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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 some profound interstitial change in the very tissue of the law".—Mr. Justice Holmes, Collected Legal Essays, p. 269.

NOTES ON MISSOURI CASES

THE STATUTE OF FRAUDS IN THE CONFLICT OF LAWS

Occasionally the question of how the statute of frauds affects oral contracts is encountered in the field of Conflict of Laws. The problem is not too easy and the cases are in more or less confusion It is the purpose of this note to consider the cases and to determine, if possible, the present state of authority. Regardless of how the statute may operate upon and affect contracts within its sweep, it was enacted to accomplish one purpose. In the words of the preamble to the original statute, it was passed to prevent "fraudulent Practices", which were "commonly endeavored to be upheld by Perjury and Subornation of Perjury". [1] Parliament, recognizing the fact that judgments were being rendered enforcing contracts, which had not actually been made, upon perjured and false testimony, endeavored to remedy this situation by requiring written evidence of certain kinds of agreements sued upon. Their position, as announced in the statute, is that verbal evidence of the existence of these contracts was likely to be so unreliable that British courts in the future should not listen to it and adjudicate rights founded thereon. This clearly appears to have been the object of the original statute and to be the purpose of all statutes of this nature that may have been enacted since the original legislation in England in other common law jurisdictions.

How do these various statutes operate? Do they merely control the method of proving a contract in court, or do they go further than this and affect the very validity of all oral agreements within their sweep? Further than this, if the statutes purport merely to limit the manner of proving a contract, is it accurate to say that such limitation is only a rule of evidence or procedure and does not affect the validity of the contract itself? In this connection, it should be noted that the original statute used different phraseology in different sections and this is true of the Missouri statute

1. 29 Car. II Cap. 3.

in force today as has, also, always been the case.[2] In one section the provision is that "no action shall be brought"[3] on certain types of verbal agreements, while in another section the enactment is that certain kinds of contracts shall not "be allowed to be good"[4] unless in writing. Does this difference in the wording of the two parts of the statute indicate that the respective sections have adopted different legal machinery or devices to prevent perjury?

The general holding has been that the difference in the language used was due to accident or inadvertence and that each section should receive the same construction. It is then said that verbal agreements within the terms of the act are good but that an alleged obligor or promisor may defeat recovery on such an obligation, if he so desires, by pleading the statute and insisting upon proof of the contract sued upon by an appropriate memorandum.[5] In other words, the position is taken that both sections of the statute merely establish a rule of evidence—a method of proving a perfectly good existing contract, and it is sought to sustain this position by citing the cases which hold that a writing signed by the party to be charged after the verbal agreement has been made meets the requirements of the statute.[6] It is argued that such a writing does not constitute the contract—at the most it is only evidence of that which preexisted and that, therefore, the contract without it must have legally existed before it was given. Upon this line of reasoning, the statute is said to be procedural in its nature only and not to affect the substance of any contract within its terms.

It must be conceded that such interpretation of the statute does esbablish a rule of evidence and in this sense also prescribes a rule of procedure. Wherever such a construction prevails, if there is a statute at the *forum*, no matter how worded, it should, if duly pleaded, defeat recovery upon a verbal contract. As already intimated, the statute enacts that the likelihood of perjury in this type of case is so great that oral evidence must not be heeded. It embodies a prohibition against the admission of this kind of proof, even in cases where the contract sued upon was entirely valid according to the proper law governing its validity. Accordingly, the rule should be that no action should ever be entertained upon an oral contract if the defense of the *forum's* statute of frauds is properly interposed, and there is authority to this effect.[7] Under this theory as to the nature and operation of the statute, a

2. Secs. 2169 and 2170 R. S. '19.

3. Sec. 2169 R. S. '19; 29 Car. II Cap. 3, sec. IV.

4. Sec. 2170 R. S. '19; 29 Car. II Cap. 3, sec. XVII.

5. "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indespensable when it is sought to enforce the contract." Blackburn, L. J., in Maddison v. Alderson (1883) L. R. 8 App. Cas. 467, 488. See, also, *accord*: Baily v. Sweeting (1861) 9 C. B. (N. S.) 843; Townsend v. Hargraves (1875) 118 Mass. 325; Browne, Statute of Frauds (5th Ed.) sec. 115.

The same rule has been adopted in Missouri in construing generally the local statute of frauds. Notwithstanding the language of the statute is that the contract shall not be "*allowed to be good* unless a note or memorandum be made in writing, yet the construction of this language is that the contract itself is not void, but no evidence shall be received in its support, unless in writing." Ellison, J., in Cash v. Clark (1895) 61 Mo. App. 636, 640. The learned Judge cited to sustain this proposition. Moore v. Mountcastle (1875) 61 Mo. 424. That case, however, was not necessarily in point or controlling authority because it construed the other section of the Statute which provided that "no action shall be brought" upon certain prescribed oral agreements.

6. See Bailey v. Sweeting (1861) 9 C. B. (N. S.) 843; Heideman v. Wolfstein (1882) 12 Mo. App. 365; Cash v. Clark (1895) 61 Mo. App. 636; Ridall v. Castner (1919) 202 Mo. App. 584, 209 S. W. 127.

7. Under this reasoning it has been said that both sections of the statute of frauds "prescribe rules of evidence which courts, where the recovery is sought are required to observe." Heaton v. Eldridge (1897) 56 Ohio St. 87, 46 N. E. 638, 639. This statement is somewhat weakened, however, because the statute at the *forum* was "procedural" in form providing that "no action shall be brought.".

See, also, Pope v. Hoopes (1898) 84 Fed. 927, and Rantoul Co. v. Claremount Paper Co. (1912) 196 Fed. 305, where the court lays down the same proposition in construing that section of the statute which provides that oral contracts shall not be "good".

court should not be concerned with the question whether or not there was a statute of frauds in the proper law of the contract,[8] because, even conceding that the agreement was unobjectionable under that law, it could not be proved in an appropriate manner at the *forum* without the aid of written evidence.

Suppose that there is no statute at the *forum*, but there is in the proper law of the contract and the legislation is construed as providing merely a rule of evidence as explained in the last paragraph; under such an interpretation a recovery could be had at the *forum* because the contract would be valid and the *forum* has no policy against proving contracts by oral evidence. The statute in the law which determines the validity of the contract did not invalidate the same. In the words of Jervis, C. J., it "contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing."[9] Under such a line of reasoning the contract in the assumed case would be enforceable at the *forum* and occasionally this position has been taken.[9a]

The writer, however, wonders whether it is accurate to say that the statute of frauds can ever be characterized as being a rule of evidence and nothing more? Suppose that the construction of the statute last stated (*i.e.* that the contract is enforceable unless the alleged obligor insists upon the production of a memorandum by a plea duly interposed) is accepted; does such an interpretation mean that the statute does not go to the substance of an obligee's or plaintiff's rights? It has always seemed to the writer that such a provision, under such an interpretation, must affect the substance of the transaction and actually is operative to cut down a promisee's rights.

This position is taken and suggested because the law governing the validity of the agreement does not give the promisee a perfect remedy; it gives the promisor the privilege, if he so desires, to defeat his promissee's recovery by insisting upon the production of written evidence, which can not be produced. It seems futile and inexact to speak of any plaintiff having a right in a case where the law governing the transaction from which the alleged claim arose afforded no complete remedy. Surely if the law that controls the conduct of parties affords no remedy to enforce a promise (and no remedy can exist if it lies within the power of the promisor to defeat a recovery) the promisor is under no binding legal duty and the promisee has no legal right. Now this is exactly the situation where there is a statute of frauds in the proper law of the contract even though such statute is called a rule of evidence. By that law the alleged contractor can defeat recovery at his election by insisting upon written proof, and because of this power the obligee has no right, which should be recognized anywhere if this power is exercised. It accordingly follows reasonably enough that where there is a statute of frauds in the proper law of the contract, even though it is said to establish a mere rule of evidence, the contract should not be enforced at the *forum* and this should be the rule in spite of the fact that there may be no statute of frauds at the *forum*. If such a contract is enforced under the assumed facts,

But this statement was not necessary to the decision, it being finally held by the Court that the contract in suit was not within the terms of the statute.

8. By "proper law of the contract" is meant that law which determines the validity thereof and the obligations of the parties thereunder. As to what law should govern, the cases are in great confusion and this question is not discussed herein. Some courts have held that the law of the place of the making shall determine these matters (Carnegie v. Morrison (1841) 2 Metc. (Mass.) 381; Scudder v. Union Nat. Bank (1875) 91 U. S. 406, 23 L. Ed. 245). Other courts have held that the law of the place of performance will control (Hall v. Cordell (1891) 142 U. S. 116, 12 Sup Ct. 154, 35 L. Ed. 956; Pritchard v. Norton (1882) 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104). It will be noted that both holdings have been adopted by the same court on different occasions.

9. Leroux v. Brown (1852) 12 C. B. 801, 824.

9a. See 2 Wharton, Conflict of Laws (3d Ed.) 1445; Downer v. Cheesbrough (1869) 36 Conn. 39.

10. "The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing."

the *forum* will in fact be creating a right where the proper law of the transaction denied one. It will be giving a remedy where the law which should have controlled the obligation of the parties denied one.[10]

Sometimes courts have seized upon the difference in the wording of the different sections of the statute, stating that the variation between the phraseology used in the two sections causes each clause to operate differently. Where this notion prevails it is said that the provision that "no action shall be brought" upon a contract unsupported by a written memorandum does not go to the substance of the transaction at all but merely prescribes a rule of evidence, while the statutory stipulation to the effect that an agreement shall not be "good" unless in writing renders verbal agreements entirely invalid and void. The proposition is that different words were used in the separate parts of the statute intentionally and advisedly with the end in view of causing the statute to have a different effect in varying cases.[11]

Under the theory last suggested, if the statute in the proper law of the contract provided that the contract should not be good, no action would lie thereon at any *forum* because the agreement was a nullity and unenforceable. On the other hand, if the statute in the law determining the validity of the contract merely prescribed a rule of evidence, it would not prevent the contract's enforcement at another *forum*, because it merely lays down a rule of procedure indicating how contracts must be proved before the courts of that particular jurisdiction and nowhere else. The question would be what are the statutory provisions at the *forum*? Does the statute there forbid the enforcement of this contract which was perfectly good according to its proper law and was merely unenforceable before the courts of that particular jurisdiction? Courts who have interpreted the statute as last suggested have obviously, in the case where there is a rule of evidence at the *forum*, been compelled to deny recovery on all parol contracts, whether regarded as valid or invalid under their proper law. The law of the *forum* forbids the admission of oral evidence to prove the contract.[12]

Suppose, however, that the contract falls within the section of the *forum's* statute which says that verbal contracts shall not be good and that the agreement is otherwise valid in all respects; should an action on the contract be refused? To be consistent, a recovery under the assumed facts would have to be allowed on the ground that the purpose of the statute at the *forum* is to regulate the formation of contracts entered into within the jurisdiction and, consequently, subject to its regulation. The position taken would be that this part of the statute was passed to prevent people subject to the statute from making oral agreements of the nature described; that this was the sole function of the statute and that it had no effect whatever upon any agreement made elsewhere which of necessity was controlled by the law of some other jurisdiction.[13]

A decision such as that last mentioned seems unsound. As already intimated, the sole purpose of the statute is to prevent possible perjury. No matter what device a jurisdiction may adopt to accomplish this end, the presence of the legislation upon

There can be no doubt, we think, that to the extent that the remedy affects the validity and obligation of a contract it is imported into and becomes an essential part of it, and characterizes it wherever it is the subject matter of litigation. The Illinois statute of frauds became part of the agreement in suit, and the provision that no action should be maintained for damages for the breach of the agreement became as much a part of its character and substance as if specifically incorporated therein." Cochran v. Ward (1892) 5 Ind. App. 89, 94 *et seq*, 29 N. E. 795.

See, also, Miller v. Wilson (1893) 146 Ill. 523, 34, N. E. 1111.

11. Leroux v. Brown (1852) 12 C. B. 801; Houghtaling v. Ball (1855) 20 Mo. 563.

12. Houghtaling v. Ball, *supra*, note 11; Brockman Commission Co. v. Kilbourne (1905) 111 Mo. App. 542; Third National Bank v. Steel (1902) 129 Mich. 434, 88 N. W. 1050.

the statute books shows that oral evidence of the agreement is not favored. It is against the policy of such a state to admit the same. For this reason it is believed that no verbal agreement within the terms of the *forum's* statute should be enforced regardless of the way in which the statute may be worded or may be construed to operate.[14]

James Lewis Parks

PRACTICE—SPECIAL APPEARANCE—WAIVER BY PLEADING OVER

A personal judgment against a defendant over whom the court rendering it has no jurisdiction is void for all purposes.[1] As a general rule jurisdiction over the person must be acquired by consent[2] or actual service[3] of process on the defendant.[4] Lack of jurisdiction over the person of the defendant may be due to various causes. There may have been no service at all. There may have been service in an improper manner.[5] The act of service may have been proper but the original notice or process may have been insufficient.[6] Both the act of service and the notice may have been

13. See Marie v. Garrison (1883) 13 Abbots New Cas. (N. Y.) 210. "But the action is under the sixth section of our statute, which corresponds with the seventeenth section of the English statute. The words of these corresponding sections are different from those of the fourth, in the English, and the fifth section in the Missouri statute. They are, 'that no contract shall be good,' etc. So they leave [room for the?] application for [of?] the rule of law that a contract, valid at the place where made shall be valid everywhere." Houghtaling v. Ball, *supra*, note 11, 20 Mo. l. c. 566.

14. "A contract valid where it is made is valid everywhere, but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum_____But the statute evidently embraces a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without the safeguard. If the policy of Massachusetts makes void an oral contract of this sort made within the state, the same policy forbids that Massachusetts testators should be sued here upon such contract without written evidence, wherever it is made" Holmes, J., in Emery v. Burbank (1895) 163 Mass. 326, 39 N. E. 1026, *et seq.* See, also, Barbour v. Campbell (1917) 101 Kan. 616, 168 P. 879, where the same view is expressed but in construing, however, the other section of the statute. Apparently the writer's suggestion has not met with the approval of the courts.

1. Pennoyer v. Neff (1877) 95 U. S. 714, 733, 24 L. Ed. 565; Harkness v. Hyde (1878) 98 U. S. 476, 478, 25 L. Ed. 237; Wilson v. Seligman (1892) 144 U. S. 41, 46, 12 Sup. Ct. 541, 37 L. Ed. 338.

2. Consent may be expressed by entering a general appearance (see note 9, infra), by appointing an agent on whom process may be served (Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co. (1917) 246 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610), by giving a power of attorney to confess judgment (Van Norman v. Gordon (1899) 172 Mass. 576, 53 N. E. 267), or by accepting or waiving service (Jones v. Merril (1897) 113 Mich. 433, 71 N. W. 838).

3. Certain forms of constructive service are treated as equivalent to actual personal service. Thus, service on a resident of the state by delivery of a copy of the summons to a member of the defendant's family at the defendant's place of abode, etc. See, R. S. Mo., 1919, sec. 1186.

4. If the defendant is a nonresident, service must be made within the state. Pennoyer v. Neff (1877) 95 U. S. 714, 24 L. Ed. 565; Baker v. Eccles & Co. (1917) 242 U. S. 394, 37 Sup. Ct. 152, 61 L. Ed. 386. As to whether personal jurisdiction may be obtained by service upon a resident while without the state, see, Henderson v. Staniford (1870) 105 Mass. 504, 7 Am. Rep. 551; Hurlbut v. Thomas (1887) 55 Conn. 181, 10 Atl. 556; Moss v. Fitch (1908) 212 Mo. 484, 111 S. W. 475; Raher v. Raher (1911) 150 Iowa 511, 129 N. W. 494. In the case of foreign corporations and nonresident motorists, exceptions have been made to the general rule that jurisdiction over the person must be acquired by consent or actual service of process. See, Hinton, "Substituted Service on Nonresidents", 20 Ill. L. Rev. 1.

5. There must be susbtantial compliance with the requirements of law as to the manner of service. Lowman & Co. v. Ballard (1915) 168 N. C. 16, 84 S. E. 21; Sanford v. Edwards (1895) 19 Mont. 56, 47 Pac. 212; Wells v. Wells (1919) 279 Mo. 57, 213 S. W. 830. And as to the time when and place where it is performed. Cummings v. Landes, (1908) 140 Iowa 80. 117 N. W. 22; Madison County Bank v. Suman (1883) 79 Mo. 527. Also as to the person or officer who performs it. Wood v. Ross (1814) 11 Mass. 271. Service may be invalid because made on an improper person. Nat'l Bank of Charlotte v. Wilson (1879) 80 N. C. 200.

6. As where the summons does not designate the time or place for the appearance of the person served. See, State ex rel Rakowsky v. Bates (1926) 286 S. W. 421, (Mo. App.); Rousey v. Stilwagon (1912) 70 W. Va. 570, 74 S. E. 732; Cummings v. Landes (1908) 140 Iowa 80, 117 N. W. 22. The cases are divided as to whether a summons must run in the name

sufficient but the defendant exempt from service.[7] Finally, the affidavit or return of the person or officer making the service may be insufficient.[8] In order to confer jurisdiction over the person, there must be a substantial compliance with the requirements of law as to the process, service and return. Failure to observe such requirements may defeat jurisdiction.

Jurisdiction of the person may be conferred by consent, however, and a general appearance to contest the merits of the action is everywhere regarded as a submission of the person to the jurisdiction of the court.[9] Such an appearance waives all defects and irregularities in the process, service or return.[10] If there is some substantial defect in the process, service or return, the defendant may, of course, refuse to appear for any purpose. If the plaintiff secures a personal judgment against him by default, it can be set aside[11] or defended against at any time when it is sought to be enforced.[12] There are many cases, however, in which it may be doubtful whether the defect is fatal to jurisdiction. In such cases the defendant may be assuming considerable risk in failing to appear and contest the merits of the action. To meet this situation, it is held in most states that the defendant may enter a special appearance for the sole purpose of objecting to the jurisdiction of the court over his person.[13]

of the state. See, Yeager v. Groves (1879) 78 Ky. 278; Doan, King & Co. v. Boley and Moore (1866) 38 Mo. 449. There is also a conflict as to whether a seal and clerk's signature are essential to the validity of a summons. See, Jump v. McClurg (1864) 35 Mo. 193; Austin v. Lamar Fire Ins. Co. (1871) 108 Mass. 338; Sherman v. Hout (1898) 20 Mont. 555, 52 Pac. 558. An improper or insufficient naming of a defendant in service of process is not fatal and unless he takes advantage of the defect by plea, a judgment rendered against him will be valid. State ex rel Zeigenheim v. Burr (1898) 153 Mo. 209, 44 S. W. 1045.

7. The general rule is that where a person is actually present within a territory he may upon proper service of process be subjected to the jurisdiction of the courts of that territory. Beale, "The Jurisdiction of Courts Over Foreigners", 26 Harv. L. Rev. 193, 283 285. But at common law a state does not in civil cases exercise juridiction over a nonresident brought into the state by fraud or the unlawful exercise of force by the plaintiff. Cavanagh v. Manhattan Transit Co. (1905) 133 Fed. 818. See, Byler v. Jones (1883) 79 Mo. 261; Capitol City Bank v. Knox (1871) 47 Mo. 493; Marsh v. Bast (1867) 41 Mo. 493. Most states hold that a witness is immune from service while attending trial in a state other than that of his residence, but Missouri does not recognize such immunity. See, 21 L. Ser. Univ. of Mo. Bull. 35. It is often said in such cases that the court does not have jurisdiction of the person. It is clear that the state does have the power to exercise jurisdiction but it does not do so as a matter of policy. Over some persons within the state, such as a foreign sovereign, or his ambassador, principles of international law, or constitutional provisions, or some treaty, prevent the exercise of jurisdiction.

8. Thomasson v. Mercantile Town Mutual Ins. Co. (1916) 217 Mo. 485, 116 S. W. 1092.

9. A general appearance may be effected in many ways. Brown v. Woody (1877) 64 Mo. 547 (by answering to the merits); Baisley v. Baisley (1893) 113 Mo. 544, 21 S. W. 29 (by applying for a change of venue); Columbia Brewery Co. v. Forgey (1909) 140 Mo. App. 605, 120 S. W. 625 (by agreeing to a continuance); State v. Oliver (1901) 163 Mo. 679, 64 S. W. 128 (by filing motion for security for costs); Cudahy Packing Co. v. Chic. & N. W. Ry. Co. (1921) 287 Mo. 452, 230 S. W. 82 (by appealing from a justice court to a higher court).

10. See note 9, supra, and note 42, infra. In Brown v. Marshall (1912) 241 Mo. 707, 145 S. W. 810, it was held that where a writ is made returnable to no known term of the law, but to some day not the commencement of the term, appearance and pleading will not cure the defect.

11. Some courts have held that by making a motion to set aside or vacate a judgment, the movant appears generally. Pierce v. Hamilton (1913) 55 Colo. 448, 135 Pac. 796. Other courts take the opposite view. Supreme Hive v. Harrington (1907) 227 Ill. 511, 81 N. E. 533. See, Pomeroy v. Botts (1862) 31 Mo. 417; Schnell v. Leland (1870) 45 Mo. 289; Higgins v. Beckwith(1890) 102 Mo. 456, 14 S W. 931. If the defendant in his motion strikes at the case on the merits, it constitutes a general appearance. Meyer v. Ruby Trust Mining & Milling Co. (1905) 192 Mo. 162, 90 S. W. 821; Case v. Smith (1923) 215 Mo. App. 621, 257 S. W. 148; Brown v. British Dominions General Ins. Co., Ltd. (1920) 228 S. W. 883 (Mo. App.); Currey v. Trinity Zinc, etc. Co. (1911) 157 Mo App. 423, 139 S. W. 212.

12. See note 1, supra. See also, McDonald v. Mabee (1917) 243 U. S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608; Riverside, etc., Mills v. Menefee (1915) 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910.

13. It is provided by statute in a few states that an appearance for any purpose, even to object to the jurisdiction of the court over the person, confers jurisdiction. (1925) Rev. Civ. Sts. of Tex., sec. 2048; Hemingway's Ann. Miss. Code, sec 2953. The United States Supreme Court has held that such statutes are constitutional. York v. Texas (1890) 137 U. S. 15, 11 Sup. Ct. 6, 34 L. Ed. 580. But the policy of such statutes has been criticised. See Paxton Blair, "Construc-

If the defendant appears for the sole purpose of objecting to the jurisdiction of the court over his person and the decision of the court is favorable to the defendant, he is not in court or subject to its jurisdiction. But if the defendant's special appearance is overruled, what course should he pursue? It is held that an order overruling a special appearance is not a final judgment and is not appealable.[14] Should the defendant withdraw from the case, submit to a final judgment being entered against him by default, and take the chances, if the appellate court should affirm the ruling of the trial court, of having to pay the plaintiff's full and uncontested demand, or should he except to the ruling of the trial court and contest the case on the merits? If it is clear that the trial court has no jurisdiction over the defendant, he would be safe in withdrawing from the case after his objection to the jurisdiction is overruled. But if the jurisdictional question is a doubtful one, this method would be dangerous. On the other hand, if the defendant contests the case on the merits, after his special appearance has been overruled, can he preserve the jurisdictional question for review?

There is a direct conflict of authority on this question. One line of decisions holds that a defendant who unsuccessfully raises, upon a special appearance, an objection to the jurisdiction of the court over his person, waives such objection by taking steps thereafter to contest the case on the merits.[15] Missouri has followed this rule since an early date.[16] Another line of decisions holds that a defendant does not waive his objection to the jurisdiction of the court over his person by appearing generally and contesting the merits after his objection has been overruled, provided, of course, he properly excepts to the ruling of the court.[17] The authorities are about evenly divided.

Most of the cases follow one rule or the other without discussion. But a few courts offer reasons for their decisions. Those cases holding that contesting the case on the merits after an adverse ruling on the jurisdictional question waives all defects in acquiring jurisdiction of the person proceed on the theory that a contrary rule would give the defendant an unfair advantage over the plaintiff. Thus in the case of *In re Clarke*,[18] the Supreme Court of California, in holding that pleading over and going to trial waives the jurisdictional question, said: "It [the contrary rule] gives the defen-

tive General Appearance and Due Process", 23 Ill. L. Rev. 119. In Southern Pacific Co. v. Denton (1892) 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 943, the court held the Texas doctrine inapplicable to cases begun in the federal courts sitting in Texas, on the ground that the Conformity Act imposed no duty on federal courts to follow state statutes where to do so would "unwisely encumber the administration of law (or) tend to defeat the ends of justice."

14. Case v. Smith (1925) 215 Mo. App. 621, 257 S. W. 148. See also, Peltzer v. Gilbert (1914) 260 Mo. 500, 169 S. W. 257. As to the use of the writ of prohibition, see, McBaine, "The Extraordinary Writ of Prohibition in Missouri", 30 L. Ser. Univ. of Mo. Bull. 3, 31 Id. 3; 32 Id. 3.

15. DeJarnette v. Dreyfus (1900) 166 Ala. 138, 51 So. 932; Remsberg v. Hackney Mfg. Co. (1917) 174 Cal. 799, 164 Pac. 792; Farmer's Life Ins. Co. v. Connor (1927) 82 Colo. 81, 257 Pac. 260; Henry v. Spitler (1914) 67 Fla. 146, 64 So. 745; Franklin Life Ins. Co. v. Hickson (1902) 197 Ill. 117, 64 N. E. 248; Williams v. Seufert Bros. Co. (1920) 96 Or. 163, 188 Pac. 165; McCullough v. Railway Mail Assn. (1909) 225 Pa. 118, 73 Atl. 1007; Rafield v. Atlantic Coast Line R. R. Co. (1901) 86 S. C. 324, 68 S. E. 631; Corbett v. Physician's Casualty Assn. (1908) 135 Wis. 505, 115 N. W. 365; Heard v. Holbrook (1911) 21 N. D. 348, 131 N. W. 251.

16. The Missouri cases are cited in notes 39 and 44, infra.

17. Coyne v. Plume (1916) 90 Conn. 293, 97 Atl. 337; Shearer v. Farmer's Life Ins. Co. (1920) 106 Kan. 574, 189 Pac. 648; State ex rel Lane v. District Court (1915) 51 Mont. 503, 154 Pac. 200; Cheshore Nat. Bank v. Jaynes (1916) 224 Mass. 14, 112 N. E. 500; Gaines v. Warrick (1925) 113 Neb. 235, 202 N. W. 866; In re Smith (1922) 197 N. Y. S. 373, 200 App. Div. 248; Mullen v. Norfolk & C. Canal Co. (1894) 114 N. C. 8, 19 S. E. 106; Ohio Electric Ry. Co. v. United States Express Co. (1922) 105 Ohio St. 331, 137 N. E. 1; Guaranty State Bank v. First Nat. Bank (1927) 127 Okla. 292, 260 Pac. 508; American Electrical Works v. Devaney (1911) 32 R. I. 292, 79 Atl. 678; Fisher v. Crowley (1905) 57 W. Va. 312, 50 S. E. 422; Harkness v. Hyde (1878) 98 U. S. 476, 25 L. Ed. 237.

18. (1899) 125 Cal. 388, 392, 58 Pac. 22.

dant, whose objections to the jurisdiction of the court have been erroneously overruled, an opportunity to go to trial, and if the judgment is favorable to abide by it, while if it is unfavorable he can secure a reversal. The plaintiff has no such advantage."[19] Professor Sunderland, in the most scholarly discussion of this question to be found anywhere,[20] answers this argument by quoting from *Miner v. Francis & Southard*,[21] where the court said:

> "Some of the courts which hold an appearance under such circumstances to be voluntary deem it unfair that the defendant should have the chance of defeating a judgment on the merits by sustaining the jurisdictional point on appeal, while he enjoys the certainty of sustaining the judgment, if favorable to himself. But it often happens that upon the trial of an action, reversible error is committed by the court while plaintiff is proving his case. Must the defendant then be regarded as waiving such error because he proceeds, with the chance of reversal if defeated? It is well to put the responsibility for this condition where it belongs. That the defendant enjoys this advantage is owing to the action of the plaintiff, in persisting in his prosecution of the case after he has been fairly warned by the defendant that he will, at all stages of the action, insist upon his contention that the court had no right to take jurisdiction of his person. Let the plaintiff dismiss and start anew, if he is unwilling that defendant should enjoy this advantage. We are aware that there are a number of cases in which the contrary view is adopted; but we feel that the rule which we establish in this case is more in accord with principle, and more equitable in its spirit, having in view the interests and rights of both plaintiff and defendant in the action."[22]

There are many instances of errors which the prejudiced party does not waive by proceeding to contest the case on the merits. A party who suffers an adverse ruling upon a challenge of a juror for cause does not waive the advantage by proceeding to trial in that court and submitting his case to the objectionable juror. He may accept the judgment if it is favorable, or he may have it reversed if unfavorable.[23] If the trial court commits error in ruling upon objections to evidence, objections to improper argument of counsel[24] or prejudicial remarks of the trial judge,[25] objections to improper examination of a juror on his voir dire,[26] motions for a directed verdict,[27] or requests for instructions[28]—the injured party may rely upon the error to reverse the judgment after he has had the advantage of a trial on the merits. And yet in Missouri and many other states the defendant must not be given this advantage after his objection to the jurisdiction of the court over his person has been overruled.

The principle underlying the cases which hold that there is no waiver seems to be that the appearance to constitute a waiver must be voluntary, and it cannot be said to be voluntary when the defendant does all he can in objecting to the jurisdiction of the court over his person and is compelled to plead or subject himself to a default judgment and risk everything upon the jurisdictional question.[29] To force the de-

19. This view is also well stated in Lowe v. Stringham (1861) 14 Wis. 222. In Sealey v. Cal. Lumber Co. (1890) 19 Or. 94, 97, 24 Pac. 197, Lord, J., said: "The law will not allow him to occupy an ambiguous position to avail himself of its jurisdiction when the judgment is in his favor, and to repudiate it when the result is adverse to him."

20. Sunderland, "Preserving a Special Appearance", 9 Mich. L. Rev. 396.

21. (1894) 3 N. D. 548, 58 N. W. 343.

22. This argument is also well stated in State ex. rel. Lane v. District Court (1915) 51 Mont. 503, 154 Pac. 200.

23. Theobald v. St. Louis Transit Co. (1905) 191 Mo. 395, 90 S. W. 354.

24. Chawkley v. Wabash Ry. Co. (1927) 317 Mo. 782, 297 S. W. 20.

25. Clear v. Van Barclum (1922) 241 S. W. 81 (Mo. App.).

26. Chambers v. Kennedy (1925), 274 S. W. 726 (Mo.).

27. State ex rel Union Biscuit Co. v. Becker et al (1927) 316 Mo. 865, 293 S. W. 783. See also, Berkmeir v. Reller (1927) 296 S. W. 739 (Mo.); Marshall v. Western Envelope Mfg. Co. (1927) 295 S. W. 491. (Mo. App.)

fendant to waive the jurisdictional question by holding that if he does not, he can make no defense on the merits, would seem to deny him real freedom of choice.

Consideration will now be given to the manner in which the attack upon the personal jurisdiction of the court is to be made. At common law objections to the plaintiff's case were made by plea, demurrer or motion.[30] The defendant's plea might be either a dilatory plea or a plea in bar. Dilatory pleas consisted of pleas to the jurisdiction[31] and pleas in abatement.[32] The term "plea in abatement" is often applied, however, to both classes of dilatory pleas. A plea to the jurisdiction of the court over the person had to be taken before the defendant offered any other plea or he would submit himself to the jurisdiction of the court.[33] Pleas to the jurisdiction or in abatement could not be joined with matter in bar.[34] Under the code system of pleading, however, the dilatory pleas of the common law have in general been abolished. Issues formerly raised by such pleas are now raised by demurrer, motion, or answer.[35]

The Missouri statute makes lack of jurisdiction of either person or subject-matter ground for demurrer if the facts showing it appear on the face of the petition.[36] Since ordinarily jurisdiction of the person is not a matter to be alleged in the petition but is obtained by service of process or consent of the defendant, it is unusual for lack of jurisdiction over the person to appear on the face of the petition.[37] There are many Missouri decisions, however, in which it has been said that if such want of jurisdiction does appear on the face of the petition, the question must be raised by demurrer and not by answer.[38] If the defendant does file a demurrer on this ground and it is overruled, he waives the jurisdictional question by pleading over and contesting the case on the merits.[39]

Lack of jurisdiction over the person may appear on the face of the return on the summons, as where the return does not show that there has been a substantial compliance with the requirements of law as to service of process. At common law if any defect in the service or return was apparent from an inspection of the record it

28. Hill v. Johnson (1923) 249 S. W. 138 (Mo. App.).

29. This view is expressed in the following cases: Avery v. Slack (1837) 17 Wend. 85; Fisher v. Crowley (1905) 57 W. Va. 312, 50 S. E. 422; Duke v. Duke (1906) 70 N. J. Eq. 149, 62 Atl. 471; State ex rel Lane v. District Court (1915) 51 Mont. 503; Coyne v. Plume (1916) 90 Conn. 293, 97 Atl. 337.

30. Clark, Code Pleading, 340-341.

31. Pleas to the jurisdiction raised questions as to the jurisdiction of the court over the subject-matter of the suit and over the person of the defendant. Shipman, Common Law Pleading (3rd. Ed. Ballantine) 385.

32. Pleas in abatement raised issues concerning the disability of one of the parties to sue or to be sued, the pendency of another action, misnomer, non-joinder and misjoinder of parties, etc. Shipman, Common Law Pleading, (3rd Ed. Ballantine) 388.

33. Tidd, Practice (8 Ed.) 680; Shipman, Common Law Pleading (3rd. Ed. Ballantine) 383-386. In Greer v. Young, 120 Ill. 184, 11 N. E. 167, it was said: "The rule, as recognized here in repeated decisions, and which is in strict accord with the common law practice, is, that any defect in the writ, its service or return, which is apparent from an inspection of the record, may properly be taken advantage of by motion but where the objection is founded upon extrinsic facts the matter must be pleaded in abatement, so that an issue may be made thereon, and tried, if desired, by a jury, like any other issue of fact."

34. See, Cudahy Packing Co. v. Chic. & N. W. Ry. Co. (1921) 287 Mo. 452, 461, 230 S. W. 82.

35. Clark, Code Pleading, 342, 410. See, Little v. Harrington (1880) 71 Mo. 390; Byler v. Jones (1883) 79 Mo. 261; Hallen v. Smith (1924) 305 Mo. 157, 264 S. W. 665.

36. R. S. Mo. 1919, sec. 1226.

37. See, Hinton's Cases on Code Pleading (2Ed.) 448 note.

38. See, Hendricks v. Holloway (1908) 211 Mo. 536, 111 S. W. 60; Newcomb v. N. Y. C. & H. R. Ry. Co. (1904) 182 Mo. 687, 707, 81 S. W. 1069; Harris v. McQuay (1927) 300 S. W. 305, 307 (Mo. App.); Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. (1909) 137 Mo. App. 308, 317, 118 S. W. 500. In these cases, lack of jurisdiction over the person did not appear on the face of the petition, and the last three involved questions of venue and not of jurisdiction.

In Johnson v. Detrick (1899) 152 Mo. 243, 53 S. W. 891, it was said that if lack of jurisdiction appears on the face of the petition the defendant is not required to demur but may raise the objection by answer. But that case was a partition suit against non-residents and involved a question of venue rather than jurisdiction over the person. See note 50, infra.

39. See, Kingman-St. Louis Implement Co. v.

could properly be taken advantage of by motion.[40] The Missouri statute provides that where any of the matters specified as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer.[41] It is held in Missouri, however, that if the objection is to the insufficiency of the return it must be raised by motion to quash the return and not by answer. If the defendant does not file a motion to quash the return but pleads to the jurisdiction of the court over his person in the same answer in which he makes his defense on the merits he waives the jurisdictional defect.[42] In *Newcomb v. New York Central & Hudson River Ry. Co.*,[43] it was said: "It is true that under our system a plea in abatement is not waived by a plea in bar in the same answer and the defendant must include all his defenses in one answer. But the insufficiency of this return was not a point to be presented by the plea at all; it was out of place in the answer.....If it arises on the face of the return it is only a question of whether the defendant has been properly served, that is met by a motion to quash the return." If the defendant does file a motion to quash the return and it is overruled he must withdraw from the case and risk all on the jurisdictional question or plead over and contest the case on the merits in which event he waives the want of jurisdiction. He cannot preserve the point by including it in his answer.[44] If an objection to the sufficiency of a return must be taken by motion to quash the return, it would seem that if the objection is to the substance of the notice or summons it should be raised by a motion to quash the notice or summons.[45]

Assume that want of jurisdiction over the defendant does not appear on the face of the record but a showing of new facts is necessary to establish it.[46] As stated above, the Missouri statute[47] provides that where any of the matters specified as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer; also, that if the objection is not taken either by demurrer or answer, the defendant is deemed to have waived it, except in two instances not here involved. As to the answer, it is provided that it may contain a denial of the allegations of the petition and a statement of any new matter constituting a defense or counterclaim.[48]

Bantley Bros. Hardware Co. (1909) 137 Mo. App. 308, 317, 118 S. W. 500. But this case deals with venue rather than jurisdiction over the person.

40. Greer v. Young (1887) 120 Ill. 184, 191, 11 N. E. 167.

41. R. S. Mo., 1919, sec. 1230.

42. Thomasson v. Mercantile Town Mutual Ins. Co. (1909) 217 Mo. 485, 116 S. W. 1092; Wicarver v. Mercantile Town Mutual Ins. Co. (1909) 137 Mo. App. 247, 117 S. W. 698. See also, State ex rel Pac. Mutual Life Ins. Co. v. Grimm (1912) 239 Mo. 135, 143 S. W. 483; Jackson v. Weber Implement & Auto Co. (1923) 247 S. W. 468 (Mo. App.); Buddecke v. Garrels (1919) 203 Mo. App. 1, 216 S. W. 811.

43. (1904) 182 Mo. 687, 707-708, 81 S. W. 1069.

44 Newcomb v. N. Y. C. & H. R. Ry. Co. (1904) 182 Mo. 687, 81 S. W. 1069. See also, Kronski v. The Mo. Pac. Ry. Co. (1883) 77 Mo. 362.

45. See, Curfman v. Fidelity & Deposit Co. of Md. (1912) 167 Mo. App. 507, 152 S. W. 126.

46. It is the law in Missouri that the return by a proper officer of personal service cannot be attacked in the proceeding itself, or collaterally, or even by a bill in equity. There is relief in equity when there is fraud upon the part of the plaintiff in inducing the officer to make a false return, but except in such a case the defendant's only recourse is a suit against the sheriff or his bondsmen. Newcomb v. N. Y. C. & H. R. Ry. Co. (1904) 182 Mo. 687, 81 S. W. 1069; Smoot v. Judd (1904) 184 Mo. 508, 83 S. W. 481; Regent Realty Co. v. Armour Packing Co. (1905) 112 Mo. App. 271, 86 S. W. 880. In Miedreich v. Lauenstein (1914) 232 U. S. 236, 34 Sup. Ct. 309, 58 L. Ed. 584, a case in which the defendant was a resident of Missouri, the Court upheld the Missouri rule as not violating the "due process of law" provided for by the Fourteenth Amendment. We have seen that if the return is insufficient, the objection must be raised by motion to quash the return. But if the return is made by the proper officer and is sufficient as to substance, it is difficult to conceive of a case in which the defendant would be permitted to establish lack of jurisdiction by extrinsic evidence.

The cases in which it is said that lack of jurisdiction over the person must be established by evidence outside the record are cases involving venue or exemption from service rather than jurisdiction over the person. For example, a state does not in civil cases exercise jurisdiction over a non-resident brought into the state by fraud. It is often said that the state does not have jurisdiction of such persons. It is more accurate to say that the state has the power to exercise jurisdiction but it does not do so as a matter of policy. See note 7, supra. As to the cases involving matters of venue, see note 50, infra.

47. R. S. Mo., 1919, sec. 1230.

48. R. S. Mo., 1919, sec. 1232.

It follows that when the want of jurisdiction over the person does not appear on the face of the petition or on the return but a showing of new facts is necessary to establish it, the question may be raised by answer.[49] And in such cases, the defedant may plead to the jurisdiction of the court over his person in the same answer in which he makes his defense on the merits; both defenses must be tried and neither is waived by the other.[50]

We have then this result: When the want of jurisdiction over the person is apparent on the face of the record, the defendant cannot preserve his objection, after it is overruled, without withdrawing from the case, abandoning his defense on the merits, and risking everything on the jurisdictional defect. But if the jurisdictional defect is one which is not disclosed by the record it may be raised by answer; and in that answer, any proper defense may be united with the objection to the jurisdiction without waiving the latter. This distinction seems illogical and unjust. These divergent rules have given rise to doubt, confusion, and uncertainty of application, and are not serving a useful purpose.

If a defendant has two defenses, one going to the merits and one to the jurisdiction of the court over his person, he should be permitted to contest the case on both grounds without waiving either. The fact that the want of jurisdiction appears on the face of the record seems immaterial. It is conceded that there is no inconsistency in joining a plea to the merits with a plea to the jurisdiction over the person when such lack of jurisdiction does not appear on the face of the record. And yet it is held in Missouri that when the jurisdictional defect appears on the face of the record, it is inconsistent to permit the defendant to preserve his objection, after it is overruled, without withdrawing from the case. Thus in *Kronski v. The Missouri Pacific Railway Company*,[51] the court said: "The rule to be deduced from the cases is, that there should be no further appearance, in order to secure the benefit of the objection. It [the defendant] could not consistently appear and save exceptions to the jurisdiction and then proceed with the trial of the cause in a court possessing no jurisdiction over the person, when, by the very act of appearing further, the requisite jurisdiction was conferred." But the code system of uniting defenses in abatement and in bar, and trying both, is wholly inconsistent with the rule that a special appearance is waived by pleading over.[52] It would seem that the better rule is that which holds, that a defendant does not waive his objection to the jurisdiction of the court over his person by pleading over and contesting the merits after his objection has been overruled, provided he properly excepts to the ruling of the court.

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49. See cases cited in note 50, infra. Some courts hold that a motion supported by affidavits is a proper alternative remedy. See, Wall v. Chesapeake & Ohio Ry. Co. (1899) 95 Fed. 398. See also, Greer v. Young, note 33, supra.

50. Harris v. McQuay (1928) 300 S. W. 305 (Mo, App.); Roberts v. American Natl. Assurance Co. (1919) 201 Mo. App. 239, 212 S. W. 390; Peak v. International Harvester Co. (1916) 194 Mo. App. 128, 186 S. W. 575; Barnett, Haynes & Barnett v. Colonial Hotel Bldg. Co. (1909) 137 Mo. App. 636, 119 S. W. 471; Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. (1909) 137 Mo. App. 308, 118 S. W. 500.

It will be noticed that these cases deal with questions of venue. Venue concerns the particular district or place where the action must be brought. Stephen on Pleading (Williston's Ed.) 315-327; Scott, Fundamentals of Procedure in Actions at Law, Ch. 1. Jurisdiction over the person concerns the power of a court to render a personal judgment against a defendant and such power must be acquired by proper service of process or consent. See notes 2, 3 and 4, supra. But questions of venue are often treated as questions of jurisdiction over the person. Thus, in Roberts v. American National Assurance Co., supra, the court said: "The lack of jurisdiction is based upon improper *venue* and not upon improper or defective *notice* or summons or the service thereof." (p. 244). See, Clark, Code Pleading, 412, note 93.

51. (1883) 77 Mo. 362, 368.

52. See, Sunderland, "Preserving A Special Appearance", 9 Mich. L. Rev. 396.

NEGLIGENCE—RES IPSA LOQUITUR AND SPECIAL ALLEGATIONS OF NEGLIGENCE. *Stolovey v. Fleming, et al.* [1]

This is an action for personal injuries sustained by plaintiff while endeavoring to board defendants' street car in Kansas City, Missouri. Plaintiff's allegation of defendants' negligence is that "she was thrown and injured by the carelessness and negligence of defendants' operators in charge of said car in starting the car while the plaintiff had one foot upon the step and trying to get thereon as a passenger." From a verdict and judgment for defendants below plaintiff appeals, alleging as error the giving of instruction No. 3 on the burden of proof. Appellant's contention is that the petition is framed upon the *res ipsa loquitur* doctrine, and that the instruction complained of does not make allowance therefor. Respondents insist that plaintiff's allegation of negligence is specific and not general, and that this therefore is not a *res ipsa loquitur* case. The Supreme Court sustains respondents' contention, holding the allegation of negligence to be specific, and that the *res ipsa loquitur* doctrine is not involved. For error in other instructions, however, the judgment is reversed and the cause remanded for a new trial.

The *res ipsa loquitur* doctrine is a rule of evidence which enables a party to establish a prima facie case of negligence without direct proof of the specific act of negligence, the law recognizing that an injury may occur under such circumstances that mere proof of the injury is, prima facie, proof of negligence. In a case where the doctrine is applicable, specific acts of negligence, not having to be proved, need not to be alleged. The doctrine is, in part, at least, a rule of necessity, based upon the consideration that the control of the agency producing the injury is, where the doctrine applies, exlusively vested in the defendant, and that the defendant, therefore, is in exclusive possession of the facts concerning the cause of the accident, and plaintiff cannot know or allege them.

The rule is well established in Missouri that if the plaintiff, in a case where the doctrine of *res ipsa loquitur* would otherwise apply, evinces his knowledge of the cause of the injury by alleging specific acts of negligence on the part of the defendant, he cannot invoke the doctrine, and must recover, if at all, upon and by proof of the specific acts alleged and not otherwise.[2]

1. ((1928) 8 S. W. (2nd) 832. (Mo.)

2. Porter v. St. Joseph, etc. Co., (1925) 311 Mo. 66, 277 S. W. 913; Kuhlman v. Water, etc. Co.,(1924) 307 Mo. 607, 271 S. W. 788; Pate v. Dumbould, (1923) 298 Mo. 435, 250 S. W. 49; Byers v. Essex Inv. Co., (1919) 281 Mo. 375, 219 S. W. 570; Pointer v. Construction Co., (1916) 269 Mo. 104, 189 S. W. 805; Stauffer v. Met. St. Ry. Co., (1912) 243 Mo. 305, 147 S. W. 1032; Price v. Met. St. Ry. Co., (1909) 220 Mo. 435, 119 S. W. 932; MacDonald v. Met. St. Ry. Co., (1908) 219 Mo. 468, 118 S. W. 78; Black v. Met. St. Ry. Co., (1908) 217 Mo. 672, 117 S. W. 1142; Beave v. Transit Co., (1908) 212 Mo. 331, 111 S. W. 52; Roscoe v. Met. St. Ry. Co., (1906) 202 Mo. 576, 101 S. W. 32; Orcutt v, Century Building Co., (1906) 201 Mo. 424, 99 S. W. 1062; McGrath v. Transit Co., (1906) 197 Mo. 97, 94 S. W. 872; Thompson v. Ry. Co., (1925) 274 S. W. 531 (Mo. App.); Scott v. Davis, (1925) 270 S. W. 433 (Mo. App.); Kean v. Piano Co., (1921) 206 Mo. App. 170, 227 S. W. 1091; Hennekes v. Beetz, (1920) 203 Mo. App. 63, 217 S. W. 533; Motsch v. Standard Oil Co., (1920) 223 S. W. 677 (Mo. App.) Boeckmann v. Milling Co., (1917) 199 S. W., 457 (Mo. App.); Mullery v. Telephone Co., (1914) 180 Mo. App. 128, 168 S. W. 213; Israel v. United Ry's. Co., (1913) 172 Mo. App. 656, 155 S. W. 1092; Bobbitt v. Railroad, (1912) 169 Mo. App. 424, 153 S. W. 70; Capehart v. Murta, (1912) 165 Mo. App. 55, 145 S. W. 827; Zachra v. Mfg. Co., (1911) 159 Mo. App. 96, 139 S. W. 518; Miller v. United Rys. Co., (1910) 155 Mo. App. 528, 134 S. W. 1045; Gibler v. Railroad, (1910) 148 Mo. App. 475, 128 S. W. 791; Ingles v. Met. St. Ry. Co., (1910) 145 Mo. App. 241, 129 S. W. 493; Detrich v. Met. St. Ry. Co.. (1909) 143 Mo. App. 176, 127 S. W. 603; Potter v. Met. St. Ry. Co., (1910) 142 Mo. App. 220, 126 S. W. 209; Kaw Feed & Coal Co. v. Railroad, (1908) 129 Mo. App. 498, 107 S. W. 1034; Kennedy v. Met. St. Ry. Co (1907) 128 Mo. App. 297, 107 S. W. 16; Todd v. Missouri Pac. Ry. Co., (1907) 126 Mo. App. 684, 105 S. W. 671; Hamilton v. Met. St. Ry. Co, (1905) 114 Mo. App. 504, 89 S. W. 893.

In Roscoe v. Met. St. Ry. Co., 202 Mo. 576, 587, 101 S. W. 32, *supra*, the court says: "General allegations of negligence are permitted because plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of pre-

This is likewise the rule in a number of other jurisdictions.[3] The weight of authority, however, seems to be to the contrary, the courts in most jurisdictions having taken the position that if the petition otherwise alleges facts sufficient to make the doctrine of *res ipsa loquitur* applicable, the plintiff will not be deprived of the benefit of the doctrine by alleging, in addition, specific acts of negligence.[4] Some of the cases so holding proceed upon the theory that the specific allegations may be disre-

sumptive negligence is indulged. But if plaintiff by his petition is shown to be sufficiently advised of the exact negligent acts causing, or contributing to, his injury, as to plead them specifically,------then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act, and he admits that he does so know it by his petition, then he must prove it, and, if he recovers it must be upon the negligent acts pleaded and not otherwise."

On occasion, however, the rule has been overlooked, disregarded or criticized by the Missouri courts. See Gannon v. Laclede Gas Co. (1898) 145 Mo. 502, 46 S. W. 968, 47 S. W. 907; and Galllagher v. Edison Co., (1897) 72 Mo. App. 576.

In Briscoe v. Met. St. Ry. Co., (1909) 222 Mo. 104, 120 S. W. 1162, the case was tried on an amended petition which contained no specific allegations of negligence. The original petition, however, specified particular acts of negligence. The court held that plaintiff was not precluded from invoking the doctrine of *res ipsa loquitur*. Gibler v. Railroad, (1910) 148 Mo. App. 475, 128 S. W. 791, supra, contains a dictum to the same effect. *Quaere*, whether this holding is not in conflict with the theory upon which the Missouri court proceeds in the foregoing cases.

If the plaintiff in one count of his petition properly invoked the doctrine of *res ipsa loquitur*, and in another count declared upon specific acts of negligence, would the Missouri court hold the plaintiff to be entitled to the benefit of the doctrine under the first-mentioned count? Some cases elsewhere have so held. Feldman v. Chicago R. Co., (1919) 289 Ill. 25, 124 N. E. 334; Chicago Union Traction Co. v. Giese, (1907) 229 Ill. 260, 82 N. E. 232. However, the Illinois court seems to have taken no very definite stand on the general question as to whether specific allegations of negligence bar the application of the *res ipsa loquitur* doctrine. See Chicago City Ry. Co. v. Carroll, (1903) 206 Ill. 318, 68 N. E. 1087; O'Rourke v. Marshall, (1923) 307 Ill. 197, 138 N. E. 625.

In Gallagher v. Edison Co., (1897) 72 Mo. App. 576, supra, the petition first alleged negligence generally, in such a manner as properly to invoke the *res ipsa loquitur* doctrine. It then alleged that "among other defects", certain specific and particular defects existed. The court held that plaintiff was not restricted to recovery upon the particular acts of negligence specified.

In MacDonald v. Met. St. Ry. Co., (1908) 219 Mo. 468, 118 S. W. 78, supra, plaintiff alleged that in rounding a curve the car in which plaintiff was riding "came to a sudden and violent stop, which was caused either by the negligent and careless condition in which the appliances used by said defendant for going around said curve were allowed to remain, or by the negligent and careless manner in which the gripman discharged his duty in managing and controlling said car, but it was either one or the other, or both, as plaintiff believes and alleges, and she is ignorant whether it was one or the other." The court held that plaintiff was entitled, under this pleading, to invoke the doctrine of *res ipsa loquitur*, since she had pleaded nothing showing her knowledge of the precise manner in which the accident occurred. Would the court hold that if plaintiff pleaded specific acts of negligence on information and belief, he could still rely upon the *res ipsa loquitur* doctrine?

When the plaintiff goes to trial upon a petition which properly invokes the doctrine of *res ipsa loquitur* and contains no specific allegations of negligence, plaintiff is still entitled to the benefit of the doctrine although, assuming an unnecessary burden, he introduces evidence of particular acts of negligence and unsuccessfully attempts to establish them. See Porter v. St. Joseph, etc. Co., (1925) 311 Mo. 66, 277 S. W. 913; Price v. Met. St. Ry. Co., (1909) 220 Mo. 435, 119 S. W. 932. Is this holding wholly consistent with the general position taken by the Missouri courts?

3. Federal Electric Co. v. Taylor, (1927) 19 Fed. (2d) 122 (C. C. A.- 8th Cir.); White v. Chicago etc. R. Co., (1917) 158 C. C. A. 491, 246 Fed. 427 (8th Cir.); King v. Davis, (1924) 54 App. D. C. 239 296 Fed. 986; Whitmore v. Herrick, (1928) 218 N. W 334 (Ia.); Garvey v. Coleman Lamp Co., (1923) 113 Kan. 70, 213 Pac. 823; Pierce v. Great Falls R. Co. (1899) 22 Mont. 445, 56 Pac. 867; Davis v. Castile, (1924) 257 S. W. 870 (Tex.).

4. Biddle v. Riley, (1915) 118 Ark. 206, 176 S. W. 134; Atkinson v. United Railroads, (1925) 71 Cal. App. 82, 234 Pac. 863; Colorado, etc. Ry. Co. v. Reese, (1917) 69 Colo. 1, 169 Pac. 572; Chicago City Ry. Co. v. Carroll, (1903) 206 Ill. 318, 68 N. E. 1087; Terre Haute, etc. Ry. Co. v. Sheeks, (1900) 155 Ind. 74, 56 N. E. 434; Heffter v. Northern States Power Co. (1927) 217 N. W. 102 (Minn.); Alabama & V. R. Co. v. Groome, (1910) 97 Miss. 201, 52 So. 703; Shawnee Light & Power Co. v. Sears, (1908) 21 Okla. 13, 95 Pac. 449; Boyd v. Portland El. Co., (1901) 40 Or. 126, 66 Pac. 576; Boyd v. Portland El. Co., (1902) 41 Or. 336, 68 Pac. 810; Nashville Int. Ry. Co. v. Gregory, (1917) 137 Tenn. 422, 193 S. W. 1053; Dearden v. Railroad, (1907) 33 Utah 147, 93 Pac. 271; Humphrey v. Twin States Gas Co., (1927) 100 Vt. 414, 139 At. 440; Washington-Virginia Ry. Co. v. Bouknight, (1912) 113 Va. 696, 75 S. E. 1032; Kluska v. Yeomans, (1909) 54 Wash. 465, 103 Pac. 819; Walters v. Seattle, etc. Ry. Co., (1908) 48 Wash. 233, 93 Pac. 419.

garded, as surplusage.[5] Or, what perhaps amounts to the same thing, the courts say that plaintiff should not be deprived of the case made merely because he alleged more than he was able to prove.[6] In other cases the court has considered that the effect of the specific allegations is to limit the field within which the doctrine of *res ipsa loquitur* applies: that is to say, the doctrine can still be invoked, but only as to the existence of the particular negligent act or omission specified.[7]

There would seem to be much to commend the latter view. The application of the doctrine of *res ipsa loquitur* often works a hardship upon the defendant, in compelling him to prove that all of his acts, throughout the entire transaction in question (or so many of them as might be responsible for the accident) were carefully done. He may not know the cause of the injury. He may be compelled to make quite an extensive investigation and submit proof covering a wide range of facts, in order to overcome the prima facie case established against him. If the plaintiff knows how the accident occurred, and knows what particular act or omission he complains of, he should not be penalized for making specific allegations with respect thereto and thereby lessening the burden placed upon the defendant. Nor, if he alleges specific acts of negligence, should he be deprived of whatever advantage the doctrine of *res ipsa loquitur* gives him. It is one thing for him to know how the accident happened; quite another for him to prove to the satisfaction of the jury just what occurred. If the mere fact that the accident happened is of some probative value on the issue of defendant's neglignece, plaintiff is entitled to the benefit of that evidence no matter if he is clear in his own mind as to what the particular act of negligence was and is willing to win or lose on the theory that the act alleged was the one of which the defendant was guilty.

It would seem not to be proper to regard the specific allegations as surplusage, for the defendant would naturally restrict his investigation and proof to the acts alleged, and might well be prejudiced if the plaintiff could recover upon any other theory.

The holding of the principal case to the effect that specific negligence was pleaded seems to be wholly correct. The particular act complained of was that defendant started the car while plaintiff had one foot upon the step.

The rule as to what constitutes, for the purpose in hand, a special, as distinguished from a general, allegation of negligence, is simple of statement, but not so simple of application. "To constitute a special allegation, as distinguished from a general allegation, an enumeration and averment of the specific act or acts relied upon as a ground of recovery must be made."[8] That is, if plaintiff pleads the particular act or omission which caused the accident, the allegation is special.

The cases naturally group themselves into two classes: (1) Cases of defective appliances and defective condition of premises, (2) cases of negligent handling and operation. In the first class of cases, if plaintiff avers that the appliance was defective, without specifying the particular defect, has he pleaded specific negligence? It would seem not. Yet in *Pointer v. Construction Co.*,[9] a scenic railway case, an alle-

5. Shawnee Light & Power Co. v. Sears, (1908) 21 Okla. 13, 95 Pac. 449; Nashville Int. Ry. Co. v. Gregory, (1917) 137 Tenn. 422, 193 S. W. 1053; Washington-Virginia Ry. Co. v. Bouknight, (1912) 113 Va. 696, 75 S. E. 1032; Walters v. Seattle, etc. Ry. Co., (1908) 48 Wash. 233, 93 Pac. 419.

6. Humphrey v. Twin States Gas Co., (1927) 100 Vt. 414, 139 At. 440; Washington-Virginia Ry. Co v. Bouknight, (1912) 113 Va. 696, 75 S. E. 1032; Walters v. Seattle, etc. Ry. Co., (1908) 48 Wash. 233, 93 Pac. 419.

7. Atkinson v. United Railroads, (1925) 71 Cal. App. 82, 234 Pac. 863; Terre Haute etc. Ry. Co. v. Sheeks, (1900) 155 Ind. 74, 56 N. E. 434; Boyd v. Portland El. Co., (1901) 40 Or. 126, 66 Pac. 576; Boyd v. Portland El. Co., (1902) 41 Or. 336, 68 Pac. 810.

8. Porter v. St. Joseph, etc. Co., (1925) 311 Mo. 66, 74, 277 S. W. 913.

9. (1916) 269 Mo. 104, 189 S. W. 805.

gation of defective construction of the car and defective construction of the track, was held to be a specific allegation of negligence, although the particular defects were not indicated. Likewise in *Kennedy v. Met. St. Ry. Co.*,[10] where the allegation was that the defendant had allowed the motor and electrical appliances on a street car to become out of order. Perhaps the question is different if a defect is alleged, not in the appliance as such, but in a particular part of the appliance. Thus an averment that the brakes were defective might more properly be held to be a special allegation than one that the car was defective, even though in neither case is the particular defect pointed out. It furthermore would seem to be true that as to certain matters, an allegation of a defect in general terms really indicates the nature of the defect. If plaintiff pleaded that the axle was of defective construction, the allegation would seem to be substantially as specific as though he had stated that the iron from which the axle was made contained, at the point where it broke, too much carbon. Perhaps the same may be said of an allegation to the effect that an electrical appliance was out of order. This may in effect mean that the electrical circuit was broken.

In *Thompson v. Ry. Co.*,[11] the allegation was that a certain timber had been left on a railroad car in such a position that it might fall. This was held to be a special allegation. In *Kean v. Piano Co.*[12], an averment that defendant suspended a flag pole from a building in such a manner that it fell off, was held to be a general allegation. It is submitted that both cases are sound. In the former, the allegation is in effect that the timber was protruding over the sides of the car; in the latter, the statement that the pole was so suspended that it fell, does not indicate the nature of the defect which caused it to fall.

In *Byers v. Essex Inv. Co.*,[13] plaintiff alleged that defendant made repairs upon the railing of a building in such a negligent and careless manner that said railing was left in a defective and insecure condition. The court held that negligence was specially pleaded. The case seems to be of questionable soundness. It would seem to be doubtful whether, under the circumstances, the mere averment of a defect reasonably indicates the nature of the defect.

It seems impossible to reconcile and satisfactorily explain all of the cases dealing with negligent operation. Out of a group of eight collision cases, where the allegations were substantially identical (*i. e.*, that defendant negligently ran one car into another), three holdings were to the effect that negligence was specially pleaded, five to the contrary.[14] An averment that defendant through the negligncе of its servants caused the car to come to an abrupt stop, has been held to be a general allega-

10. (1907) 128 Mo. App. 297, 107 S.W. 16.
11. (1925) 274 S. W. 531 (Mo. App.)
12. (1921) 206 Mo. App. 170, 227 S. W. 1091.
13. (1919) 281 Mo. 375, 219 S. W. 570.
14. Porter v. St. Joseph, etc. Co., (1925) 311 Mo. 66, 277 S. W. 913: so negligently maintained and operated said street car as to cause it to collide with a fire truck. Held to be a general allegation.

Bergfield v. K. C. Rys. Co. (1920) 285 Mo. 654, 227 S. W. 106: said collision was caused by the carelessness and negligence of the defendants, their servants, agents, and employees, operating said car. Held to be general.

Stauffer v. Met. St. Ry. Co., (1912) 243 Mo. 305, 147 S. W. 1032: said car was negligently caused to collide with a steam roller. Held to be general.

Price v. Met. St. Ry. Co., (1909) 220 Mo. 435, 119 S. W. 932: carelessly, negligently caused and permitted the train to come into violent collision with another train. Held to be general.

Beave v. Transit Co., (1908) 212 Mo. 331, 111 S. W. 52: so negligently and unskillfully managed said car and the machinery and appliances thereof and the brakes and running gear thereof, as to cause said car to collide with another car. Held to be general.

Davidson v. Transit Co., (1907) 211 Mo. 320, 109 S. W. 583: defendant so carelessly and negligently conducted itself that the car in which plaintiff was riding was caused to collide with another car. Held to be special.

Miller v. United Rys. Co., (1910) 155 Mo. App. 528, 134 S. W. 1045: the motorman so carelessly and negligently managed and ran said car that he permitted the same to collide with a wagon. Held to be special.

Monday v. St. Joseph, etc, Co., (1909) 136 Mo. App. 692, 119 S. W. 24: defendant's servants negligently, carelessly and recklessly operated said car so that they ran said car into a wagon. Held to be general.

tion.[15] An allegation that defendant's train was by reason of defendant's negligence caused to leave the track, was held to be a general allegation.[16] An allegation that defendant so carelessly and negligently drove an automobile that it skidded and turned completely around, was held to be a special allegation.[17] An allegation that defendant so carelessly and negligently handled a gasoline filling apparatus as to allow the gasoline to be spilled and to catch fire, was held to be a special allegation.[18] An allegation that defendant suddenly and without warning started a certain machine, was held to be a general allegation.[19]

The issue in the negligent operation cases should be whether plaintiff has pleaded the particular act or omission as distinguished from the result of the particular act or omission. An averment that defendant handled the appliance so negligently that the accident occurred would seem to be, under most circumstances, a general allegation. It states the result, but does not specify the particular cause. Perhaps the circumstances may well be such, however, that such an averment reasonably indicates the particular wherein defendant was negligent. Where plaintiff alleges that defendant so negligently drove the automobile that it skidded and turned completely around, perhaps the allegation reasonably means that defendant attempted to stop or turn too suddenly, or while proceeding at too great a speed. Perhaps in the collision cases it can be argued that the allegation to the effect that defendant negligently caused one car to collide with another, in effect is an averment that defendant was not keeping a proper lookout for obstructions on the track ahead.

It is submitted that the line is exceedingly vague and hard to draw, and that any rule which obliges the plaintiff, at his peril, to draw the line, places a real hardship upon him,—a hardship which, if possible, should be avoided. To be sure, in those jurisdictions which do not subscribe to the Missouri doctrine, but hold that plaintiff, having pleaded specially, may invoke *res ipsa loquitur* only to prove the specific acts charged, the distinction between general and special allegations must be drawn. But in such jurisdictions, the penalty for failure to make the proper distinction is not so drastic.

J. B. S.
J. Herbert Taylor*

SOLICITATION TO COMMIT MURDER AS AN ATTEMPT TO COMMIT.

State of Missouri v. Davis.[1]

Davis was alleged to have tried to hire a detective, whom he had been led to believe was an ex-convict, to commit murder. All arrangements were made as to the time and place of the murder, Davis planning the entire affair. There were no acts on Davis' part other than the payment of money and the giving to the detective of the photograph of the person to be murdered. While Davis was waiting for news of the murder he was arrested, and was subsequently tried in the Circuit Court of Jackson County, and convicted of an attempt to commit murder. On appeal to the Supreme Court the judgment was reversed and the defendant discharged.

It was the opinion of the majority of the court that solicitation, unaccompanied by any act moving directly toward the commission of the crime, is not an "overt act" constituting an essential element in the crime of attempt; and that there were no

15. Briscoe v. Met. St. Ry. Co., (1909) 222 Mo. 104, 120 S. W. 1162.
16. Watson v. Chicago Great Western R. Co., (1926) 287 S. W. 813 (Mo. App.).
17. Hennekes v. Beetz, (1920) 203 Mo. App. 63, 217 S. W. 533.
18. Motsch v. Standard Oil Co., (1920) 223 S. W. 677 (Mo. App.)
19. Heckfuss v. Am. Packing Co., (1920) 224 S. W. 99. (Mo. App.)
*Senior, School of Law.
1. (1928) 6 S. W. (2d) 609 (Mo.)

other overt acts present upon which the conviction could be sustained. Judge Walker, dissenting, took the position that mere solicitation is a sufficient "overt act" toward the commission of the crime to constitute an attempt.

An "attempt is the name given by the law to an indictable endeavor to commit a crime."[2] It consists of three essential elements: (1) intent to commit a certain crime, (2) performance of some overt act toward the commission of that crime, and (3) failure to consummate the commission of the crime.[3] Lacking any one of these elements, there can be no attempt.[4]

It is with respect to the second element that difficulty arises. It is uniformly agreed, however, that mere acts of preparation are not overt acts.[5] Beyond this, there is considerable confusion in the cases as to what constitutes an overt act. It has been held in some quarters that "slight acts in furtherance of the design" are sufficient.[6] Other courts require the acts to go far enough toward the accomplishment of the offense to amount to a commencement of the consummation of the crime.[7] In Missouri, the definition frequently relied on is that given in *State v. Mitchell*,[8] viz. the act must be such that, in the ordinary course of events, if not hindered by events outside of the actor's will, it will result in the commission of the crime.

State v. Hayes[9] is the only Missouri case in which the facts are at all similar to the facts in the principal case. Defendant solicited one McMahan to burn defendant's house, and defendant was indicted and convicted of an attempt to commit arson. Defendant furnished McMahan with coal oil and plans and helped to saturate the floor of the building with the coal oil. McMahan was to light the fire. He sent defendant for matches and defendant never returned. The Supreme Court sustained the conviction, and in the course of the opinion stated in express terms that solicitation to commit a crime is an act toward its consummation, and is a sufficient overt act to constitute an attempt. This case is relied upon by Judge Walker in his dissenting opinion in the principal case. The case is, however, distiguished in the majority opinion, on the ground that something more than solicitation existed in *State v. Hayes*: the defendant had done an act toward the consummation of the crime, namely, he had saturated the floor of the building with oil.

In *State v. Sullivan*[10] a state senator was indicted, tried and convicted for soliciting a bribe for his vote as Senator on a bill then pending in the Senate. The defendant was not charged with an attempt; but the Kansas City Court of Appeals, in sustaining the conviction, argued that an attempt to commit an offense is of itself an offense, and that solicitation is an attempt. The court said: "The act of soliciting is an attempt to have the offense committed." The court cited and relied upon *State v. Hayes*, *supra*, for the proposition that soliciting is an act, a step in the direction of an offense.

In *State v. Harvey*[11] defendant was indicted for an attempt to commit rape upon a child under the age of consent. The indictment merely charged a solicitation to sexual intercourse. The judgment of the lower court quashing the indictment

2. State v. Smith, (1883) 80 Mo. 516.

3. State v. Fraker, (1898) 148 Mo. 162, 49 S. W. 1017.

4. Section 3683, Revised Statutes of Missouri, 1919, reads, in part, as follows: "Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:"

5. Bishop on Criminal Law, 9th Ed., Sec. 726; Wharton's Criminal Law, 11th Ed., Sec. 219.

6. State v. Roby, (1922) 194 Ia. 1032, 188 N. W. 709.

7. People v. Lanzit (1925), 70 Cal. App. 498, 233 Pac. 816; Uhl v. Commonwealth, (1849) 6 Grat. (Va.) 706.

8. (1902) 170 Mo. 633, 71 S. W. 175.

9. (1883) 78 Mo. 307.

10. (1904) 110 Mo. App. 75, 84 S. W. 105.

11. (1890) 101 Mo. 470.

was affirmed. This case is probably not in point on the present inquiry, because defendant was not soliciting the child to commit the crime of rape, inasmuch as she would not have been guilty of the offense if she had acceded to his solicitations.

A case similar to *State v. Hayes* is the Oregon case of *State v. Taylor*[12] There one Taylor solicited McGrath to burn Banister's barn. McGrath agreed to do it, but notified Banister and related the plan to him. Taylor explained to McGrath how to start a slow-burning fire by using a pair of overalls as the combustible material, and gave McGrath a pair of overalls, to be used by him in setting fire to the barn, and paid McGrath $100. Taylor was convicted of an attempt to commit arson and on appeal the conviction was affirmed, the court finding a sufficient overt act. The court said that if Taylor had attempted the crime himself and had failed he would have been found guilty, and if he used another for the same purpose and he failed, the result is the same. The court relied in part upon *State v. Hayes, supra.*

Perhaps the leading case in the United States on the point in issue is the New York case of *People v. Bush.*[13] It interprets the New York statute on attempts, upon which the Missouri statute and the statutes of many other states were modeled. Here the defendant was indicted and convicted of an attempt to commit arson. He had solicited Kinney to burn a barn, and had given him a match with which to start the fire. He did not intend to be present at the burning, and Kinney never intended to commit the act. The conviction was affirmed. The court said: "What a man does by another he does himself, and the course taken here was the same as if the defendant had intended to burn the barn himself and had taken steps toward that end." The headnote to the case, which has been taken as the holding of the case by many courts, states "merely soliciting one to commit a felony, without any other acts being done, is sufficient to warrant a conviction under the statute." There was something more than the mere solicitation here, however, namely, the delivery of the match.

The case of *People v. Mills*[14] cites the above case as authority for the proposition stated in its headnote. In this case there was evidence that the defendant had solicited a detective to steal some public records, and the court, purorting to follow *People v. Bush, supra,* held it to be an attempt. There were no acts other than the solicitation.

Smith v. Commonwealth[15] is a Pennsylvania case in which the defendant was prosecuted for soliciting a woman to commit adultery. It was held there, as in many other cases where there are solicitations to commit such crimes as adultery, sodomy, incest[16], etc., that such solicitations are not indictable. It was said that solicitation does not amount to an attempt because the solicitation is merely the expression of a desire or an intent and is not the act. It is said here by the court "the law punishes the act and not the intent."

In *Stabler v. Commonwealth*[17] the defendant was indicted for an attempt to poison. He had solicited one Neyer to put poison in Waring's well, stating that he desired to kill Waring and his entire family. Neyer refused and handed back the poison which the defendant had given him. Later the defendant put the poison in Neyer's pocket but Neyer never intended to use it. The court held that the mere solicitation was not an attempt because the act proved did not approximate sufficiently near the commission of murder to come within the statute.

A West Virginia case, *State v. Baller,*[18] holds that solicitation by Baller to one Earl that Earl absent himself from a trial where he was a witness was not such an

12. (1906) 47 Or. 455, 84 Pac. 82.
13. (1843) 4 Hill 133.
14. (1903) 41 Misc. (N. Y.) 195.
15. (1867) 54 Pa. 209.
16. Cox v. People (1876) 82 Ill. 191.
17. (1880) 95 Pa. St. 318.
18. (1885) 26 W. Va. 90.

act as to constitute an attempt. The court said that if the solicitation had been accompanied by some overt act, such as the payment of money to Earl, the defendant could have been convicted of an attempt to obstruct justice. From the reasoning in the case it would seem that it never occurred to the court to consider the solicitation alone as an overt act.

The proposition that solicitation, accompanied by other acts moving toward the crime, is indictable as an attempt is clearly stated in *State v. Bowers*[19], a South Carolina case. In this case the defendant not only solicited another to commit arson but paid him and gave him matches with which to start the fire. The court here expressly says that it is not deciding whether or not mere solicitation is an attempt, and points out the conflict on the point.

In *Ex parte Floyd*,[20] one Floyd solicited another to print some cigar coupons for him. If the coupons had been printed, the act would have amounted to a forgery by Floyd. The one solicited never intended to print the coupons. The court said, "the law recognizes a distinction between an attempt and mere solicitation." The acts in this case were held to constitute solicitation and not an attempt.

The leading English case on this point is *King v. Higgins*.[21] It is cited in most of the decisions reviewed above, either as authority for the proposition that solicitation itself is indictable, or that solicitation is an overt act constituting an attempt. In this case the defendant was indicted for soliciting a servant to steal his master's goods. Lord Kenyon said "solicitation itself is an act.....it would be a slander upon the law to suppose that an offense of such magnitude is not indictable." Cases are then cited showing that to incite another to commit a misdemeanor is a misdemeanor. The court then remarks: "A fortiori it is a misdemeanor to incite another to a felony." It is said that solicitation is indictable, but the court at no point makes the statement that solicitation is an attempt.[22]

Two leading writers on the subject of Criminal Law, Bishop[23] and Wharton,[24] entertain opposing views on the point in question, Bishop contending that solicitation is an overt act, and hence of itself sufficient to constitute an attempt. Wharton says: "An attempt is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this cannot be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject."

Wharton's view would seem to be preferable, and the principal case sound. If defendant merely entertained the intention to commit a crime of course he would be guilty of no crime. It would seem that if he solicited another to commit a crime, or even persuaded him to commit it, but the person solicited did no act toward its commission, he is no nearer the commission of an offense.

Indeed, solicitation accompanied by acts of preparation should not be indictable as an attempt—as where there is a solicitation to commit arson, and matches are delivered to be used in starting the fire. If the defendant, intending to start the fire himself, had procured matches for that purpose, there would be no attempt.

The correct principle would seem to be that solicitation supplies only the element of wrongful intent. Defendant, to be guilty of an attempt, should be required to do such an overt act toward the accomplishment of the crime as would be sufficient to constitute an attempt if he himself contemplated the direct commission of the crime.

19. (1891) 35 S. C. 262, 14 S. E. 288.

20. (1908) 7 Cal. App. 588, 95 Pac. 175.

21. (1801) 2 East. 5.

22. This note is not concerned with the question as to whether solicitation as such is indictable. However, the prevailing view is that solicitation to commit a felony is a misdemeanor, and, with some qualifications, that solicitation to commit a misdemeanor is likewise a misdemeanor.

23. Bishop on Crimimal Law, 9th Ed., Sec. 767, 768.

24. Wharton's Criminal Law, 11th Ed., Sec. 218.

If this view be sound, there was no attempt in the principal case. Planning the time and place of the murder, and obtaining a picture of the intended victim for purposes of identification, certainly would not be acts approaching near enough to the commission of the crime to constitute an attempt.

Apparently, however, many courts would hold that an attempt has been committed where defendant solicits another to commit an offense and furnishes him the means with which the act is to be accomplished, even though, if defendant were planning to commit the crime directly, and had provided himself with the means for its commission, there would be no attempt. There would seem to be no justification for such a position, if it be admitted that mere solicitation does not constitute an attempt. But even though such decisions be considered sound, there would seem to be no attempt in the principal case. If defendant had furnished the detective with a revolver, he might be held to be guilty of an attempt. But the furnishing of a photograph of the intended victim seems to be quite a different matter.

The payment of money by the defendant to the detective should not be a sufficient overt act. In *State v. Baller*, supra, the court intimated that solicitation of a witness to absent himself from a trial, plus the payment of money to the witness, would be an attempt to obstruct justice. Such a case is distinguishable, however, from the principal case. There the defendant is really committing the crime directly.[25]

M. S. F.

JURIES—QUESTIONING JURORS ON *VOIR DIRE* EXAMINATION AS TO THEIR CONNECTION WITH INSURANCE COMPANY. *Cazzell v. Schofield.*[1]

Plaintiff sues defendant, a physician, to recover damages for personal injuries charged to have resulted from the alleged malpractice of the defendant. From a verdict and judgment for plaintiff below, defendant appeals, assigning, among other errors, the error of the trial court in permitting plaintiff's counsel, over defendant's objections, to inquire on *voir dire* examination of the jury panel whether any of the jurors were stockholders in or agents of the Ft. Wayne Medical Protective Association, and whether they, or their relatives, had any connection with such company. Plaintiff's counsel began the examination on the point in question thus: "Are any of you stockholders in the Ft. Wayne—," at which point he was interrupted by counsel for defendant. Court and counsel then withdrew out of the hearing of the panel, and plaintiff's counsel stated to the court that he desired to ask the following question: "Are any of you stockholders in the Medical Protective Company of Ft. Wayne, Indiana, an insurance company that insures physicians and surgeons against malpractice cases?"[1a] Defendant's counsel objected to the question on the ground that the company named was a foreign corporation and had no stockholders in Missouri, and on the further ground that the question was unfair and prejudicial. The court sustained the objection so far as concerned the latter part of the question dealing with the nature of the business of the company but otherwise overruled the objection. Upon the resumption of the examination, plaintiff's counsel put to the panel the question as modified, *i. e.*, he inquired whether any of the jurors were stockholders in the Ft. Wayne Medical Protective Association. Over defendant's objection he also inquired of the prospective jurors whether they were acquainted with any of the

25. Since the preparation of the above note the Supreme Court has handed down an opinion in State v. Lourie, (1928) 12 S. W. (2d) 43 (Mo.), the companion case of State v Davis. The defendants in the two cases were jointly charged with an attempt to murder. A severance having been granted, the two were tried separately. In State v. Lourie, a judgment of conviction is likewise reversed. The court reaffirms the position taken in State v. Davis.

1. (1928) 8 S. W. (2d) 580 (Mo.).

1a. No consideration will be given herein to the *form* of the inquiry put to the jurors. As bearing

agents of said company, whether they had ever represented said company, or had dealings with it, and whether any of their relatives were in any way interested in or associated with said company. The Supreme Court affirms the judgment, holding that no error was committed by the trial court in overruling defendant's objections to the examination of the jury panel. The court comments thus:[1b] "While counsel for defendant was not asked specifically by the court whether the named insurance company was directly or indirectly interested in the case as the insurer of defendant, nevertheless, so far as the record shows, counsel for defendant did not say, or even intimate, that the named insurance company was not an insurer of defendant; nor did counsel offer, or attempt to offer, testimony to show that the named company was not an insurer of defendant and was not in any way interested in the case. Neither has there been any such disclaimer made by defendant in brief or argument in this court. There is nothing in the record before us to indicate that counsel for plaintiff was acting in bad faith in propounding the questions to the prospective jurors, or for the mere purpose of prejudicing them, and, in the absence of such showing, the assumption may be indulged by us that plaintiff's counsel was acting in good faith."

The determination of the point in issue involves the balancing of conflicting considerations. The plaintiff in such a case very properly takes the position that he is entitled to an unbiased, unprejudiced jury. A juror directly or indirectly interested in the outcome of the suit should not be allowed to serve. The plaintiff's right to examine him, for the purpose of laying bare such interest, is an integral part of the right to trial by jury, and necessary to due process. Any interest in or connection with the one ultimately bound to pay any judgment which may be rendered should be pertinent to the inquiry, as well as interest in or connection with the defendant of record.

On the other hand, an intimation to the jury in a personal injury action that an insurance company, and not the defendant, will be obliged to pay the judgment, is universally recognized as prejudicial.[2] It is thought to influence, not only the amount of the verdict, but the finding of the jury on the question of liability.

The problem, then, is a difficult one. Any solution involves, to a degree, the impairment of rights of either plaintiff or defendant, or both. As will appear from the following review of the authorities,[2a] it is not easy to state just what solution the Missouri courts have arrived at.

In *Meyer v. Gundlach-Nelson Mfg. Co.*,[3] counsel for plaintiff inquired of the jurors on *voir dire* examination as to their relation to the Union Casualty and Surety Company. At the time the question was put, counsel stated to the court that he was informed that the company named was the real party in interest, and he appealed to the attorney for the defendant to state whether this information was correct. Defendant's attorney virtually admitted the company's interest. The court held the examination to be proper, both as a basis for the statutory right of peremptory challenge, as well as to lay ground for challenge for cause.

Saller v. Friedman Brothers Shoe Co.[4] was a master-servant personal injury case,

upon the propriety of the question in the principal case, as originally phrased, see Eckhart Mill Co. v. Schaefer (1902) 101 Ill. App. 500; Inland Steel Co. v. Gillespie (1914) 181 Ind. 633, 104 N. E. 76; W. G. Duncan Coal Co. v. Thompson, (1913) 157 Ky. 304, 162 S. W. 1139; Lipschutz v. Ross (1903) 84 N. Y. Supp. 623.

1b. (1928) 8 S. W. (2d) l. c. 591 (Mo.).

2. "We take cognizance of the universal belief among lawyers of the highly injurious effect on the defense in a personal injury suit of the intimation that defendant is protected by insurance." Trent v. Printing Co., (1909) 141 Mo. App. 437, 126 S. W. 238.

2a. For convenience the cases will be considered in chronological sequence.

3. (1896) 67 Mo. App. 389.

4. (1907) 130 Mo. App. 712, 109 S. W. 794

for injuries sustained by plaintiff in defendant's shoe factory. In answer to a question put by plaintiff's counsel as to the nature of his business, one juror stated that he was in the life and accident insurance business. Counsel then asked him: "Do you insure against these accidents in factories?" He answered in the affirmative. Counsel then inquired whether he did business with the Travelers Insurance Company. Over objection he was allowed to answer, and answered in the affirmative. Plaintiff's counsel then asked other jurors if they knew anybody connected with the Travelers Insurance Company. The appellate court, in approving the method of examination, states that evidently counsel's object was not to lay the basis for challenge for cause (for the juror in question was not challenged for cause), but the purpose was to gain information to guide counsel in making peremptory challenges. The court states that if such was the object, the examination was permissible.

In *Boten v. Sheffield Ice Co.*,[5] inquiry was made as to the relation of the jurors to any liability insurance company. Defendant objected to the question, and moved to discharge the panel. Out of hearing of the panel, the court then inquired of defendant's counsel whether an insurance company was involved, and counsel replied in the affirmative. The objection was overruled, and the examination proceeded. The appellate court held no error was committed in overruling the objection, the court referring to the method of examination in the following terms:[5a] "We cannot say it was based on bad faith, especially as it was but a single question, carrying with it no intimation as to what effect it had on defendant's fortunes, and did not tell them anything more than they would have known as itelligent men, *i. e.*, that in all probability defendant carried indemnity insurance."

Kinney v. Met. St. Ry. Co.[6] approves an inquiry as to the connection of the prospective jurors with a named insurance company. The attorney for that company was in court, ostensibly as counsel for the defendant. The opinion contains no discussion of the point, other than the statement that such a question was held to be proper in *Meyer v. Gundlach-Nelson Mfg. Co.*[7]

In *Burrows v. Likes*[8] jurors were asked whether they were in the employ of or stockholders in either of two named surety companies. One of the companies was a local concern, with a large number of stockholders and employees in Springfield, Missouri, where the case was tried. Under the circumstances, the examination was approved. Note, however, the language of the court:[9] "The mere asking of such question is generally equivalent to giving direct information that an insurance company is obligated to take care of any judgment that may be rendered, and the giving of such information is so irrelevant and prejudicial as to not only warrant the court in sustaining an objection but in discharging the jury. (Citing cases) Ordinarily the chance that some juror might have an interest in, or be an employee of, an insurance company interested in the result of the trial is so remote that the asking of such questions is no more than an indirect means of improperly informing the jurors of such company's interest and would evidently be asked for no other purpose. Any information proper for an attorney in making his challenge can usually be obtained in other ways, or by inquiring as to the occupation and business of the jurors."

In *Yates v. House Wrecking Co.*,[10] counsel for plaintiff, apparently out of the hearing of the panel, asked defendant's attorney whether or not defendant was insured, and if so, in what company. Defendant's attorney refused to answer. Coun-

5. (1914) 180 Mo. App. 96, 166 S. W. 883.
5a. (1914) 180 Mo. App. l. c. 109, 166 S. W. 883.
6. (1914) 261 Mo. 97, 169 S. W. 23.
7. (1896) 67 Mo. App. 389, supra, note 3.
8. (1914) 180 Mo. App. 447, 170 S. W. 459.
9. (1914) 180 Mo. App. l. c. 456, 170 S. W. 459.
10. (1917) 195 S. W. 549 (Mo. App.).

sel was then permitted to inquire of the jurors whether any of them represented a company that carried insurance for the defendant. The appellate court held the examination proper.

In *O' Hara v. Lamb Construction Co.*,[11] inquiry was made of the jurors as to their interest in the Travelers Insurance Company. In argument to the jury, plaintiff's counsel remarked: "I suppose it would be highly improper for me to tell you who the real defendants are in this case." Thereupon defendant objected, and moved the court to discharge the jury, which motion was denied. The court granted a new trial, however, on the ground that the question propounded on *voir dire*, taken in connection with said statement in argument, was prejudicial. The appellate court affirmed the action of the trial court in granting a new trial.

Smith v. Scudiero[12] approves an inquiry as to whether any of the panel are connected with, or financially interested in, or have relatives in the employ of any insurance company. The question was put after defendant's counsel had refused to state whether he represented an insurance company interested in the defense of the case.

In *Bright v. Sammons*[13] plaintiff's counsel asked the jurors whether they had any connection with any employers' liability company. An objection to the question was sustained, and the question was not answered. Defendant appended to his motion for a new trial an affidavit to the effect that no insurance company was interested, and that plaintiff's counsel knew at the time the question was asked that no insurance company was interested, as evidenced by a certain conversation between counsel had prior to the trial, which conversation was detailed in the affidavit. The action of the trial court in overruling the motion for new trial was affirmed by the appellate court. The court says:[14] "There is nothing in the record to show that no insurance company was interested, or defending, or to show that plaintiff was so informed. An affidavit to that effect, and as to what transpired between counsel, appended to and filed with the motion for new trial, does not preserve such extraneous matter.....To instill into the jurors' minds the idea that the defendant is not really interested in the outcome of the case, because.....someone else will have to bear the loss, is very reprehensible, and where it appears that such has been the adroit purpose and result, such conduct will meet with the punishment of a reversal.....But under the circumstances here we cannot say that counsel was acting in bad faith."

Wagner v. Gilsonite Co.[15] upholds the action of the trial court in allowing an inquiry as to whether any of the jurors, or their near relatives, were employed by the Aetna Insurance Company. So far as appears, no basis was laid for the question by ascertaining from counsel whether defendant was insured with that company.[16]

Laurent v. Hoxmier[17] holds not reversible error the action of the trial court in permitting counsel to ask the prospective jurors whether any of them were stockholders, bondholders, or employees of any corporation which insures the operators of automobiles from liability and damages for personal injuries.

Wallnitz v. Werner[18] is a similar case, approving an inquiry as to ownership of

11. (1917) 197 S. W. 163 (Mo. App.).
12. (1918) 204 S. W. 565 (Mo. App.).
13. (1919) 214 S. W. 425 (Mo. App.).
14. (1919) 214 S. W. l. c. 426 (Mo. App.).
15. (1920) 220 S. W. 890 (Mo.).
16. The only comment contained in the opinion is in the following terms: "In our large cities especially it is usual for construction companies, where employees are liable to be injured, to carry liability insurance, and plaintiff had a right to know whether any of the jury or their near relatives worked for the Aetna Insurance Company, or any other insurance company, so as to strike them from the jury if he saw fit." 220 S. W. l. c. 898.
17. (1921) 227 S. W. 135 (Mo. App.).
18. (1922) 241 S. W. 668 (Mo. App.).

stocks or bonds in any liability insurance company. No qualifications of the right are stated, either in this case or the preceding.

In *Muehlebach v. Muehlebach Brewing Co.*,[19] the following questions were asked: "Are you connected in a business way with the Maryland Casualty Company? Or have you been at any time? Are you acquainted with Laurence Phister, an agent of the Maryland Casualty Company?" The only comment by the appellate court is as follows:[20] "No objection was made to these questions, and this manner of examining the jury under circumstances such as are present in this case has been approved." (citing cases)

In *Garvey v. Ladd*[21] the panel was questioned as to its relations to the Travelers Insurance Company. Defendant objected to the question, and then, out of the hearing of the panel, the court asked defendant's attorney if the Travelers Insurance Company was interested in the case. Defendant's counsel replied in the affirmative. Thereupon the court overruled the objection. This procedure was approved by the appellate court.

Jedlicka v. Shackelford[22] approves an inquiry as to whether the prospective jurors were stockholders in the Missouri Mutual Casualty Company. Here defendant's counsel was the attorney for said company; too, the company had secured a copy of a deposition previously taken in the case.

In *Chambers v. Kennedy*[23] the Supreme Court reverses a judgment for plaintiff below on the ground that the lower court committed reversible error in overruling defendant's motion to discharge the jury panel because of a question put by plaintiff on *voir dire* examination. Plaintiff had inquired whether the jurors were in any manner interested in the Continental Casualty Company or any other insurance company engaged in issuing policies of insurance to indemnify persons against claims for damages on account of personal injuries. The Supreme Court, in the course of an extended consideration of the point, reviews many of the decisions hereinbefore cited. The court says:[24] "There is no pretense that some local insurance company was concerned, or that stockholders or persons insured by such company were members of the panel. There was no attempt to show good faith in asking the questions.... In such cases as this the possiblility of drawing a juror connected with an insurance company interested in the defense is so remote that counsel should have shown their good faith before being permitted to poison the minds of the jurors by asking a question of this character."

In *Kelley v. Sinn*[25] the appellate court affirmed the action of the trial court in discharging the jury following certain examination of the panel by plaintiff's counsel. The questions held prejudicial and improper were: "Do you know Mr. Schwartz, attorney for defendant? Do you know Mr. Bushman, sitting behind Mr. Schwartz, who represents the Belt Automobile Insurance Company?" The appellate court deals with the point thus:[26] "It has long been the rule in this state that, on the examination of a jury on *voir dire*, it is proper to ascertain fully the relation of the parties interested in the suit, and when it is admitted that a particular insurance company is thus interested, it is proper to inquire concerning any juror's relations to or business dealings with such company.....However, such inquiry must be pertinent and made in good faith, and a showing of good faith should be made before the question is asked.....In the instant case, so far as the record discloses, nothing had occurred prior to the time the question complained of was asked, which might have intimated to the jury that a liability insurance company in any wise was interested

19. (1922) 242 S. W. 174 (Mo. App.).
20. (1922) 242 S. W. l. c. 175 (Mo. App.).
21. (1924) 266 S. W. 727 (Mo. App.).
22. (1925) 270 S. W. 125 (Mo. App.).
23. (1925) 274 S. W. 726 (Mo.).
24. (1925) 274 S. W. l. c. 729 (Mo.).
25. (1925) 277 S. W. 360 (Mo. App.).
26. (1925) 277 S. W. l. c. 361 (Mo. App.).

in the case, nor had there been any admission to that effect.....Plaintiff's counsel clearly had the right to interrogate the members of the panel as to their acquaintance with Mr. Bushman.....If any juror admitted an acquaintance with Mr. Bushman, there might have been some excuse for interrogating him further as to his relation to or business dealings with the company which Mr. Bushman represented."

In *Melican v. Whitlow Construction Co.*,[27] plaintiff's counsel inquired of the jurors as to their connection with the Southern Surety Company. Defendant objected. Out of the hearing of the panel, the court asked defendant's attorney if he would show that said company was not interested in the case. There being no response, the objection was overruled. The Supreme Court, in affirming the judgment, says merely, as to the point in question:[28] "Under the conceded circumstances it was not error to overrule the objection.", citing *Kinney v. Met. St. Ry. Co.*[29] and *Boten v. Sheffield Ice Co.*,[30] supra.

Plannett v. McFall[31] is a similar case. Defendant there objected to a question probing the relation of the jurors to the Maryland Casualty Company. Out of the hearing of the jury, defendant's counsel stated that the Maryland Casualty Company denied all liability and had withdrawn from the case, and that he was representing only the defendant. It appeared that the company had disclaimed liability because of alleged lack of cooperation by defendant in preparing the defense of the case. The court suggested that the defendant be sworn and examined as to the matter. Defendant's attorney stated that there was no occasion for such an examination. The court thereupon overruled the objection. The appellate court, in affirming the action of the trial court as to this point, says that the better practice is for plaintiff's attorney, before the question is put, to inquire out of hearing of the panel whether or not an insurance company is interested in the case, but that, after all, the real test of the propriety of the question is good faith.

Steinkamp v. F. B. Chamberlain Co.[32] approves an inquiry as to whether the members of the panel were stockholders in T. H. Mastin & Company. The court says: "It does not appear to be disputed that T. H. Mastin & Company was in fact interested in and conducting the defense on behalf of the defendant."

In Malone v. Small[33] plaintiff's attorney, out of the hearing of the panel, asked defendant's attorney whether the defendant was insured, and if so, the name of the company. Defendant's attorney answered in the affirmative, giving the name of the company. Plaintiff's counsel then inquired of the jurors concerning their connection with that company. This procedure was held proper.

In *Floun v. Birger*[34] a question concerning the relation of the jurors to the Travelers Insurance Company was asked and objected to. Thereafter, out of the hearing of the jurors, defendant's counsel admitted that said company was interested in the case. The objection was then overruled. The action of the trial court in this respect was affirmed.

Bruce v. East Side Packing Co.[35] is the latest decision on the point, except for the principal case. Here plaintiff's counsel, out of hearing of the panel, advised the court of his intention to go into the matter of the connection of the jurors with the Commercial Casualty Company, and then inquired of defendant's attorney whether or not such company was defending the action. Defendant's counsel refused to answer the inquiry. It further appears that there were a number of automobile owners on the panel; that defendant had testified in a deposition that he was insured; and that

27. (1925) 278 S. W. 361 (Mo.).
28. (1925) 278 S. W. l. c. 366 (Mo.).
29. (1914) 261 Mo. 97, 169 S. W. 23, note 6.
30. (1914) 180 Mo. App. 96, 166 S. W. 883, note 5
31. (1926) 284 S. W. 850 (Mo. App.).
32. (1927) 294 S. W. 762 (Mo. App.).
33. (1927) 291 S. W. 163 (Mo. App.).
34. (1927) 296 S. W. 203 (Mo. App.).
35. (1928) 6 S. W. (2d) 986 (Mo. App. .

plaintiff's counsel had been told by defendant's representative that the Commercial Casualty Companiy carried the risk. The trial court overruled the objections to the proposed course of inquiry. Judgment for plaintiff was affirmed by the appellate court, the court dealing with the point in the following terms:[36] "Room for doubt no longer exists as to the right of counsel for plaintiff to ascertain fully the relations and business dealings of the prospective jurors with the insurance company ultimately concerned in the judgment rendered, provided that such inquiry is pertinent, and pursued in good faith, and that the showing of good faith is made before the question is asked."

The foregoing cases, in the main, seem to lay down the general rule that plaintiff may interrogate prospective jurors as to their connection with insurance companies, or with a named insurance company, provided the inquiry be made in good faith.[37] It is at once apparent, however, from the foregoing review of the cases, that the court has used the expression "good faith" in varying senses. For the most part good faith seems to have meant reasonable cause to believe that defendant was insured,[38] or insured in a named company.[39] Thus in cases where the fact of the insurance was admitted by defendant, the inquiry, if in proper form, was sustained.[40] And in cases where defendant was asked by court or counsel whether or not he carried insurance, and refused to answer, plaintiff was permitted to examine the panel in connection with the matter, presumably because defendant's refusal to answer was in effect an admission that he carried insurance.[41] Likewise when from other sources plaintiff had reasonable cause to believe that an insurance company was interested, the examination was held permissible.[42]

36. (1928) 6 S. W. (2d) 987 (Mo. App.).

37. This seems to be the prevailing rule elsewhere. Vindicator Consol. Gold Min. Co. v. Firstbrook, (1906) 36 Colo. 498, 86 Pac. 313; Girard v. Grosvenordale Co., (1909) 82 Conn. 271, 73 Atl. 747; Wilson v. St. Joe Boom Co., (1921) 34 Idaho 253, 200 Pac. 884; Iroquois Furnace Co. v. McCrea, (1901) 191 Ill. 340, 61 N. E. 79; M. O'Connor Co. v. Gillaspy, (1908) 170 Ind. 428, 83 N. E. 738; Foley v. Cudahy Packing Co., (1903) 119 Ia. 246, 93 N. W. 284; Swift & Co. v. Platte, (1903) 68 Kan. 1, 74 Pac. 635; Dow Wire Works Co. v. Morgan, (1906), 96 S. W. 530 (Ky.); Uggen v. Bazille & Partridge, (1914) 127 Minn. 364, 149 N. W. 459; Heydman v. Red Wing Brick Co., (1910) 112 Minn. 158, 127 N. W. 561; Spoonick v. Backus-Brooks Co., (1903) 89 Minn. 354, 94 N. W. 1079; Walters v. Durham Lumber Co., (1914) 164 N. C. 388, 81 S. E. 453; Hoyt v. Independent Asphalt Paving Co., (1909) 52 Wash. 672, 101 Pac. 367; Faber v. C. Reiss Coal Co., (1905) 124 Wis. 554, 102 N. W. 1049.

38. Boten v. Sheffield Ice Co., (1914) 180 Mo. App. 96, 166 S. W. 883, note 5; Yates v. House Wrecking Co., (1917) 195 S. W. 549 (Mo. App.), note 10; Smith v. Scudiero, (1918) 204 S. W. 565 (Mo. App.), note 12; Bright v. Sammons, (1919) 214 S. W. 425 (Mo. App.), note 13.

39. Meyer v. Gundlach-Nelson Mfg. Co., (1896) 67 Mo. App. 389, note 3; Garvey v. Ladd, (1924) 266 S. W. 727 (Mo. App.), note 21; Kelley v. Sinn, (1925) 277 S. W. 360 (Mo. App.), note 25; Melican v. Whitlow Construction Co., (1925) 278 S. W. 361 (Mo.), note 27; Plannett v. McFall, (1926) 284 S. W. 850 (Mo. App.), note 31; Steinkamp v. F. B. Chamberlain Co., (1927) 294 S. W. 762 (Mo. App.), note 32; Malone v. Small, (1927) 291 S. W. 163 (Mo. App.), note 33; Floun v. Birger, (1927) 296 S. W. 203 (Mo. App.), note 34.

40. Meyer v. Gundlach-Nelson Mfg. Co., (1896) 67 Mo. App. 389, note 3; Boten v. Sheffield Ice Co., (1914) 180 Mo. App. 96, 166 S. W. 883, note 5; Garvey v. Ladd, (1924) 266 S. W. 727 (Mo. App.) note 21; Malone v. Small, (1927) 291 S. W. 163 (Mo. App.), note 33; Floun v. Birger, (1927) 296 S. W. 203 (Mo. App.), note 34.

41. Yates v. House Wrecking Co., (1917) 195 S. W. 549 (Mo. App.), note 10; Smith v. Scudiero, (1918) 204 S. W. 565 (Mo. App.), note 12; Melican v. Whitlow Construction Co., (1925) 278 S. W. 361 (Mo.), note 27; Plannett v. McFall, (1926) 284 S. W. 850 (Mo. App.), note 31; Bruce v. East Side Packing Co., (1928) 6 S. W. (2d) 986 (Mo. App.), note 35.

42. In Kinney v. Met. St. Ry. Co., (1914) 261 Mo. 97, 169 S. W. 23, note 6, the attorney for the insurance company was in court. In Jedlicka v. Shackelford, (1925) 270 S. W. 125 (Mo. App.), note 22, defendant's counsel was the attorney for the insurance company. Furthermore, the company had secured a copy of a deposition previously taken in the case. In Bruce v. East Side Packing Co., (1928) 6 S. W. (2d) 986 (Mo. App.), note 35, in addition to the fact that defendant's counsel refused to answer the inquiry as to whether the insurance company was defending the action, there was the circumstance that defendant had testified in a deposition that he was insured. Furthermore, plaintiff's counsel had been informed by a representative

On occasion, however, good faith has seemed to mean the absence of a motive to prejudice defendant's case. That is, good faith is present if the question is asked, not for the purpose of poisoning the minds of the jurors, but in order to lay bare any possible bias on the part of the members of the panel.[43] The court in the principal case, at certain parts of the opinion, at least, seems to use the term in this sense.[44]

In at least two of the cases, good faith is apparently used in still a third sense, to mean reasonable cause to believe that the jurors have or may have some connection with the insurance company inquired about. Thus in *Burrows v. Likes*[45] the question was permitted because the insurance company was a local concern, with a great many stockholders and employees in Springfield, where the trial was had. The court states, however, that ordinarily the chance that some juror might have an interest in the insurance company in question would be so remote that the question could be asked for no other purpose than to prejudice the jury. *Chambers v. Kennedy*[46] is similar. The court says there is no pretense that a local insurance company was concerned and that the possibility of drawing a juror connected with an insurance company interested in the defense is so remote that counsel should have shown his good faith before being permitted to poison the minds of the jurors by asking the question.[47]

Perhaps *Burrows v. Likes* and *Chambers v. Kennedy* do not give a new definition of good faith, but deal rather, with evidence of good faith. That is, good faith here may mean an absence of a motive to prejudice defendant's case; but the circumstance that there is no likelihood of the jurors being interested in the company in question, is very strong evidence of bad faith.

Other questions suggest themselves in connection with the foregoing outline of cases. Must there be a showing of good faith, or, in the absence of a showing to the contrary, is good faith presumed? If a showing is required, when must it be made, and how? On these points the cases seem to be in great confusion.

Chambers v. Kennedy,[48] *Kelley v. Sinn*[49] *and Bruce v. East Side Packing Co.*[50] say expressly that a showing of good faith is required, and that it must be made before the question is asked. In the two latter cases good faith means reasonable cause to believe that the defendant was insured; in *Chambers v. Kennedy* presumably it means reasonable cause to believe that the jurors had some connection with the insurance company.

of the defendant that the named insurance company carried the risk.

43. This seems to have been the conception of the term in Boten v. Sheffield Ice Co., (1914) 180 Mo. App. 96, 166 S. W. 883, note 5; and in Bright v. Sammons, (1919) 214 S. W. 425. (Mo. App.), note 13.

44. "There is nothing in the record before before us to indicate that counsel for plaintiff was acting in bad faith in propounding the questions to the prospective jurors for the mere purpose of prejudicing them, and, in the absence of such showing, the assumption may be indulged by us that plaintiff was acting in good faith." Cazzell v. Schofield, (1928) 8 S. W. (2d) l. c. 591, (Mo.), note 1.

45. (1914) 180 Mo. App. 447, 170 S. W. 459, note 8.

46. (1925) 274 S. W. 726 (Mo.), note 23.

47. There are likewise cases in other jurisdictions which make the right to question depend upon the likelihood that the jurors will be interested in the insurance company. Thus in Putnam v. Pacific Monthly Company, (1913) 68 Or. 36, 130 Pac. 986, an inquiry as to whether the jurors had any connection with or held stock in the Employers Liability Assurance Corporation of London, England, was held improper. The court says: "Considering the remoteness of probability that the average juror of Multnomah County would be a stockholder or interested in a corporation of London, England, it was an indiscretion of the court to allow that institution to be made such a prominent feature in the process of impaneling the jury." In Girard v. Grosvenordale Co., (1909) 82 Conn. 271, 73 At. 747, the position is taken that it is within the discretion of the court to permit the matter to be gone into, if, upon the statements of counsel, there is any reason to believe that any jurors would be connected with the insurance company in question.

48. (1925) 274 S. W. 726 (Mo.), note 23.

49. (1925) 277 S. W. 360 (Mo. App.), note 25.

50. (1928) 6 S. W. (2d) 986 (Mo. App.), note 35.

In *Yates v. House Wrecking Co.*,[51] *Smith v. Scudiero*,[52] *Malone v. Small*[53] and *Bruce v. East Side Packing Co.*,[54] plaintiff's counsel did in fact question the defendant or the attorney for the defendant as to whether defendant was insured, or insured with a particular company, before making inquiry of the panel.

However, in *Meyer v. Gundlach-Nelson Mfg. Co.*,[55] *Boten v. Sheffield Ice Co.*,[56] *Garvey v. Ladd*,[57] *Melican v. Whitlow Construction Co.*,[58] *Plannett v. McFall*[59] *and Floun v. Birger*,[60] the question to the panel preceded the inquiry made of defendant or defendant's counsel; and in *Saller v. Friedman Brothers Shoe Co.*,[61] *Burrows v. Likes*,[62] *Bright v. Sammans*,[63] *Wagner v. Gilsonite Co.*,[64] *Laurent v. Hoxmier*,[65] *Wallnitz v. Werner*,[66] *Muehlebach v. Muehlebach Brewing Co.*,[67] *Jedlicka v. Shackelford*[68] and *Steinkamp v. F. B. Chamberlain Co.*,[69] no basis whatever was laid for the question, either before or after the inquiry.

The plain implication from the language of the court in *Bright v. Sammons*[70] is that good faith will be presumed, in the absence of a showing to the contrary. And the principal case expressly takes this position.[71] To be sure, the court in the principal case is at this point using "good faith" in the sense of absence of a motive to prejudice. Elsewhere in the opinion the court says that defendant in effect admitted that the insurance company was interested in the case. Perhaps the court means that if there is no showing to the contrary, absence of a motive to prejudice will be presumed; but that reasonable cause to believe that the insurance company was interested must affirmatively appear. In other words, good faith, in one sense of the term, will be presumed; good faith, in another sense, must be established.

Difficulties arise in connection with the proof of good faith or bad faith. It is not competent for the parties to introduce evidence at the trial to show that defendant is or is not insured.[72] This would amount to the introduction of irrelevant and prejudicial matter, and would not be made competent by any countervailing policy. Presumably the plaintiff has no right to require the defendant or his attorney to give information as to whether the defendant is insured, or insured with a particular company.[73] If no such right exists, there might well be some question as to the

51. (1917) 195 S. W. 549 (Mo. App.), note 10.
52. (1918) 204 S. W. 565 (Mo. App.), note 12.
53. (1927) 291 S. W. 163 (Mo. App.), note 33.
54. (1928) 6 S. W. (2d) 986 (Mo. App.), note 35.
55. (1896) 67 Mo. App. 389, note 3.
56. (1914) 180 Mo. App. 96, 166 S.W. 883, note 5.
57. (1924) 266 S. W. 727 (Mo. App.), note 21.
58. (1925) 278 S. W. 361 (Mo.), note 27.
59. (1926) 284 S. W. 850 (Mo. App.), note 31.
60. (1927) 296 S. W. 203 (Mo. App.), note 34.
61. (1907) 130 Mo. App. 712, 109 S. W. 794, note 4.
62. (1914) 180 Mo. App. 447, 170 S. W. 459, note 8.
63. (1919) 214 S. W. 425 (Mo. App.), note 13.
64. (1920) 220 S. W. 890 (Mo.), note 15.
65. (1921) 227 S. W. 135 (Mo. App.), note 17.
66. (1922) 241 S. W. 668 (Mo. App.), note 18.
67. (1922) 242 S. W. 174 (Mo. App.), note 19.
68. (1925) 270 S. W. 125 (Mo. App.), note 22.
69. (1927) 294 S. W. 762 (Mo. App.), note 32.
70. (1919 214 S. W. 425 (Mo. App.), note 13.
71. "There is nothing in the record before us to indicate that counsel for plaintiff was acting in bad faith in propounding the questions to the prospective jurors, or for the mere purpose of prejudicing them, and, in the absence of such showing, the assumption may be indulged by us that plaintiff's counsel was acting in good faith." Cazzell v. Schofield, (1928) 8 S. W. (2d) l. c. 591.
72. Gore v. Brockman, (1909) 138 Mo. App. 231, 119 S. W. 1082; Trent v. Printing Co., (1909) 141 Mo. App. 437, 126 S. W. 238.

However, in Snyder v. Wagner Elec. Mfg. Co., (1920) 284 Mo. 285, 223 S. W. 911, and in Jablonowski v. Modern Cap Mfg. Co., (1925) 312 Mo. 173, 279 S. W. 891, such evidence was allowed to be introduced for the purpose of impeaching prior witnesses. The latter case deals with the matter of good faith in the following terms: "The assumption that plaintiff's counsel, in bringing out the testimony complained of, was acting in good faith, must be indulged on the record before us, and our ruling herein is made on that basis. If the case were one in which it appeared that an insurance company had not in fact conducted the defense.....and that questions had not been propounded to witnesses with respect to their relations to such a mythical defendant in bad faith....., a different situation would confront us."

73. It is beyond the scope of this note to consider whether and under what circumstances, witnesses may be called and examined to establish bias and prejudice on the part of prospective jurors. Under some circumstances the introduction of evidence

propriety of saying that if defendant refuses to answer such an inquiry he in effect admits the fact of the insurance or the interest of the company. *Bright v. Sammons*[74] holds that bad faith cannot be established by setting forth the facts in an affidavit appended to the motion for a new trial. The principal case comments upon the failure of the defendant to disclaim the interest of the insurance company in brief and argument before the Supreme Court. But, surely, proof of facts is not properly made in brief or argument.

It is submitted that the Missouri courts have, in general, been too lenient with respect to inquiries concerning the jurors' interest in insurance companies. If good faith means an absence of a motive to prejudice, and good faith is presumed in the absence of a showing to the contrary, there may as well be an unqualified rule that such questions are proper; for bad faith cannot be established, except in the rarest of instances. If good faith means reasonable cause to believe that an insurance company is interested, and plaintiff has grounds for believing that defendant is insured, he may inquire of the juror's interest, and thereby prejudice the defendant's case, though there is scarcely the remotest possiblility of any connection between the juror and the insurance company. And if there be superadded an additional requirement of good faith in the sense of absence of a motive to prejudice, and good faith in this sense is to be presumed, the unfairness to the defendant is not relieved against.

Chambers v. Kennedy[75] seems to be a step in the right direction, and its rule is much to be preferred over that laid down in the principal case. The examination of the juror should not be permitted unless there is reasonable cause to believe that the juror is interested in or connected with the insurance company. And even in such a case, if plaintiff's counsel can get at the desired information without mentioning the term insurance or insurance company, he should be required to do so.[76] Instead of inquiring whether the juror is or has been employed by a named insurance company, counsel should interrogate the juror as to his occupation, past and present. Instead of asking whether he is a stockholder in a named insurance company, counsel should first inquire whether the juror owns stock in any corporation. If the answer is in the affirmative, counsel may then ask the nature of the corporation, or the name of the corporation. Instead of asking whether the juror is related to or acquainted with any of the officers of a named insurance company, counsel should, if he wants to examine on the point, learn the names of the officers, and then simply ask concerning the juror's relation to or acquaintance with certain named individuals. It is believed that only in a very exceptional case would it be found necessary to ask the juror directly as to his connection with a particular company.

If in a particular case, it should prove impossible, except by a direct question, to ascertain the juror's interest, plaintiff's counsel should then be required, out of the hearing of the panel, to state to the court his reasons for believing that defendant

is proper. See 35 C. J. 400, and cases cited in note 57. Testimony may seemingly be offered to show the juror's interest, when he has denied it. Ellis v. State, (1889) 25 Fla. 702, 6 So. 768. But it would seem to be quite a different matter for the plaintiff, during the impaneling of a jury, to submit evidence to the court tending to show that defendant carried insurance, merely as a basis for his examination of the jury. The information sought to be elicited is sought for the plaintiff's benefit; it is not proof upon a matter in issue. In Plannett v. McFall, (1926) 284 S. W. 850 (Mo. App.), note 31, the court suggested that the defendant be sworn and examined upon the question of the insurance company's interest, but in none of the Missouri cases has this procedure been followed, and in no other case was it suggested. Rather, the practice seems to have been for plaintiff's counsel to inquire informally of defendant's counsel as to the fact of the insurance or the interest of the particular company.

74. (1919) 214 S. W. 425 (Mo. App.), note 13.

75. (1925) 274 S. W. 726 (Mo.), note 23.

76. This seems to be the rule of the Texas court. Gordon Jones Construction Co. v. Lopez, (1925) 172 S. W. 987 (Tex.)

carried insurance, his reasons for believing that some the jurors might be interested in the insurance company, and the reasons why he deems it impossible to elicit the desired information from the jurors other than by a direct question as to their connection with the insurance company. The court, if satisfied from the statement of counsel that an insurance company is interested in the case, and that some juror might well have some connection with that company, and that the information can be obtained in no other way, should have the discretionary power to allow the question to be put to the panel.

In this manner the substance of the plaintiff's right to make full inquiry concerning the juror's interest or bias would be preserved, with a minimum of prejudice to the defendant's case.[77]

F. C. B.
G. V. H.

77. Since the foregoing note was prepared, two additional cases have been reported dealing with the same problem.

In Maurizi v. Western Coal and Mining Co. (1928) 11 S. W. (2d) 268 (Mo.), the prospective jurors were asked as to their connection with the United States Fidelity and Guaranty Company or Thomas McGee & Son, agents of that Company in Kansas City. Defendant objected to the inquiry, and moved to discharge the jury. Thereupon, out of the hearing of the panel, the court inquired of defendant's counsel if he represented said company and it was interested in the case. He answered that he was attorney for the company, but did not answer whether he represented the company in the case, or whether the company was interested.

Defendant contends that plaintiff's counsel should have laid a foundation for his question to the jury before asking it. The Supreme Court, in approving the action of the trial court in refusing to discharge the jury, says it knows of no rule requiring a foundation to be laid. The court continues (p. 274): "Counsel for plaintiff is not required to prove that an insurance company, or insurance agency, is interested, before inquiring of the members if they are connected with either. He is presumed to be acting in good faith when he makes the inquiries. If it appears from the record that counsel had reasonable cause to believe an insurance company, or an insurance agency, was interested, and that he acted in good faith in making the inquiries, the sound discretion of the court in controlling and directing the examination will be sustained."

Here, the court says, the trial court could assume that the insurance company named was interested in the defense of the case, because of the fact that defendant's counsel had failed to answer the question of the court with respect to that matter.

Clayton v. Metalcrafts Corporation (1929) 12 S. W. (2d) 938 (Mo. App.), approves an inquiry of the jurors with respect to their interest in a named insurance company, made after defendant's counsel, out of the hearing of the panel, had admitted that said company was defending the action.