell, Slander & Libel (2d Ed.) p. 317. Another judge has deplored the use of the word, and the maintenance of the doctrine that malice is essential in cases like this . . . because malice, though always insisted on in theory, is dispensed with in every comprehensible sense. Only legal malice is exacted, and on analysis this sinks into a myth or fiction, for so much malice as is necessary to afford compensation for actual damage is inferred from the fact that a false writing was published concerning the plaintiff, although in truth the publisher felt no ill will, and believed he was telling the truth. This result eliminates malice from actions for libel, as a practical factor, save as a reason for awarding more than compensative damages or overcoming the defense of privileged communication. A libel is a tort, and, generally speaking, neither the intention with which a tort-feasor acted, nor the state of his feelings toward the person injured or mankind at large, lessens his responsibility for injuries actually caused by his wrongful act. He must make recompense, although he was free from moral delinquency. Any false and defamatory publication which is not privileged gives rise to a case for damages sustained from it. This is true of libel, notwithstanding the formula so often reiterated, that malice is the gist of the action. The essential facts are the falsity of the charge, and its publication and libelous nature. If true, no degree of malice in the publisher will make it libel, nor, if false, will rectitude of purpose exonerate him.[15]

These various meanings of the word malice as used by the courts will be illustrated in the cases discussed under slander and libel, malicious prosecution, and fraud and deceit.

II. Proof of State of Mind Generally

To taste the real flavor of the law on state of mind requires us to nibble at some of the cases involving proof of mental states. The layman naturally wonders how a state of mind can ever be proven unless the party charged has talked too much. Fortunately, however, it is frequently easier to tell a man's mind by what he does than by what he says. "By their deeds ye shall know them." This is a fruitful field for circumstantial evidence, and it is surprising how often the circumstances bring conviction. Even a straw will show in which direction the wind is blowing.

Of course declarations of the party, oral or written, are admissible to show his intent and purpose unless self-serving. The case of *Townsend v. Schaden*[16] is an excellent illustration of this rule. An action

15. *Id.* at 226-27, 87 S.W. at 569.

16. 275 Mo. 227, 204 S.W. 1076 (1918).

was brought against a decedent's estate to recover the value of certain bonds claimed to have been given the plaintiff by defendant's intestate. It seems during his life the intestate delivered certain bonds to his sister, the plaintiff; he later got them back and had them in his possession when he died, and the question was whether delivery of the bonds to the plaintiff was with the intention of making a gift to her. The court admitted in evidence letters from the deceased to his sister and diary entries in his own hand indicating that the nature of the transaction was that of gift. Afterwards, before his death, he wrote certain other letters indicating that he had not given his sister the bonds, but these letters were excluded as self-serving. The court held that the declarations or the admissions of a donor as to his intention are admissible to support an alleged gift but not to impeach his gift.

A party may testify in his own behalf as to his good-will and lack of ill-will, where malice is an essential element, and the testimony is material. Thus in *Van Sickles v. Brown*,[17] a malicious prosecution suit, the court held that the defendant could testify that he acted in good faith and had no ill feelings toward the plaintiff. A party to a suit may always testify as to the intent with which he did an act when it is material to the issues to determine what his intention was.

It will be noted that the court in the *Van Sickles* case used the word "intent" in the sense in which we have used the words "purpose" and "motive," viz., absence of evil purpose or motive. However, as we have stated, in cases of this kind, while purpose and motive are material, they are not essential.

In criminal cases the defendant may testify as to his intent where specific criminal intent is an issue; but he may not testify as to a purpose or motive which is not material. This is well illustrated by the case of *State v. Welch*.[18] That was a case of felonious wounding. The defendant had assaulted the prosecuting witness on the street. He had unsuccessfully sought to prove by other witnesses prior improper relations between the victim and the defendant's wife. He took the stand in his own behalf and was permitted to testify that he did not intend to kill the victim, but he was not permitted to testify that when he struck him he intended only to punish him enough so he would let his wife alone. This latter statement related to his purpose, which was immaterial.

It is generally held that state of mind is not the subject of opinion evidence. For example, in the case of *Patrick v. Rice*[19] the trustee in bankruptcy sued to recover certain payments made by the bankrupt within four months of bankruptcy and the question was the defen-

17. 68 Mo. 627 (1878).
18. 311 Mo. 476, 278 S.W. 755 (1925).
19. 98 F.2d 550 (3d Cir. 1938).

dant's knowledge of the bankrupt's insolvency at the time of payment. The court admitted in evidence the fact that several prior checks of the bankrupt's had been dishonored, but the court did not permit the witness to testify that the fact of non-payment of the prior checks should create the belief in the payee's mind that the drawer was insolvent. So also in *Consolidated Gas, Electric Light & Power Co. v. State,*[20] a suit for the wrongful death of a lineman who was electrocuted while working on a power line, the court excluded evidence offered by the defendant that an experienced lineman would or should know the dangers involved in working on a power line.

Another important method of proving a relevant mental state of a party is by showing prior conduct inconsistent with his present contentions. In *Freeman v. Kansas City Public Service Co.,*[21] the Kansas City Court of Appeals had a case of wrongful death as a result of a street car running over the plaintiff's decedent. The court admitted testimony disclosing that the motorman had claimed his constitutional privilege and had refused to testify at the coroner's inquest; that an attorney for the defendant had attended the inquest, had conferred with the motorman and had advised him that it was the custom of the company for an employee to stand on his constitutional rights whenever a death was involved; that the motorman told him he wanted to abide by the custom and it was after this advice by the lawyer that the motorman claimed his constitutional rights. The court said that while the privilege against self-incrimination is absolute and cannot be shown in any proceeding where the motorman is involved, yet under the facts in evidence it appeared that the reason the motorman stood on his constitutional rights was because it was the custom of the defendant to have its employees do so. Standing on one's constitutional rights because the evidence might tend to be incriminating is a matter of personal choice in each case. The evidence showed, however, that the lawyer had explained to the motorman, not his personal privilege, but the custom of the company and that the inference was plain that the custom was for the purpose of suppressing evidence rather than protecting the witness. The advice of counsel given to the motorman was tantamount to a direction by the defendant that the motorman claim his privilege in that case, the court reasoned, and in view of this the testimony became admissible as an admission that the defendant was conscious of being in the wrong and that its cause was unjust.

It is well settled that extrajudicial admissions need not be made in words; they may consist of non-verbal acts of the party.[22] The com-

20. 109 Md. 186, 72 Atl. 651 (1909).
21. 30 S.W.2d 176 (Mo. App. 1930).
22. Reiling v. Russell, 345 Mo. 517, 134 S.W.2d 33 (1939).

monest and frequently the most successful method of proving state of mind is by showing all the circumstances surrounding the transaction, known as circumstantial evidence. The possible situations and varying circumstances are absolutely limitless; the circumstances may be weak, or they may be very strong.

A tax case furnishes an excellent example. In *Majestic Securities Corp. v. Comm'r*[23] the taxpayer had purchased during the depression a number of securities from a certain bank. The purchase price of these securities was the bank's cost, although their market value had severely declined during the depression. Later, the taxpayer sold the securities at their then market value and sought to take as a loss the difference between what it had paid for them and what it received, all in accordance with the letter of the income tax law. However, the controlling stockholders of the taxpayer were substantial stockholders, and members of the family of stockholders, of the bank, although their ownership of the taxpayer was not in the same proportion as their ownership of stock in the bank. It also appeared that securities acquired from other sources during the same period were all purchased at the prevailing market price. The Commissioner determined that the part of the amount paid to the bank above the market price of the securities did not represent cost to the taxpayer but was paid for a purpose other than acquiring them. The proof did not affirmatively show what purpose the stockholders had in paying more than the amount for which the securities could have been purchased on the open market, nor did the proof show that the payment was in fulfillment of any agreements previously made, nor that there was any consideration for the excess. The court held that the Commissioner's determination was correct; when the relation of the taxpayer's stockholders to the bank and their resulting interest in the bank's financial condition were considered it was a reasonable inference that excess payment was for the purpose of improving the condition of the bank and that such excess did not represent a part of the cost.

A number of other cases involving circumstantial proof of state of mind will appear under the various headings below.

III. Slander and Libel

(a) The Requirement of Malice

The established definition of slander and libel is the malicious unprivileged publication of false matter which is either defamatory per se or is shown to be defamatory (per quod).[24] Malice has always been

23. 120 F.2d 12 (8th Cir. 1941).

24. "Per quod" is the phrase used to precede the portion of the declaration alleging special damage in the old common law pleading. Black, Law Dictionary (4th ed. 1951). In this article it is used to designate those cases in which the words are not defamatory "per se" under either definition given in note 12 *supra*.

said to be an essential element of a cause of action for slander or libel.[25] What element of malice is required? As an essential element of recovery, malice in the true sense of ill-will and evil purpose has been substantially eliminated except in the case of qualified privilege, where it is still required in theory—but even there it is often considerably watered down.

In the first place, if the false matter is defamatory per se, malice is conclusively presumed and no proof of it is required.[26] If the matter is shown to be defamatory (per quod), malice is sufficiently shown by the intentional publication since malice in the legal sense is no more than the intentional doing of a wrongful act without just cause or excuse and the jury need not find actual spite or ill-will. This is legal malice.[27]

Where the publication is qualifiedly privileged, we have a strong vestige of the old rule that malice must be shown, and in such cases the courts often refer to express malice or actual malice.[28] Under a plea of qualified privilege it is for the defendant to convince the court that the privilege existed and then the burden shifts to the plaintiff to show actual malice.[29]

But while actual malice is said to be required, it is not necessary that personal ill-will be shown; the wanton disregard of the rights of the party injured is sufficient to constitute malice. It is sufficient if the purpose for which the statement was made was other than the purpose for which the law confers the privilege, or is outside or beyond the limits of the privilege. Moreover, if the defendant was actuated by an improper motive in making the defamatory utterance, he is guilty of actual malice even though he erroneously believed the statement to be true.[30] Furthermore, the actual malice required to overcome the defense of qualified privilege may be inferred from the parties' relationship, from the circumstances attending the publication, from intemperate, reckless or violent language exceeding the limits necessary to accomplish the privileged purpose, and even from the falsity of the statement itself, together with other circumstances.[31] And the court of appeals in *Boehm v. Western Leather & Clothing Co.*,[32] (involving qualified privilege) even approved an instruction that malice does not consist alone of personal spite or ill-will, but exists in law whenever a wrongful act is intentionally done without

25. 53 C.J.S., *Libel & Slander* § 166, at 261 (1948).
26. *Ex parte* Nelson, 251 Mo. 63, 157 S.W. 794 (1934).
27. Sitts v. Daniel, 284 S.W. 857 (Mo. App. 1926); Boyce v. Wheeler, 197 Mo. App. 295, 195 S.W. 84 (1917).
28. Boehm v. Western Leather Clothing Co., 161 S.W.2d 710 (Mo. App. 1942).
29. Gust v. Montgomery Ward & Co., 229 Mo. App. 371, 80 S.W.2d 286 (1935).
30. Boehm v. Western Leather Clothing Co., 161 S.W.2d 710 (Mo. App. 1942).
31. *Ibid.*
32. 161 S.W.2d 710 (Mo. App. 1942).

just cause or excuse, the court stating that this was a correct definition of actual malice. But that is the definition of legal malice.[33]

It has been said that malice is an issue only where the words are defamatory per quod and not per se, where qualified privilege is claimed, where mitigation of damages is sought or where punitive damages are sought. However, except in the case of qualified privilege, express malice is not required, although the lack of it may be shown by the defendant in the above named situations.

The extent to which the cases have departed from the requirement of malice used in any real sense is well illustrated by two types of cases: first, the cases of mistaken identity; and second, the cases of those who assist in a publication without knowledge of the defamation. The rule, particularly in the case of newspapers and other professional publishers, is that if the publication can be reasonably understood to refer to the plaintiff, and is so understood by those receiving the publication, it is immaterial that the defamer did not intend to refer to him but did so either through mistake or perhaps without knowledge of his existence. In *Coats v. News Corp.*,[34] the defendant newspaper publisher published an item concerning one Charles C. Coats who had escaped from jail and in the course of his flight had killed a highway patrolman. Defendant also published Coats' picture. In the course of the article the paper referred to Coats as a former ticket agent who had left a certain company under a shadow because of his handling of funds. As a matter of fact, Charles C. Coats had never been employed by the company as a ticket agent, but the plaintiff, whose name was Willis R. Coats, had been. Upon the mistake being called to the attention of the publishers, they apologized and published a correction stating that the plaintiff was not the same person who had been referred to in the article and had never been in any trouble, but had an excellent reputation at all times. His picture was also published under a headline—"A Clear Record." Nevertheless the plaintiff brought suit for libel. The defendant requested a directed verdict on the theory that the article was unambiguous and clearly identified the person concerning whom it was written by his correct name, photograph and parentage, and that the reference to his being a former ticket agent was insufficient to identify the plaintiff as the person intended. But the court held that if the communication was reasonably understood by those who heard or read it as intending to refer to the plaintiff, it was immaterial that the defamer did not intend to refer to him. This principle is settled in the law of libel; but what has happened to the requirement of malice? There was none toward the plaintiff. We can only say that at least in cases of news-

33. See text supported by note 27 *supra*.
34. 355 Mo. 778, 197 S.W.2d 958 (1946).

papers and professional purveyors of news, malice is no longer required; the definition of malice as the intentional doing of a wrongful act is not conditioned upon the doer intending to do any wrong.

Another example of the disappearance of the requirement of real malice is the case of those who innocently assist in the publication. The principal case on this subject in Missouri is *McDonald v. R. L. Polk & Co.*[35] In that case the defendant furnished to one Nulsen a mailing list of prominent people in St. Louis; in envelopes furnished by Nulsen it enclosed and mailed for him a scurrilous, false and highly defamatory circular concerning the plaintiff. There was only slight evidence in that case that the defendant or any of its agents knew of the contents of the circular,[36] nor was plaintiff's recovery based upon a finding of negligence in failing to ascertain its contents. The supreme court held that all persons who participate in the publication of libelous matter are responsible and approved an instruction that if the jury found the circular was libelous and the defendant published it, they should find for the plaintiff even though they found that the mailing of the circulars was a result of oversight or mistake without any intention or purpose to injure the plaintiff.

The court relied upon the case of *Sorenson v. Wood*,[37] which was a suit for damages against a broadcasting company based on defamatory language concerning the plaintiff, broadcast in a political speech. The defense was that the broadcasting company had no advance knowledge of the contents of the speech. The trial court gave an in-instruction telling the jury that the law of negligence and not of defamation was the basis of liability of the broadcasting company. The Supreme Court of Nebraska reversed and remanded saying that when one reads libelous words before the microphone with the consent of the owner of the station, the user and the owner unite in the publication of the libel in the same manner in which a newspaper publisher and writer unite. There is liability in both cases, notwithstanding due care and honest mistake.

The Missouri Supreme Court in the *McDonald* case discussed the case of *Becker v. Brinkop*.[38] That was a suit for distributing a libelous circular against an opposing candidate for ward committeewoman in St. Louis. In the course of the opinion the court of appeals had said that defendants would be liable only if it appeared that they were aware that the circular was or probably might be libelous. If defendants were wholly ignorant of the contents of the circular and had

35. 346 Mo. 615, 142 S.W.2d 635 (1940).
36. In the companion case of Edwards v. Nulsen, 347 Mo. 1077, 152 S.W.2d 28 (1941), knowledge of the contents of the circular by defendant's agents was shown at the trial.
37. 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098 (1932).
38. 230 Mo. App. 871, 78 S.W.2d 538 (1935).

no reason to suppose it contained libelous matter, they could not be held liable because, the court reasoned, they had not consciously published the libel. The supreme court in the *McDonald* case, without passing on the soundness of the rule requiring conscious publication, stated that it was not pertinent because such a rule should not be applicable to an advertising agency such as the defendant and that the rules applicable to newspapers or broadcasting stations should apply.[39]

The *Restatement of Torts*, section 577, states: "What constitutes publication—Publication of defamatory matter is its communication intentionally *or by a negligent act* to one other than the person defamed." (Emphasis added.) In the opinion of the authors of the *Restatement*, a negligent act in connection with a communication may be the source of liability. This, however, is a departure from the requirement of malice and even that departure does not seem to extend as far as the law of Missouri. Assistance in the publication, even innocently, creates liability—at least in the case of those engaged in the business of publication.

The difficulty of the problems of libel in this modern world of expanded communications is growing. The Federal Communications Commission in 1948 rendered an opinion that the Political Broadcast Section 315 of the Communications Act of 1934—prohibiting censorship by the station—prohibits the refusal to broadcast a speech or part of a speech by a candidate for public office because of its allegedly libelous or slanderous content.[40] This opinion, and the authority of the FCC to render it as a binding interpretation of the law, was denied by Judge Hutcheson, in *Houston Post Co. v. United States*.[41]

(b) Circumstantial Proof of Malice

A few examples of proof of malice by circumstantial evidence will be of interest. In the *Boehm* case the president of defendant company made a statement to a shop committee concerning the plaintiff, calling her a crook and a thief. Plaintiff, an immigrant without much education, had been employed by the defendant for about eight years and was a skilled buttonhole operator. The shop was organized and the employees were represented by shop committees to whom the company was supposed to report any grievances. Plaintiff had two sisters, one of whom was chairman of the shop committee. Plaintiff's mother was a former employee and two years previously had had a claim against

39. Criminal libel is defined as the malicious defamation of a person made public by any printing, writing, etc. MO. REV. STAT. § 559.410 (1949). This section has been held applicable to civil cases also. Hylsky v. Globe-Democrat Pub. Co., 348 Mo. 83, 152 S.W.2d 119 (1941). No opinion is here expressed as to the applicability of the foregoing cases to prosecutions for criminal libel.

40. Port Huron Broadcasting Co. (WHLS), 12 F.C.C. 1069 (1948).

41. 79 F. Supp. 199 (1948).

the company arising out of a disability. After the mother's claim had been made, the defendant's president began to criticize the plaintiff and these disagreements with the plaintiff became worse after her sister was elected chairman of the shop committee. The president charged the sister with trying to run his business and he was overheard to say to a foreman that he would have to bring down the sister and go after some of her relatives. At this time, a question arose whether plaintiff had received excessive amounts of pay from the defendant by false work tickets and the shop committee was called together. In the meantime the defendant had already advertised for buttonhole operators who, at the conclusion of the meeting, were given plaintiff's work. At the meeting defendant's president shouted that the plaintiff was a thief, a crook and accused her of having stolen from him for years. In fact he kept on repeating the statements for half an hour.

All of these circumstances were held to be evidence of actual malice. This is an excellent case on the facts to show the role of circumstantial evidence in proving malice.

Other similar publications by the defendant are admissible except those absolutely privileged. For example, in *McGinnis v. Phillips*,[42] the defendant in the course of a trial of another suit had accused the plaintiff of lying; after the trial he repeated the accusation on the courthouse steps. In a suit for slander, based on the second accusation, plaintiff sought to prove the remarks made in the courtroom, but they were excluded because absolutely privileged.

Other circumstances showing malice include: the fact that the statement was volunteered; acts of the defendant trying to avoid suit; agreements with other newspapers to suppress the fact that suit has been filed; bad feeling between the parties; threats by defendant before and after publication; efforts to get the plaintiff indicted; refusal to retract the statement; sending plaintiff a copy of the publication; and either the defendant's knowledge of the falsity of the statement—in which case the statement is clearly malicious—or that no effort was made to ascertain the truth.

On the other hand, any relevant circumstance may be used to rebut malice, such as a lack of hostility evidenced by giving the entire conversation, or that reliable sources of information were relied upon, or that libelous publications by the plaintiff preceded the one in suit which is an answer to them. The defendant may testify also as to his own feelings, intentions and sources of information.[43]

Even in cases of slander per se, the defendant may testify as to his honest, though mistaken belief in the truth of his statements in miti-

42. 224 Mo. App. 702, 27 S.W.2d 467 (1930).
43. 53 C.J.S., *Libel & Slander* § 213 (1948).

gation of damages. In *Hall v. Adkins*,[44] a landlord charged his farm tenant with theft in removing corn on which the landowner had a lien. Of course the plaintiff could not have been guilty of theft in removing his own corn, but the defendant was permitted to testify in mitigation of damages that he honestly though mistakenly believed it was theft.

(c) Conclusion

The law of malice in slander and libel is in need of restatement by the courts in more modern and realistic language. It is sound law and good policy to hold a newspaper responsible for publishing defamatory matter concerning the wrong man even though the result of a mistake. It is sound to require advertising agencies to find out what is in matter which they undertake to mail for their customers; but it is unrealistic to call the offense libel if malice is the gist of the libel, or even if it is an essential ingredient. It is sound law and good policy to make actionable the publication of false matter which is defamatory per se. But it would help avoid confusion if liability were so stated to be independent of malice rather than saying that malice is an essential element of the tort but is conclusively presumed, since often no actual malice is present.

IV. Malicious Prosecution

This tort has been defined as a previous unsuccessful civil or criminal proceeding prosecuted by the defendant without probable cause and with malice. Malice is said to be the gist of the action,[45] but here again, while malice includes a hostile, angry or vindictive motive, all that is required is an intentional act in the furtherance of the prosecution with knowledge that it is without legal justification. Actual malice is not required.[46]

Where the prosecution is instituted for the purpose of collecting a private debt, it is malicious in the legal sense.[47] Nor is affirmative evidence of either ill-will or an improper purpose essential to the recovery. In Missouri if the prosecution is instituted without probable cause, no other *evidence* of malice is required since malice may be inferred from want of probable cause.[48]

However, there must be a *finding* of malice since both malice and want of probable cause are essential to the recovery. The jury is not

44. 59 Mo. 144 (1875).

45. Ripley v. Bank of Skidmore, 355 Mo. 897, 198 S.W.2d 861 (1947).

46. Pritchett v. Northwestern Mut. Ins. Co., 228 Mo. App. 661, 73 S.W.2d 815 (1934).

47. *Ibid.*

48. Randol v. Kline's Inc., 322 Mo. 746, 18 S.W.2d 500 (1929).

required to find malice merely because it finds want of probable cause.[49]

So while the law in theory requires malice and the instructions to the jury must hypothecate the existence of malice as well as want of probable cause, yet, since evidence of want of probable cause is sufficient for a finding of malice, as a practical matter malice may be found on slight evidence. Of course this is not the same as a conclusive presumption of malice, but no additional affirmative proof of malice is required. Furthermore, want of probable cause may be inferred from an acquittal, and since malice may be inferred from want of probable cause, we have that relatively rare case of an inference upon an inference.[50] Usually the only safe advice that can be given a client who wants to prosecute is to let the prosecuting authorities do it.

In malicious prosecution, as in slander and libel, there are cases of mistaken identity where the defendant has had to pay. In *Jones v. Phillips Petroleum Co.*,[51] the defendant had obtained a judgment against one Clarence L. Jones and garnished the salary of plaintiff, also named Clarence L. Jones. Unfortunately the defendant had made no investigation to make sure plaintiff was the same person against whom the judgment had been rendered, although such an investigation if reasonably pursued might well have disclosed the difference. The court held that under the evidence there was want of probable cause due to proof of failure to make adequate inquiry. The defendant raised the point that there was no evidence at all of malice, since he was merely mistaken as to the identity of the judgment debtor in the garnishment proceedings. But the court held that malice may be inferred by the jury from a sufficient showing of want of probable cause.

The most interesting cases of malicious prosecution are those which deal with evidence. The discharge of the plaintiff or the dismissal of the suit is evidence of malice because it is evidence of want of probable cause. It is not settled whether the discharge of the plaintiff standing alone is sufficient evidence of want of probable cause and thus of malice. Other relevant circumstances are also admissible as evidence of malice, for example, lack of diligence of the defendant in making his investigation, as in the *Jones* case.[52]

Equally interesting are the cases involving evidence to rebut malice. A valid judgment for the plaintiff in the original civil case or of conviction in the criminal case, though subsequently reversed, is con-

49. *Ibid.*

50. Sappington v. Watson, 50 Mo. 83 (1872).

51. 239 Mo. App. 331, 186 S.W.2d 868 (1945).

52. La Chance v. National Pigments & Chemical Co., 104 S.W.2d 693 (Mo. App. 1937).

clusive evidence for the defendant,[53] except that a conviction by a magistrate or a police judge, while it is evidence of probable cause, is not conclusive if the plaintiff is subsequently acquitted on appeal.[54] The fact that the identity of the plaintiff was mistaken by the defendant is evidence rebutting malice, though experience shows that juries are not too inclined to let off defendants merely because they made mistakes. A reasonable belief in the facts as justifying the prosecution is also evidence of want of malice. The commonest form of this evidence is prior consultation with counsel, but it is available only if counsel is given all of the facts before he renders an opinion that prosecution is justified.[55]

It is easily seen from a consideration of these cases and the principles they announce that both motive and purpose are not required if the act is intentional and proves to be wrongful. If bad motive or purpose is present it is important because it makes a verdict for the plaintiff highly probable and aggravates the amount of the recovery, particularly where punitive damages are asked.[56]

V. Action for Damages for Fraud and Deceit

State of mind is also an essential element in an action for damages for fraud and deceit, and the old word used to denote that state of mind is "scienter." Of course the word "scienter" is just a Latin adverb which means knowingly, and is one of the essential elements of the cause of action. Scienter is shown where the false representation has been made knowingly, or without belief in its truth, or recklessly and without care whether it be true or false. The latter two classes are the legal equivalent of actually knowing the falsehood and in fact are really but one, for one who makes a statement careless of whether it be true or false can have no real belief in the truth of his statement.[57]

Again in these cases, however, it is necessary to distinguish between intent and purpose, because if the false statement is made intentionally—that is with knowledge of its falsity—lack of a purpose to cheat the plaintiff is immaterial. An excellent illustration of this principle is the case of *Bank of Atchison County v. Byers*.[58] In that case a certain investment company which owned a large tract of land was indebted in an amount of more than $400,000 secured by a first mortgage. Desiring to refund this mortgage, it arranged

53. Ripley v. Bank of Skidmore, 355 Mo. 897, 198 S.W.2d 861 (1947).
54. Hanser v. Bieber, 271 Mo. 326, 197 S.W. 68 (1917).
55. Richardson v. La Font, 119 S.W.2d 25 (Mo. App. 1938); Sappington v. Watson, 50 Mo. 83 (1872).
56. See § VI *infra*.
57. Derry v. Peek, 14 App. Cas. 337, 374 (1889).
58. 139 Mo. 627, 41 S.W. 325 (1897).

to sell a refunding mortgage bond issue through a broker named Winner, and printed a series of bonds which were represented to be first mortgage debenture bonds on their faces, and a mortgage was executed to secure them. The broker did not pay for the bonds at the time of delivery, but he was to sell the bonds and pay off the first mortgage with the proceeds. He was unable to sell many of the bonds, however, and the original first mortgage remained unreleased. Plaintiff had purchased a number of the bonds, and when the property was foreclosed under the original first mortgage, plaintiff's bonds became worthless. The investment company and Winner became insolvent.

The bank then brought an action for fraud and deceit against the officers of the investment company, based on the false statement that the bonds were first mortgage bonds. Defendants strongly urged that they had in good faith intended to pay off the outstanding first mortgage (which would have made the representation good) and that they did not intend that the purchasers of the bonds should suffer any loss. The court held that since the defendants knew the bonds were not first mortgage bonds at the time they were issued or at the time the plaintiff acquired them, they therefore knew that the statement on the faces of the bonds was false. This was conclusive proof of fraudulent intent (sometimes called scienter). The court also quoted from a New York case[59] holding that if the necessary consequence of a transaction is to defraud another, the transaction is conclusive evidence of fraudulent intent, as defendant must be presumed to have intended the necessary consequences of his own act.

In terms of our present discussion this means it is not necessary to prove that defendant intended the loss which the plaintiff suffered if the loss was the necessary consequence of the falsity of the representations he made; in brief, the *purpose* to cause the loss or even to deceive need not be shown, so long as the defendant *intentionally* made the false statement intending that it be relied on. This is of course thoroughly sound. If the law were otherwise, every cheat might contend that he meant no harm or that he expected the transaction to turn out successfully for the plaintiff.

The converse of these propositions is likewise true, namely, that although the defendant had a fraudulent purpose, that alone is insufficient to impose liability if the other elements of an actionable fraud are absent. For example, a promise to do something in the future is not actionable fraud if it does not include any misrepresen-

59. Babcock v. Eckler, 24 N.Y. 623 (1862).

tation of a present fact, even though the defendant had an intention at the time not to perform the promise.[60]

In fraud cases the field of circumstantial evidence reaches its fullest development. Any statement or act of the party charged throwing any light on the nature of the transaction involved is admissible. For example, in a suit for fraud over the sale of bank stock induced by a false financial statement, evidence of excessive dividends before and the passing of the dividends after the sale, subsequent decline in the market value, and audits made and examined by the defendant while he was unloading the stock, are admissible.[61]

Transactions between the defendant and third parties are admissible if they throw any light on the alleged fraud. For example, in a suit between two brokers for the misrepresentation by the one concerning the amount of commission to be split, correspondence between the owners of the property and the defendant broker is admissible to show a side agreement for a larger commission.[62]

In an action for fraud over the sale of cattle, the reputation of the herd in the neighborhood is admissible.[63] Samples of other matters which may be shown are: the value of the property and the price at which the buyer resold it; similar contracts with others involving the same or similar property, if they throw light on the transaction in suit; the acts of the party charged subsequent to the deal.

One other principle of evidence should be mentioned here. In an action at law for damages where the defendant is in a fiduciary relationship to the plaintiff and owes him a duty to disclose every material fact, scienter of the defendant may be inferred from his failure to make full disclosure.[64]

To summarize: the state of mind of the defendant required in an action for fraud and deceit, commonly called "scienter," is sufficiently shown when it is demonstrated that defendant intentionally made the false statements intending them to be relied upon. That is fraud even though he had no evil purpose or motive. Of course it frequently is shown that defendant intended to cheat the plaintiff—that is, his purpose was to cheat—and if it is, so much better for the plaintiff. Here again intent is the important element, rather than purpose or motive.

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60. Reed v. Cooke, 331 Mo. 507, 55 S.W.2d 275 (1932).
The scope of this article is limited to the legal action of damages for deceit. In some equitable actions scienter is not required. See 3 POMEROY, EQUITY JURISPRUDENCE §§ 885-89 (5th ed. 1941).

61. Morrow v. Franklin, 289 Mo. 549, 233 S.W. 224 (1921).

62. Sawyer v. Walker, 204 Mo. 133, 102 S.W. 544 (1907).

63. Conley v. Kaney, 250 S.W.2d 350 (Mo. 1952).

64. Klika v. Albert Wenzlick Real Estate Co., 150 S.W.2d 18 (Mo. App. 1941).

VI. PUNITIVE DAMAGES

Where punitive damages are asked, the state of mind of defendant is the only issue. The purpose of the award of such damages is to punish the defendant for his wilful, wanton or malicious conduct. The question is, therefore, what is the meaning of the word "malice" as a requirement for punishing the defendant? What must the jury find his state of mind to have been? One might assume that here at last actual malice, ill-will or purpose to injure must be present, but this is not the law. Even though the award of exemplary damages is punitive in purpose, and even though the courts say defendant's act must have been wilful, wanton or malicious, when the Missouri courts define malice for the purpose of punitive damages, they come back to the same definition applied in the case of compensatory damages. All that is required is "legal" malice to justify an award of punitive damages. In the leading case of *Lampert v. Judge & Dolph Drug Co.*,[65] the plaintiff manufactured and sold cigars under the trade-name Flor de Lampert. These cigars had a reputation for quality and their sale was profitable. Plaintiff sold the defendant drug company its cigar to be resold at retail. A clerk substituted inferior cigars in the box bearing plaintiff's trade-mark and sold them as plaintiff's cigars, a violation of the federal revenue laws for which the clerk was convicted. There was no evidence that any officer or employee of the defendant, excepting the guilty clerk, had any knowledge of the fraud. The trial court instructed the jury that if it believed defendant had wilfully and maliciously sold cigars not manufactured by plaintiff from boxes having his trade-mark thereon and awarded plaintiff actual damages in any sum whatever, it might also award such further sum by way of punitive damages as it believed defendant ought to pay. The court also instructed the jury that malice is the wilful and intentional doing of a wrongful act without legal justification or excuse. The jury awarded the plaintiff $1 actual damages and $500 punitive damages. The supreme court affirmed the awards, holding that only legal malice was required as a basis for punitive damages. The court quoted from *McNamara v. St. Louis Transit Co.*[66]

> The average layman would believe that "malicious" means ill will; spite; hostility towards the other party. This is not the legal meaning. Those feelings may or may not be present in the legal meaning of the term. The legal meaning of the term is "the intentional doing of a wrongful act without just cause or excuse."[67]

65. 238 Mo. 409, 141 S.W. 1095 (1911).

66. 182 Mo. 676, 81 S.W. 880 (1904).

67. 238 Mo. at 419, 141 S.W. at 1098; *accord*, Patrick v. Employers Mut. Liab. Ins. Co., 233 Mo. App. 251, 118 S.W.2d 116 (1938).

However, while the courts define the word "malice" in connection with the right to recover punitive damages in the same words in which they define it for the purpose of recovering compensatory damages, they sometimes make one point of difference. The phrase "the intentional doing of a wrongful act without just cause or excuse" is ambiguous. Does it mean merely that the act was done intentionally and proves to be wrongful, or does it mean that the actor, in doing the act, knew that it was wrongful? As we have seen from prior discussion of the law of slander and libel and malicious prosecution, guilty knowledge of the wrongfulness of the act is not required in the case of compensatory damages. However, there is a line of cases in which the courts, while approving instructions to the jury in the same language, have refused to allow punitive damages unless there was evidence that the defendant knew that his act was wrongful.[68] This is sound, because a defendant should not be punished for his act unless he knew it was wrong. There is a modification of the rule where the defendant's conduct so recklessly and wantonly disregards plaintiff's rights that the law will imply the intention.[69]

The courts have encountered difficulty in mistaken identity cases where there is no evidence of actual malice and no evidence of knowledge by the defendant that his act was wrongful, and their treatment of the problem has not been consistent. The case of *Byrne v. News Corp.*,[70] involved a libelous publication where the person alluded to was not named at all; the suit arose out of the publication by the newspaper of a letter to the editor containing the libelous statements made by the other defendant. It was conceded that there was no actual malice on the part of the newspaper although there was evidence tending to show malice on the part of the letterwriter. The court refused the newspaper's requested instruction that if the publication by the newspaper was not actuated by any malice whatever, but made in good faith, believing it to be true, the jury should not find any punitive damages against the newspaper. The court of appeals affirmed the jury's verdict awarding both actual and punitive damages, holding that whatever may be the rule in other jurisdictions, the rule in Missouri is that a jury may award punitive damages based merely on malice implied by law, and it is not required to find actual or express malice.

In *Jones v. Phillips Petroleum Co.* the jury awarded both compensatory and punitive damages. That was the case of mistaken identity

68. McNamara v. St. Louis Transit Co., 182 Mo. 676, 81 S.W. 880 (1904); Hall v. St. Louis-S.F. Ry., 224 Mo. App. 431, 28 S.W.2d 687 (1930); Bean v. Branson, 217 Mo. App. 399, 266 S.W. 743 (1924); Custer v. Kroeger, 209 Mo. App. 450, 240 S.W. 241 (1922).

69. Reel v. Consolidated Inv. Co., 295 Mo. 466, 236 S.W. 43 (1921).

70. 195 Mo. App. 265, 190 S.W. 933 (1916).

of the debtor in a garnishment proceeding. The defendant on appeal contended that there is a difference between the character of malice to be inferred from the want of probable cause (which was the only evidence of malice in the case) and the kind necessary to support a verdict for punitive damages. The court said that there were cases holding that the character of malice that may be inferred from lack of probable cause will support a finding for punitive damages and there were cases to the contrary. The court, however, sustained the verdict on the ground that there was evidence of conduct showing a reckless and wanton disregard of plaintiff's rights, equivalent to actual malice.

In the case of *Coats v. News Corp.*, a case of mistaken identity, the court said that there was no evidence of actual malice and the award of $1 punitive damages showed that the jury found nothing more than legal malice, that it is not necessary to find actual malice to support and award of substantial punitive damages, and that the giving of punitive damages as well as the amount lies wholly within the discretion of the jury. The last statement in the opinion assumes, of course, that there is evidence on which to base punitive damages.

A very interesting case differentiating liability for punitive damages from liability for compensatory damages is the recent case of *Zumwalt v. Utilities Ins. Co.*[71] In that case the plaintiff company had been insured against public liability by the defendant insurance company. The plaintiff had been sued on account of a personal injury arising from an accident covered by defendant's policy. The plaintiff therein had asked for $40,000 damages; the policy limit was $10,000. While this first suit was pending, negotiations for settlement were carried on between counsel for the injured plaintiff and the insurance company, during which it was suggested that the suit could be settled within the policy limits if the Zumwalt Company would contribute to the settlement, but the Zumwalt Company refused to do this. The first trial of the personal injury case resulted in a mistrial and the second in a hung jury. The third trial resulted in a verdict for plaintiff of $15,000, and the Zumwalt Company had to pay $5,000 with interest. After reviewing cases on the liability of an insurance carrier under these circumstances, the supreme court held that the basis of liability of the insurance company for refusing to settle a claim within the limits of a policy is not negligence but bad faith. Bad faith, being a state of mind, is provable by circumstantial evidence as well as by direct evidence, and consists of the intentional disregard of the financial interest of the insured in the hope of escaping responsibility imposed on it by the policy. The court further said

71. 360 Mo. 362, 228 S.W.2d 750 (1950).

that there was evidence from which the jury could conclude that the reason defendant did not settle the personal injury suit was that under no circumstances would it be liable for more than $5,000 (it had reinsured half the liability) and it could gamble on getting a favorable verdict rather than making a settlement within the limits of the policy. The court held such action was not good faith and that the trial court properly over-ruled defendant's motion for a directed verdict.

The trial court had, however, refused instructions authorizing punitive damages, and the supreme court affirmed that refusal, stating that before punitive damages can be awarded there must be evidence to show that the defendant maliciously, wilfully, intentionally or recklessly injured the plaintiff, and that there was no evidence in this case that would warrant such submission. The most that could be said of the evidence, the court stated, was that defendant did not act in good faith in handling the case and looked after its own interests only, while it was bound to sacrifice its interests in favor of those of the insured, but that this was not maliciously, wilfully, intentionally or recklessly inflicting injury upon its insured. The supreme court stated that since this was not a case of negligence, the cases that allow punitive damages in that field are of little value, and then cited *State ex rel. Kurn v. Hughes*,[72] for the proposition that there must be evidence of malicious, wilful, reckless or intentional injury. The *Kurn* case, however, was a negligence case holding that a railroad's failure to maintain a watchman or automatic signals at a grade crossing did not subject it to punitive damages.

The interesting thing about the *Zumwalt* case is that after holding that there was evidence of bad faith, justifying compensatory damages, the court held that there was no evidence of malicious, wilful or intentional injury. Under the definition of malice as the intentional doing of a wrongful act without justification or legal excuse, the court could easily have decided that the bad faith of the insurance company in gambling at the expense of its own insured was malicious. It could even have found malice under that interpretation of the rule requiring that defendant know he was doing a wrongful act. The insurance company and its lawyers certainly knew what they were doing.

In its result the decision was right. It would have been unjust to punish the insurance company for refusing to settle within the policy limits when it took three trials to determine the liability in excess of the policy limits. Courts are seeking to do justice in the cases before them; the difficulty arises when the established rules of law and of

72. 348 Mo. 177, 153 S.W.2d 46 (1941).

decision do not fit the facts of the particular case. The courts, however, often apply verbally the rules previously established but with a changed meaning, although they do not admit the change. The Missouri cases are in confusion as to what, if any, malice is required to authorize the recovery of punitive damages. The courts define malice for this purpose in the same language that they define malice for compensatory damages; one line of cases says, however, that the defendant must have known that he was doing something wrongful. Some cases hold that malice may be inferred from lack of probable cause for purposes of punitive damages as well as actual damages; others say that there must be express malice shown; others require only legal malice.

It is submitted that the courts should and do exercise some discretion in deciding whether or not the defendant should be subjected to punitive damages. It would be better to frankly establish such a rule.

VII. Fraudulent Conveyances

The statutory provisions defining fraudulent conveyances are sections 428.020 and 428.010 of the Missouri Revised Statutes.

> Sec. 428.020 Conveyances to defraud creditors, void.—Every conveyance or assignment in writing, or otherwise, of any estate or interest in lands, or in goods and chattels, or in things in action, or of any rents and profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity issuing out of them, shall be from henceforth deemed and taken, as against said creditors and purchasers, prior and subsequent, to be clearly and utterly void.
>
> Sec. 428.010 Gift in trust for benefit of donor void as to creditors. —Every deed of gift and conveyance of goods and chattels, in trust, to the use of the person so making such deed of gift or conveyance, is declared to be void as against creditors, existing and subsequent, and purchasers.

We have quoted and will refer to section 428.020 first because it is the more important and it requires the existence of a state of mind in the grantor and, in some cases, also in the grantee.

The statute requires the conveyance to have been made or contrived with intent to hinder, delay or defraud creditors or purchasers and makes void all conveyances with such intent. The word used in the statute is "intent." In accordance with the nomenclature which we have suggested in this article for purposes of analysis, this is really purpose. Every competent adult person acts intentionally when

he makes a conveyance, but the statute invalidates only those conveyances which are made with the purpose of hindering, delaying or defrauding creditors or defrauding or deceiving purchasers. In the language of the statute, the intent to hinder, delay or defraud creditors or purchasers is made the gist of the action.

Here again, as to existing creditors, an actual purpose to hinder, delay or defraud is not necessary if that is the necessary result of the conveyance.[73] This is really another example of our main thesis that the important element is intent and not purpose. If the grantor intentionally executes a conveyance which renders him insolvent and does in fact hinder and delay creditors, the fact that such result was not his purpose will not aid the conveyance. The courts sometimes say it is fraudulent in fact in the sense that it has the effect of hindering and delaying creditors. Once more motive and purpose are less important than intent.

The rule is different, however, as to future creditors. Even though the conveyance does result in hindering, delaying or defrauding future creditors, if the grantor is not indebted at the time of the conveyance it must be shown the conveyance was made in contemplation of incurring future debts whose holders would be hindered or defrauded. Here true purpose is required; the purpose to defraud future creditors.[74]

The statute is silent as to whose intent is required. Of course the grantor must have the requisite intent—but what about the grantee? It is well settled that innocent purchasers for value are not subject to the statute.[75] However, conveyances to volunteer purchasers (other than creditors) are void under the statute if the grantee has actual knowledge of the fraud and participates in the fraudulent purpose with intent to assist in it,[76] even though he paid full value.[77] Notice of facts sufficient to put a reasonable man upon inquiry is not sufficient since actual knowledge and participation in the fraudulent purpose are required.[78] However, notice of such facts is evidence from which a jury may find actual knowledge.[79] There is no dispute as to this rule and it has been frequently applied, particularly in cases where grantees were members of the grantor's family. Courts have readily found a purpose of assisting in the fraud even though the

73. McCluer v. White, 338 Mo. 1017, 93 S.W.2d 696 (1936); Snyder v. Free, 114 Mo. 360, 21 S.W. 847 (1893).
74. Stierlin v. Teschemacher, 333 Mo. 1208, 64 S.W.2d 647 (1933); Coleman v. Hagey, 252 Mo. 102, 158 S.W. 829 (1913); Kinealy v. Macklin, 89 Mo. 433, 14 S.W. 507 (1886).
75. Van Raalte v. Harrington, 101 Mo. 602, 14 S.W. 710 (1890).
76. *Ibid.*
77. Barber v. Nunn, 275 Mo. 565, 205 S.W. 14 (1918).
78. Van Raalte v. Harrington, 101 Mo. 602, 14 S.W. 710 (1890).
79. *Ibid.*

grantee gave adequate consideration since, as we shall see, a family relationship along with other circumstances is evidence of fraud not only by the grantor but also by the grantee.

But there is more difficulty in the cases where unrelated third parties with no motive of family relationship put out good, new money for property, or personally assume the liabilities of the grantor in an adequate amount. Has such grantee participated in the fraudulent act? In many such cases the only evidence of his participation is mere knowledge of the fraudulent purpose of the grantor. The cases are conflicting as to whether this is sufficient evidence of participation.[80]

One thing is clear. It is unwise to purchase property—even for its fair value—from an insolvent debtor unless, as we shall see in a moment, the proceeds all go to the payment of his debts. From knowledge of his insolvency the court or jury may infer participation in the fraudulent purpose, even if the purchaser's motive is, let us say, to acquire a home for himself. He is likely to have trouble if the seller is insolvent and he knows it.

In defining this doctrine, however, the courts ran into another well established rule, namely, that an insolvent debtor has the right at common law to prefer one creditor over another. Therefore a creditor taking payment or conveyance of property at a fair price or as security for his claim has a valid assignment at common law, even though he knows other creditors will be defrauded thereby, if he does nothing more than protect himself.[81] Hence if the grantee is a creditor and accepts payment, or if he is unsecured and accepts security for the purpose of protecting his own interest as creditor, his knowledge of the grantor's insolvency will not avoid the payment or the transfer although the grantor intends thereby to hinder or defraud his other creditors, and the acceptance of the transfer helps him do it. This is an exception to the rule that knowledge of or participation in the fraudulent purpose will avoid the transfer. This exception is sound and is another example of the general principle that a lawful act is not actionable by reason of bad motive or purpose. The law thus makes important distinctions between volunteer purchasers and creditors.[82]

What has been said as to the requirement of knowledge on the part of the grantee has no application to voluntary conveyances without

80. See Barber v. Nunn, 275 Mo. 565, 205 S.W. 14 (1918); Farmers' Bank v. Handly, 320 Mo. 754, 9 S.W.2d 880 (1928); Citizens' Bank v. McElvain, 280 Mo. 505, 219 S.W. 75 (1919).

81. Peoples Bank v. Jones, 338 Mo. 1048, 93 S.W.2d 903 (1936).

82. We are not considering here the modification of the common law rule by the Bankruptcy Act which renders voidable transfers within four months of bankruptcy to creditors who have actual knowledge or reason to know that the transferor is insolvent.

valuable consideration. In those cases neither knowledge of, nor participation in, the grantor's fraudulent intent is required of the grantee. The conveyance will be set aside on proof of the grantor's fraud.[83]

Questions of fraudulent purpose or intent are to be determined under the circumstances existing at the time of the conveyance.[84] In *McCluer v. White*[85] it was held that a voluntary conveyance by a mother to her children, not fraudulently made at the time, could not be set aside by reason of her subsequent bankruptcy as a result of the depression. The value of her property was ample at the time she made the conveyance. In *Hartman v. Lauchli*[86] the court held that the trustee in bankruptcy could not recover payments made when the bankrupt owed no debts, in the absence of affirmative proof that he contemplated defrauding future creditors at the time the payments were made. The particular point and the ruling made was that liability for income taxes does not become a debt of the taxpayer until the date the following year when the return is due and that subsequent assessments of deficiencies relate back to that date, but no farther. However, a deed not fraudulent when executed and delivered, may become so by being unrecorded and concealed.[87]

As in other fraud cases, fraudulent purpose can seldom be shown by direct evidence, but it frequently is shown by circumstantial evidence. One of the commonest evidences of fraud is family relationship between grantor and grantee.[88] Other common badges of fraud are: statements of fictitious consideration in the deed; transactions out of the ordinary course of business, such as bulk sales; large credit purchases shortly prior to the conveyance; the amount of the property conveyed in relation to the grantor's total means; the time of the transfer in relation to the bringing of suit or levy of execution; withholding conveyance from the record;[89] false statements to a credit agency;[90] continued possession of land after the date of the deed and predating the deed;[91] and of course failure of the grantee to testify.

On the other hand, circumstances rebutting fraud are: solvency at the time; subsequent payment of debts; adequate security for existing debts; retention of adequate means to pay existing debts;

83. Conrad v. Diehl, 344 Mo. 811, 129 S.W.2d 870 (1939).
84. McCluer v. White, 338 Mo. 1017, 93 S.W.2d 696 (1936); Hartman v. Lauchli, 238 F.2d 881 (8th Cir. 1956).
85. 338 Mo. 1017, 93 S.W.2d 696 (1936).
86. 238 F.2d 881 (8th Cir. 1956).
87. Goldsby v. Johnson, 82 Mo. 602 (1884).
88. Hendrix v. Goldman, 92 S.W.2d 733 (Mo. 1936); Stahlhuth v. Nagle, 229 Mo. 570, 129 S.W. 687 (1910).
89. Castorina v. Herrmann, 340 Mo. 1026, 104 S.W.2d 297 (1937); Hendrix v. Goldman, *supra* note 88; Brown v. Oehler, 192 S.W.2d 515 (Mo. App. 1946).
90. Kramer v. Wilson, 22 Mo. App. 173 (1886).
91. Barber v. Nunn, 275 Mo. 565, 205 S.W. 14 (1918).

reasonableness of the gift; subsequent depreciation in the values of the property;[92] and adequacy of consideration and application of the proceeds to the seller's debts, which is evidence of lack of fraud as well as an absolute defense.[93]

VIII. Conclusion

Consideration of the foregoing propositions and cases leads to the conclusion stated at the outset: that purpose and motive, though frequently important in proving malice, fraud, etc., are not usually essential if intent be present. The intentional doing of the act entails the legal consequences, no matter how innocent the purpose or motive. This terminology is not adhered to by courts or legislators and confusion frequently results therefrom, but the distinctions suggested in this article may be helpful in understanding and bringing order out of the confusion.

92. McCluer v. White, 338 Mo. 1017, 93 S.W.2d 696 (1936).
93. Ryan v. Young, 79 Mo. 30 (1883).

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