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INTERPLEADER IN MISSOURI

EUGENE HAUCK BUDER*

I. GENERAL PRINCIPLES

The subject of interpleader in Missouri takes on special interest because of the Proposed General Code of Civil Procedure for Missouri and the changes it would work in the ancient equitable remedy. It is the writer's purpose in this paper to consider interpleader as it now obtains in Missouri in the form of the old chancery practice and the fragmentary statutes on the subject, and to determine and appraise the changes that would come from the adoption of either of the two plans proposed for a new code.

Interpleader sprang from the common law defensive interpleader allowed in cases of wardship and detinue, and from the equitable practice of the justices in eyre in the reign of Edward III. Influenced by these practices, the Chancellor soon began to exercise an extensive interpleader jurisdiction of his own.¹ The earliest known bill of interpleader in equity dates from the year 1484,² and the earliest known instance of a technically strict bill of interpleader, from 1560.³ In the course of developing the remedy, however, the equity courts imposed restrictions, to a degree far greater than required by the inherent necessities of the remedy. These restrictions have since been a plague to the courts, including those of Missouri, and, when rigidly applied, a considerable nuisance to litigants. It will be necessary to consider them later in this paper.

The Missouri state courts, entering the field in 1821, of course found interpleader well established in equity. The Missouri legislature has attacked

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1. This new view of the history of interpleader is taken by Rogers, *Historical Origins of Interpleader, Conclusion*, filed in Harvard Law Library (1941). It is well supported by scholarly research.

2. *Flyyke v. Banyard*, 1 Cal. Ch. cxv (1484).

3. *Alnete v. Bettam & E. Marmyon*, Cary 65 (1560).

the problem piecemeal,⁴ passing a number of special statutes meant to supplement rather than amend the old chancery practice, but actually adding very little to it. For this reason, it will be easiest to consider the cases first, and then the statutory additions.

Interpleader is fundamentally an equitable remedy to enable one in possession of a chattel or a fund to avoid double or multiple vexation, or double or multiple liability through double or multiple recovery against him, by interpleading,⁵ or joining as defendants, all claimants to the chattel or fund, so that the court may dispose of all the claims in one proceeding. In strict logic it is permissible that the applicant have a claim himself; he may even deny all liability. The only requirement inherently necessary is that the claims be mutually exclusive, in whole or in part.⁶ For if both or all the claims may coexist without conflict, there is no purpose served by the joinder of interpleader.

Every suit in interpleader has potentially two stages.⁷ The purpose of the first is to decide whether interpleader will lie. If a dispute as to the amount of the fund does not of itself preclude interpleader, then a second function of the first stage will be to determine the amount of the fund that the applicant must pay into court. And if interpleader is allowed though the applicant denies all liability whatsoever, then in the first stage it will be necessary to decide whether he has any liability, and if so, how much. If interpleader does not lie, that is an end of it, and the bill is dismissed. If the remedy does lie, but the applicant proves that he is not liable at all to anyone, that is also an end of it, but the applicant will be discharged. It will be as if the claimants were ordered to interplead for the fund, only in this case the fund will be nothing. But under the present practice, when interpleader lies there is always a fund to fight over, and accordingly the claimants are ordered to interplead. This gives rise to the second stage,

4. Missouri adopted the New York Code of Civil Procedure in 1849. At that time the New York Code had no provision on interpleader, adopting its first interpleader statute in 1851. On the latter point, see Miller, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 HARV. L. REV. 1016, 1032.

5. The terminology connected with this remedy is somewhat ambiguous and misleading. The verb "to interplead" is used in the transitive sense of joining claimants as defendants, and also in the intransitive sense of coming in as a claimant on the court's order. In some of the statutes it is used to describe the claimant's coming in of his own volition: that is, synonymously with "to intervene." As an agency noun, the word "interpleader" seems to be limited to those who interplead in the two latter senses, that is, the claimants. In this paper the stakeholder who seeks to interplead the claimants will be referred to as the applicant.

6. Chafee, *Modernizing Interpleader* (1921) 30 YALE L. J. 814, 844.

7. See *Duke v. Duke*, 93 Mo. App. 244, 250 (1902).

the suit between the claimants. In this the burden of proof is allocated in the same way as if the two claimants were in a lawsuit against each other.⁸

The first stage is so distinctly a separate proceeding that under the statute⁹ allowing appeal only from a final judgment, a claimant who in the trial court has unsuccessfully resisted the applicant's effort to be discharged may appeal from the order of interpleader.¹⁰

Certain safeguards have been developed to insure that the remedy shall be available only to those actually exposed to double vexation. First, it must not appear that one of two claims, or that all but one of several claims, is groundless.¹¹ Second, the applicant must be free from collusion.¹² Third, the applicant, if he is a mere disinterested stakeholder, must put the *res* in court.¹³ It would be undesirable to permit the remedy where it is not needed, because of the general principle that equitable remedies are available

8. *Kansas City & Atlantic Ry. v. Smith*, 156 Mo. 608, 57 S. W. 555 (1900).

9. MO. REV. STAT. (1939) §1184.

10. *Lafayette-South Side Bank & Trust Co. v. Siefert*, 223 Mo. App. 431, 18 S. W. (2d) 572 (1929). In *W. A. Ross Construction Co. v. Chiles*, 344 Mo. 1084, 130 S. W. (2d) 524 (1939), the applicant was not allowed to appeal from an overruling of its motion for a new trial made when the court denied its right to interplead and went on to hear evidence on counterclaims. This situation, however, will not often arise. A denial of interpleader usually takes the form of the dismissal of the bill, or if it is defensive interpleader, of judgment for the plaintiff. Both of these are final judgments, and hence can be appealed from.

In the Ross case, *supra*, the applicant also tried unsuccessfully to block consideration of the counterclaims by a writ of prohibition (*State ex rel. W. A. Ross Construction Co. v. Skinker*, 341 Mo. 28, 106 S. W. (2d) 409 (1937), the court holding that there was not such an abuse of judicial discretion as to be defeasible by collateral attack. The hearing of evidence on the counterclaim, however, was undoubtedly improper, and if judgment were given on it, it would probably be reversed on appeal, in view of the applicant's vigorous resistance. In *State ex rel. City of St. Charles v. Becker*, 336 Mo. 1187, 83 S. W. (2d) 583 (1935), judgment on a counterclaim to a bill of interpleader was allowed to stand, but only because the applicant made no objection to the trial of the issues thereby raised, replied to the counterclaim, signed an agreed statement of facts, and introduced it in evidence. The court implies that otherwise the lower court would have had jurisdiction only to dismiss the bill or to order the claimants to interplead.

11. *Woodmen of the World v. Wood*, 100 Mo. App. 655, 75 S. W. 377 (1903); *Lafayette-South Side Bank & Trust Co. v. Siefert*, 223 Mo. App. 431, 18 S. W. (2d) 572 (1929). The earlier cases of *Sullivan v. Knights of Father Mathew*, 73 Mo. App. 43 (1898), and *Funk v. Avery*, 84 Mo. App. 490 (1900), contained dicta apparently to the effect that the doubt had to be one of fact rather than merely one of law, but *Woodmen of the World v. Wood*, *supra*, settled the law that a reasonable doubt as to the law was sufficient.

12. In *Swain v. Bartlett*, 82 Mo. App. 642 (1900), the court says that in many jurisdictions an affidavit of freedom from collusion is required; hence it may be inferred that it is not required in Missouri.

13. Omission of tender of the *res* either makes the bill demurrable or prevents an injunction against pending actions by the claimants against the applicant, but the failure is waived by going to trial on the merits. See *Murphy v. Barron*, 286 Mo. 390, 408, 228 S. W. 492, 497 (1921).

only when the legal remedies are inadequate, because the presence of the case in the equity court prevents the litigants from demanding the jury to which they would often otherwise be entitled, and because of the special privilege accorded the successful disinterested applicant, of receiving his costs and a reasonable attorney's fee, paid out of the fund.¹⁴

The matter of collusion has caused the Missouri courts some little difficulty. In a case of 1900,¹⁵ the applicant, a trustee of the proceeds from the foreclosure of a mortgage deed of trust, procured the appointment of an administrator when sued by the heirs of the deceased mortgagor, and then interpleaded the administrator and the heirs. The court held that interpleader would not lie because of the applicant's collusion with one of the claimants, in not only bringing him into the suit, but in also making him a claimant. This so-called collusion was a bar to interpleader regardless of whether the applicant had acted in good or bad faith. The strict doctrine of this case was shortly after broken in upon, in a case decided in 1906.¹⁶ There the applicant notified one group of claimants of their claim, and they were the first to bring suit. The other claimant, when brought in by interpleader, complained of collusion, but the order of interpleader was made and affirmed on the ground that the applicant had acted in good faith. The decision, however, is weakened by the fact it was not the claimants with whom collusion was charged, but the other claimant, that was brought in by interpleader, and by the fact that the applicant was trustee for the first group of claimants, and therefore obliged to notify them of their possible rights. In a case decided in 1923,¹⁷ however, the Supreme Court distinctly held that where the applicant procures additional claimants beyond the one arrayed against him, the test of whether his conduct bars interpleader is whether he acted in good faith: that is, whether he procured the claimants because he genuinely believed that they would later claim against him, or whether he did so merely to put himself in the desirable role of applicant.

14. *Woodmen of the World v. Wood*, *supra*, n. 11; *Supreme Council, Legion of Honor v. Palmer*, 107 Mo. App. 157, 80 S. W. 699 (1904). Both these cases also hold that after the dispute is decided between the two claimants, the fund is made whole for the winner by costs taxed against the loser, in addition to the costs taxed against him for the immediate proceedings. *Christian v. National Life Ins. Co.*, 62 Mo. App. 35 (1895), holds that where the applicant refused to pay the claimants jointly and tried to compel a compromise before bringing its bill of interpleader, it is not entitled to costs and attorney's fee, though it be discharged on paying the money into court.

15. *Swain v. Bartlett*, *supra*, n. 12.

16. *Little v. St. Louis Union Trust Co.*, 197 Mo. 281, 94 S. W. 890 (1906).

17. *State ex rel. Mutual Aid Union v. Allen*, 298 Mo. 231, 250 S. W. 366 (1923).

Analytically it is only the applicant in an interpleader suit who has an equity: the exposure to double vexation. Thus it would seem that he should be the only one to whom the remedy is available. Yet in some jurisdictions a claimant is allowed to bring the bill.¹⁸ In Missouri a claimant is allowed no standing to bring interpleader.¹⁹ Those cases that allow it do so because of the peculiar facts involved in them, and leave the general rule intact.²⁰ This restriction on the remedy can hardly be called a defect. The claimant may bring an action at law against the person in possession of the thing claimed, and the latter may either file his bill in a separate proceeding and enjoin the action,²¹ or answer (more accurately, file a counterclaim and a

18. *Webster v. Hall*, 60 N. H. 7 (1880); *Brown v. Clark*, 80 Conn. 419, 68 Atl. 1001 (1908). The latter case follows a statute on this point.

19. *Hathaway v. Foy*, 40 Mo. 540 (1867); *Browning v. Hilig*, 69 Mo. App. 594 (1897); *Arn v. Arn*, 81 Mo. App. 133 (1899).

20. In *Borchers v. Barckers*, 143 Mo. App. 72, 122 S. W. 357 (1909), the court tacitly let one of the claimants bring the bill. But the stakeholder had already been discharged by agreement among the parties, and had paid the fund to a trust company, to be held by it until its disposition should be determined by suit. The parties recognized that the quarrel was between themselves, and neither would have thought of suing the trust company. The original stakeholder was out of the case by agreement, and there would have been no point in requiring the trust company to bring the bill as a new stakeholder. This case is really the second stage of an interpleader suit, the fight between the claimants, except that the money is held by a trust company rather than by the court.

In *Lindsay v. Hotchkiss*, 195 Mo. App. 563, 193 S. W. 902 (1917), one claimant was allowed to bring the bill against the other. Here, however, one claimant and the stakeholder had entered into an agreement whereby the stakeholder paid the fund to the clerk of the court and was to interplead the two claimants. But since it no longer had the fund, it could not bring the bill, and if the purpose of the commendable agreement were to be effected, one of the claimants had to bring it. This is a clear case of the first stage's being dispensed with by agreement.

Bentrup v. Johnson, 223 Mo. App. 299, 14 S. W. (2d) 537 (1929), allowed one claimant to interplead the stakeholder and the other claimant, on the ground that neither claimant could bring an action at law against the stakeholder, because by an agreement among the parties the claimants had forsworn their legal remedies against the person they made their stakeholder.

21. In *Geitz v. Blank*, 108 S. W. (2d) 1066 (Mo. App. 1937), the applicant brought an original bill, interpleading the plaintiff in a garnishment suit against him as garnishee, and praying for an injunction against that plaintiff's going on with the garnishment suit. A demurrer to the bill was sustained, and judgment given for defendant. On appeal this judgment was reversed. This is the nearest case found to the granting and affirming of an injunction. The reason is that in Missouri when one of the claimants begins suit, the applicant usually takes the more natural course of demanding interpleader in the same proceeding, rather than making a collateral attack through an original bill. The possibility of this direct defense is one of the fruits of the merger of law and equity. It is to be noted that when the applicant defends against a legal claim with interpleader, he thereby converts an action at law into a suit in equity. See *infra*, n. 23.

Although the applicant can thus enjoin suits begun by the claimants, he is cut off from the remedy of interpleader when one or more of these suits has ripened into judgment. *Cheever v. Hodgson*, 9 Mo. App. 565 (1881); *Wabash R. R. v. Flannigan*, 95 Mo. App. 477, 75 S. W. 691 (1902), petition for writ of error dismissed, 192 U. S. 29 (1904).

crossclaim) in the action by way of a bill of interpleader.²² If, in any of these manners, the issue between the claimants got tried by a jury in a legal proceeding, the claimant who instigated the proceedings would have no ground to complain, because he has no equity. But it is quite probable that all the stages would be treated as cognizable in equity, no matter how they were brought before the court. The Missouri doctrine is that the dispute between the claimants, as well as the question of whether there shall be an order of interpleader, is a matter to be tried in equity.²³ This view may be justified by an application of the principle that once a case is properly in a court of equity, equity will keep it until it has cleaned it up entirely.

II. TRADITIONAL REQUIREMENTS

Thus far we have been considering interpleader in its bare outlines and logical necessities. The great bulk of interpleader litigation, however, springs from certain artificial requirements traditionally imposed by courts of equity. The classical statement of these is that of Pomeroy:

1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded.
2. All their adverse titles or claims must be dependent, or be derived from a common source.
3. The person asking the relief must not have or claim any interest in the subject-matter.
4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder.²⁴

In Missouri all these requirements do exist, or are said by the courts to exist, to one extent or another. Often the court will recite the entire list, and then find that one or more of the requirements is so obviously satisfied that it is not necessary to consider the application of that requirement to the case in hand.²⁵ A holding that interpleader will lie where a cer-

22. *McGinn v. Interstate National Bank*, 178 Mo. App. 347, 166 S. W. 345 (1914); *Novinger Bank v. St. Louis Union Trust Co.*, 196 Mo. App. 335, 189 S. W. 826 (1917).

23. In *Borchers v. Barckers*, 158 Mo. App. 267, 138 S. W. 555 (1911), the second stage was tried to a jury, but the trial court practically directed a verdict. The appellate court therefore let the judgment stand, but said that there should have been no jury. In *Taylor v. Perkins*, 171 Mo. App. 246, 157 S. W. 122 (1913), the second stage was submitted to a jury, and one of the claimants objected and moved for a new trial. The appellate court reversed for this and other reasons.

24. 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1322.

25. *United Railways Co. of St. Louis v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262 (1910).

tain requirement is satisfied is not good authority for the proposition that it will not lie where that requirement is not satisfied. Thus every case allowing interpleader is really only dropping a dictum when it rehearses the above list. Nevertheless, in such cases it is interesting to see how the requirements are satisfied; it may be in such a way as substantially to take away the requirement.

A. Identity

Considering first the requirement of identity, we find that it has something less than its literal meaning in Missouri. For example, the statement made by Vice-Chancellor Shadwell in 1840 that when the claims are for different amounts they cannot be identical²⁶ is not followed in Missouri. In *Granite Bituminous Paving Co. v. Stange*,²⁷ a general contractor sued the contractor and the subcontractor to require them to interplead for the sum of \$535, which each claimed exclusively. The applicant was liable to the contractor on the contract, and to the subcontractor on the bond which it had had to file with the city of Joplin, for which it was doing the work. The judgment of discharge and order of interpleader were affirmed. The court held that even assuming that the subcontractor claimed an unliquidated amount for labor and materials, less than the \$535, still there was sufficient identity. Furthermore, the court had to meet the objection that the two claims were made on two distinct obligations. It did so by pointing out that the contractor could also claim on the bond, to the extent of the materials he had supplied. Thus the existence of partial mutual exclusion or overlap is made enough to satisfy the requirement.

*Gee v. Leaver*²⁸ is another case in which a mere overlap is treated as sufficient, the court passing over the question of identity in silence. The opinion is rested on the authority of *Roselle v. Farmer's Bank*.²⁹ There the claim of one claimant equalled the aggregate of six other claims and a residue left for the first claimant.

In *City of St. Charles v. Wabash Ry.*³⁰ the applicant, purchaser of oil, paid the assignees of the invoices for the oil the amounts of the invoices less

26. *Glyn v. Duesbury*, 11 Sim. 139, 148 (Ch. 1840).

27. 225 Mo. App. 401, 37 S. W. (2d) 469 (1931).

28. 172 Mo. App. 191, 157 S. W. 842 (1913). In this case one claimant demanded the proceeds from the sale of land which he had claimed by deed, and the other claimants demanded part of the proceeds by equitable charges which they alleged were imposed on the land by will. Besides the difference in amounts, there is the difference in the instruments through which the various claimants claim.

29. 119 Mo. 84, 24 S. W. 744 (1893).

30. 65 S. W. (2d) 655 (Mo. App. 1933).

freight, and then sought to interplead the assignees and the railroad for the freight. All the defendants counterclaimed and all got judgments on their counterclaims. Interpleader was denied partially on the ground that none of the debts arose from the same source. This might be construed as a statement of lack of privity, but it is also a statement of the absence of identity. If the debts did not arise from the same source, they were not the same debt. The debts on the invoices were not the same debt as that for freight, because they were not mutually exclusive. On *certiorari*³¹ the judgment on the counterclaim in favor of the assignees was reversed, but only because they took the invoices subject to the term in the contract that the consignor should pay the freight.³² The dismissal of the bill was affirmed. Thus in Missouri, the requirement of identity comes down to one of mutual exclusion, which is what logically it should be. But the old wording is still adhered to, and is still likely to mislead an unwary court.

Though identity in this qualified sense is enough to satisfy the rule, it is worth noting that to be discharged the applicant must tender the largest amount demanded by any claimant. In *Metropolitan Life Insurance Co. v. Brown*³³ the applicant did not do that, and for that reason among others it was denied interpleader. In *Smith v. Grand Lodge A.O.U.W.*³⁴ the same omission was followed by the same refusal, but there the court suggested that if the applicant amended its bill to raise the fund to the higher amount claimed, interpleader would lie.

B. Privity

The second requirement listed by Pomeroy is generally called privity.³⁵ Though the Missouri courts pay lip-service to this one along with its three comrades, it is actually treated in rather a cavalier spirit, and may now very well be extinct. The judicial attitude is best shown by *McGinn v. Inter-*

31. State *ex rel.* City of St. Charles v. Becker, 336 Mo. 1187, 83 S. W. (2d) 583 (1935).

32. The railroad was not bound by this term, because the bills of lading provided that the consignee should pay the freight, and the consignee accepted delivery from the railroad.

33. 186 S. W. 1155 (Mo. App. 1916).

34. 124 Mo. App. 181, 101 S. W. 662 (1907).

35. It should be noted that this privity is not the same as that which makes a judgment *res judicata* against one other than a party. (Chafee, *Modernizing Interpleader* (1921) 30 YALE L. J. 814, 829). The definition of this privity is, of course, Pomeroy's requirement. An example of the difference may be seen in that there is privity in the interpleader sense between two assignees of the same assignor, but no privity in the general sense.

state National Bank,³⁶ in which the court found that the old requirement was met, but added that the rule was considerably relaxed, and expressed the opinion that of Pomeroy's four requirements all were inherent in the remedy except privity.³⁷

Indeed there are Missouri cases denying interpleader for want of privity, but for one reason or another they are all of pretty weak authority. *Hartsook v. Chrissman*³⁸ refused to let the principal interplead two brokers, each of whom claimed the commission for the sale of the applicant's land. The court ruled that there was no privity, blindly following an old Alabama case.³⁹ It would have done better to follow a New York lower court case, *Shipman v. Scott*.⁴⁰ For it would seem that there really was privity in this case: both claimants derived their claims from the same source, the contract of the applicant to pay the commission to whomever made the sale. Hence even in the presence of the requirement of privity, this case should have been decided the other way.

In *Metropolitan Life Insurance Co. v. Brown*⁴¹ the applicant sought to interplead two claimants of the proceeds from a life insurance policy. The sustaining of the demurrer to the bill was affirmed on the ground among others that there was no privity between the claimants. But they both claimed under the same policy, and such a holding has never been made in any of the other insurance cases. This holding is an alternate ground at best, and it might be best to dismiss it as an ill-considered dictum in view of the sound ground for denying interpleader that there was no reasonable doubt as to which of the claimants was entitled.⁴²

In *City of St. Charles v. Wabash Ry.*⁴³ interpleader was denied because none of the debts arose from the same source. This sounds like privity

36. 178 Mo. App. 347, 166 S. W. 345 (1914). In this case the applicant bank interpleaded the principal who claimed the proceeds of the sale of his mules by his agent, and the fraudulent transferee of those proceeds, the agent's wife. The court found privity in that there was obviously privity between principal and agent, and in that the wife stood in the same position as her husband.

37. 178 Mo. App. 347, 350-351, 166 S. W. 345 (1914).

38. 114 Mo. App. 558, 90 S. W. 116 (1905).

39. *Kyle v. Mary Lee Coal Co.*, 112 Ala. 606 (1896).

40. 14 Daly 233 (N. Y. C. P. 1887). In this case the fact that there was one contract, to pay the commission to whoever made the sale, was used to satisfy the requirement of identity. But it is apparent that the same fact satisfies the requirement of privity as well.

41. 186 S. W. 1155 (Mo. App. 1916).

42. The policy contained a "facility of payment" clause, and hence the applicant would have been amply protected in paying the first named beneficiary.

43. 65 S. W. (2d) 655 (Mo. App. 1933).

talk, but as has been explained above,⁴⁴ it seems more logical to take it as a recognition of the absence of identity or mutual exclusion.

Turning now to the cases which do find privity, we note a striking liberality. *Gee v. Leaver*⁴⁵ is a case which blandly allows interpleader without going into any of the technicalities, but we may examine its facts to see how the requirements may be satisfied. Here the plaintiff conveyed land to one Eckelberry, to have it sold. Eckelberry sold it, and paid the proceeds to defendant, the applicant, with the intention that he should pay plaintiff. Plaintiff had got the land by deed from his mother. But now certain grandchildren of the mother claim parts of the proceeds under a clause in the mother's will, putting equitable charges on the land in their favor. They allege that the deed passed only the legal title, and made the plaintiff trustee for beneficiaries to be appointed by the will. It is hard to see how there is privity here, since the son claims under the deed and the grandchildren under the will. For privity seems to mean a common obligation as the source of the claims, rather than merely a common person.⁴⁶ The only way to reconcile this case with the traditional requirement is to observe that if the grandchildren's contention is right, all the parties derived their claims to beneficial shares in the land from the will. But it is going pretty far to let one claimant determine the nature of the other claimant's claim.

In *Novinger Bank v. St. Louis Union Trust Co.*⁴⁷ the trustee of a mortgage to secure bonds, holding a balance of the proceeds of a foreclosure sale, sought to interplead plaintiff, holder of nine bonds, and the other bondholders, who had notified it that eight of the plaintiff's bonds were invalid. Interpleader was permitted, privity being found in the fact that the fund which all claimed in whole or in part came from one and the same foreclosure sale. But this is actually only satisfaction of the requirement of identity. There was no privity in the accepted sense, because plaintiff on the one hand and the other bondholders on the other, all claimed through different bonds.

The case of *Repetto v. Raggio*⁴⁸ is a final example of tenuous spelling out of sufficient privity to pass the test. Here the plaintiff-applicant was the administrator of the estate of one Rogers, and Raggio a distributee there-

44. *Supra* at n. 30.

45. 172 Mo. App. 191, 157 S. W. 842 (1913).

46. Chafee, *Modernizing Interpleader* (1921) 30 YALE L. J. 814, 834; 2 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) §1135.

47. 196 Mo. App. 335, 189 S. W. 826 (1917).

48. 201 Mo. App. 628, 213 S. W. 525 (1919).

under. The latter employed Stutsman to see to it that he got his share, contracting with him on a contingent fee basis. But for some reason Raggio discharged Stutsman before the probate court ordered Repetto to pay a certain share to Raggio. When this order was made, Stutsman claimed his fee, \$134.70, out of the share by way of his attorney's lien, and the administrator sought to interplead distributee and attorney for that amount. The order of interpleader was made and affirmed, although one claimant claimed through descent and the other through an attorney's lien. In this case, however, there was something of an assignment by Raggio to Stutsman: apparently enough of an assignment to make privity between them. The fact that the assigning claimant later contested the validity of this assignment would not defeat interpleader: that validity would be an issue for the second stage of the proceedings.

However the courts may treat privity when they purport to recognize the requirement thereof, there is one situation in which the absence of privity does not defeat interpleader: the case of the finder. In *Lavelle v. Bellin*⁴⁹ the court admits that there is no privity among the various claimants of a lost and found chattel, but points out in a scholarly opinion that nevertheless the old chancery practice was to permit the finder to bring interpleader. It is to be noted that this case extends the doctrine somewhat, since the applicant was not the finder, but the finder's bailee's bailee, and the finder was one of the claimants.

With privity unnecessary in the first place, and reduced to so doubtful a position by the cases in the second, it would be highly desirable to abolish the requirement by decision, without waiting for legislative reform. And a recent case in the St. Louis Court of Appeals has done that very thing through inadvertence. In *Geitz v. Blank*⁵⁰ a tenant was allowed to interplead his landlord and another, who claimed the land by record and paramount title, for the rent he owed. Here there was no privity of any sort. This was one of the typical situations under the old practice in which interpleader was needed but refused. The reason was a common law doctrine which, unless it was to be broken in upon by exception, was indeed a complete bar: the doctrine that a tenant may not question the title of his landlord. Thus interpleader in these cases was really denied for failure to satisfy another of Pomeroy's requirements, freedom from independent liability to one of the claimants. This common law doctrine is still recognized in Mis-

49. 121 Mo. App. 442, 97 S. W. 200 (1906).

50. 108 S. W. (2d) 1066 (Mo. App. 1937).

souri,⁵¹ and it is another point in the *Geitz* case that slipped past without being noticed. But it was largely from the accidental absence of privity in these landlord-tenant cases, where interpleader had to be denied anyway, that the courts of equity unwisely drew the generalization that there could never be interpleader unless there was privity.⁵² In allowing interpleader here, the Missouri court struck at the very fountainhead of the privity doctrine. Passing them over in silence is not the best way to abolish undesirable doctrines, and it may not be recognized as an abolition at all. But a modern court, aware of the harm and confusion produced by the old privity shibboleth, can undoubtedly use this case as authority for the proposition that privity is no longer needed for Missouri interpleader.

C. *Disinterestedness*

The next requirement is disinterestedness. This means that the applicant must not deny any of the claims, in whole or in part. In the case of *Smith v. Grand Lodge A.O.U.W.*,⁵³ the applicant was not allowed to interplead by placing in court a sum less than that demanded by the party with the highest claim. The same is true of at least two other cases.⁵⁴ It should be observed, however, that a claimant is not permitted to defeat interpleader by engaging in a false dispute over the amount of the fund to which he has a claim.⁵⁵ If it is a case of defensive interpleader, the amount of the fund is generally determined by the amount of the plaintiff's petition.⁵⁶ If,

51. Walker v. Harper, 33 Mo. 592 (1863); Higgins v. Turner, 61 Mo. 249 (1875); Taylor v. White, 86 Mo. App. 526 (1901); Laughlin v. Wells, 314 Mo. 474, 283 S. W. 990 (1926).

52. Chafee, *Modernizing Interpleader* (1921) 30 YALE L. J. 814, 830-832.

53. *Supra* at n. 34.

54. Young v. Miller, 182 S. W. 822 (Mo. App. 1916); Thomas v. American Central Insurance Co., 297 S. W. 982 (Mo. App. 1927). In the latter case the judgment for the plaintiff, striking out the cross-petition and the part of the answer on interpleader theory, was reversed, but on other grounds.

55. Novinger Bank v. St. Louis Union Trust Co., 196 Mo. App. 335, 189 S. W. 826 (1917). The sum that the applicant offered to pay into court was more than the plaintiff had demanded in its petition. Then the plaintiff amended its petition to add \$1,000 to the amount it alleged that the applicant held for distribution, without accounting in any way for the additional amount. The court did not allow this sham dispute to stand in the way of the applicant's discharge.

56. Young v. Miller, *supra*, n. 54. The applicant claimed an interest to the extent of half the fund claimed, and hence was properly denied interpleader under the law as it stands. But the court went on to say: "The mere fact that he is liable to be sued by . . . (the other claimant) does not entitle him to demand an interplea. He cannot be liable to two judgments unless he has assumed two different and inconsistent obligations. And if he has done the latter, then interpleader will not lie" (p. 824). This language goes too far. It would deny interpleader in every case, ignoring the bases of it, reasonable doubt and double vexation. To say that he cannot be liable to two judgments is to assume without warrant that both courts will come to the same conclusion.

on the other hand, the proceedings begin with a bill of interpleader, it might be thought that determination of the amount of the fund is within the control of the applicant. Here, however, the question of whether the applicant is holding back part of the amount reasonably open to dispute may be raised, and the figure put down in his bill is not conclusive.⁵⁷

If the applicant absolutely denies all possible liability on one of two claims, he cannot have interpleader because from his standpoint there is no reasonable doubt as to which of the claimants is entitled. But if there are several claimants, and the applicant is disposed to deny one claim altogether, he can either interplead them all and keep his scruples over that claim to himself, or leave out the claim he regards as worthless, taking his chances that the maker thereof will not later sue. It has been held, however, that the applicant cannot defend by denying his liability to plaintiff and interpleading those whose claims he regards as colorable.⁵⁸

From this it necessarily follows that if the applicant contests his liability to each and all of the claimants, interpleader is not available to him. And so it has been held.⁵⁹

D. *Freedom from independent liability*

This brings us to the last of the four requirements, freedom from independent liability to any of the claimants. The leading case in Missouri on this point is *Love v. Hartford Life Insurance Co.*,⁶⁰ which holds that a mere contractual obligation between the applicant and one or more of the claimants will not bar the remedy. In this case the insured and his wife, the sole beneficiary, assigned their policy with defendant company to the plaintiff, for value. The company consented to the assignment, and agreed in writing to pay the assignee on proof of the insured's death. But then the widow resumed her claim, and when the assignee sued the company, it was permitted to interplead him and her. The court reasons that a contractual relation between applicant and claimant does not preclude interpleader, provided that there is privity between the

57. *Metropolitan Life Insurance Co. v. Brown*, 186 S. W. 1155 (Mo. App. 1916). The applicant sought to interplead two claimants of the proceeds of a life insurance policy. It tendered \$105, but one of the claimants also demanded interest and damages and attorney's fee for vexatious delay. This answer prevented interpleader.

58. *Goggin v. Mutual Aid Union*, 213 S. W. 522 (Mo. App. 1919).

59. *Pope v. Missouri Pacific Ry.*, 175 S. W. 955 (Mo. 1915). Separate suits were brought against the railroad under the wrongful death statute by the administrator of the deceased and the administrator of the deceased's widow. The railroad sought to interplead them, while denying all liability for the death.

60. 153 Mo. App. 144, 132 S. W. 335 (1910).

claimants,⁶¹ as there was in this case. If privity were required anyway, then this fourth requirement would merge in the third, since you would have to have privity, and if you did have privity, you would not have to worry over independent liability. But with privity in so doubtful a position as an independent requirement, it takes on the new role of an alleviation to a restriction, rather than a restriction itself.

In seeking authority for the new position in this case, Judge Nortoni makes an interesting review of previous cases, and fits them into his theory. He admits that this scheme has not been used in these cases, but contends that if it had been, they would have been decided as they were. The first case fitted into this pattern is the famous old English one of *Crawshay v. Thornton*.⁶² There the applicant, owner of an iron yard, sought to interplead the owner of iron deposited with him, and the person to whom the owner's agent tortiously pledged the iron, but was not allowed to do so, because in his books he had put down the iron in the pledgee's name, and had written to the pledgee that he held the iron at the pledgee's disposal. It is indeed true that there was no privity between these claimants. Furthermore, Lord Cottenham recognizes the exceptions to the rule that a tenant or an agent cannot bring interpleader against his landlord or his principal, made in the cases where the other claimant claims by assignment from the landlord or principal: that is, where there is privity between the claimants. And most of the Missouri cases cited also fit into this scheme rather neatly.⁶³

61. Accord: 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1327.

62. 2 M. & C. 1 (Ch. 1836).

63. In *Franco-American Loan & Building Ass'n v. Joy*, 56 Mo. App. 433 (1894), applicant, which had expressly agreed to pay a fund in liquidation of a judgment establishing a mechanic's lien, was permitted to interplead the borrower to whom it had made the promise and others. Judge Nortoni, in looking back at this case, found that all the claimants derived their rights through the owner of the judgment sustaining the mechanic's lien to which the fund was to be applied.

In *Roselle v. Farmers' Bank*, 119 Mo. 84, 24 S. W. 744 (1893), the court permitted a bank to interplead the other six joint owners of a deposit when one of the joint owners, the one who had deposited the draft for himself and the others, demanded the entire sum for himself and sued the bank for it. There was a direct obligation to pay the depositor, but also a right in each of the claimants derived from the same source (possibly the debt owing from the bank to all the depositors, for whom the actual depositor was only an agent), and hence privity among the claimants. In *Woodmen of the World v. Wood*, 100 Mo. App. 655, 75 S. W. 377 (1903), the benefit association was allowed to interplead the new beneficiaries of a policy and the old one whom they replaced, who still claimed on the ground of incompetency of the insured to make the change, despite the new and direct promise made to the new beneficiaries in the form of a certificate issued to them. It is said that all the claimants derived their claims from the same undertaking of the association with the insured to pay the insurance to his lawfully designated beneficiary, and thus were all in privity together.

The formula of the *Love* case comes down to this: independent liability to one of the claimants is no bar if the claimants are in privity, because then the court can dissolve this liability if it runs to the wrongful claimant. Indeed, if this independent liability remains beyond the jurisdiction of the court, it is a logical bar to relief for the applicant,⁶⁴ since the equity court would have to enforce it and possibly give a decree on the other claim too, which would be simply a combination of judgments at law. But the strictly logical rule would seem to be that independent liability is no bar if the court can and will discharge the applicant of that liability before deciding between the claimants.

The courts have also found other ways to get around this requirement, or to restrict its operation, showing an inclination not to be hampered by it more than is logically necessary. Consider, for example, two cases of certified checks. The certification would seem to set up an independent liability, yet both allowed the bank to interplead. In *McGinn v. Interstate National Bank*⁶⁵ one claimant's donor procured the certified check from the bank. The court on the authority of *Love v. Hartford Life Insurance Co.*⁶⁶ held that the contractual relation did not bar the remedy. Following the scheme of that case, it could be made out that there was privity between the claimants, by regarding the donee as standing in the same position as her donor, since he was the other claimant's agent. Otherwise, however, one claim would spring from the agent's gift and the other from his fiduciary liability, so that privity would not be present. In *Bathgate v. Exchange Bank of Chula*⁶⁷ the claimants were the payee and the drawer of a check certified at the request of the drawer. The court held that the bank had contracted no independent liability to the payee, because the drawer had requested the certification; there was no such delivery as to make the payee a holder; and the contract that the drawer had made with the bank, if regarded as for the benefit of a third party, was that the bank should pay the check when it was presented by one lawfully entitled to payment, whether this was done being one of the issues.

To recapitulate the manner in which the four requirements are treated in Missouri, we find that identity is liberally construed to mean mutual

64. Cases recognizing this principle: *Commerce Trust Co. v. Bank of Willow Springs*, 161 Mo. App. 431, 143 S. W. 531 (1912); *City of St. Charles v. Wabash Ry.*, 65 S. W. (2d) 655 (Mo. App. 1933).

65. 178 Mo. App. 347, 166 S. W. 345 (1914).

66. 153 Mo. App. 144, 132 S. W. 335 (1910).

67. 199 Mo. App. 583, 205 S. W. 875 (1918).

exclusion in whole or in part; privity is substantially abolished; disinterestedness is still in full force, provided the allegation of interest is *bona fide* and colorable; and freedom from independent liability is limited in its application to those cases in which it necessarily operates as a bar.

In considering these requirements it will be observed that they are not distinctly articulated, but in many cases overlap or merge. Privity, for example, often serves the same purpose as identity: to test whether the same thing is claimed by both or all the claimants. When it goes beyond that, it becomes a noxious anomaly. Disinterestedness, meaning that there must be no dispute over the amount owed, is in part a reiteration of the necessity of mutual exclusion, and in part an unnecessary limitation of the cases in which the court is willing to give relief. Freedom from independent liability, however, stands alone, and is quite necessary, if by liability is meant such liability as the court cannot or will not dissolve.

III. STATUTORY MODIFICATIONS

Coming to an examination of the statutes, we first find a set on so-called interpleader⁶⁸ in cases of attachment. It is apparent, however, that these statutes actually authorize intervention by one claiming the attached property, rather than interpleader by the one in whose hands the property is attached. The same is true of a parallel group of statutes on garnishment.⁶⁹ Moreover, it has been repeatedly held that section 1568 authorizes inter-

68. MO. REV. STAT. (1939) §1489. "*Persons claiming attached property may interplead—affidavit—trial without delay.* Any person claiming property, money, effects or credits attached, may interplead in the cause, verifying the same by affidavit, and issues may be made upon such interplea, and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay."

Section 1490. "*Costs adjudged as in other actions.* In all cases of interpleader, costs may be adjudged for or against either party, as in ordinary action."

Section 1496. "*Courts may prescribe rules, when.* Courts having jurisdiction of attachments may, by rule, prescribe the time and manner of interpleading or exhibiting or filing any papers, or taking any needful steps therein, where the same are not prescribed by law."

69. MO. REV. STAT. (1939) §1568. "*Claimants may interplead.* Any person claiming property, money, effects or credits attached in the hands of a garnishee, may interplead in the cause, as provided by law in attachment cases; but no judgment shall be rendered against the garnishee in whose hands the same may be, until the interplea shall be determined."

Section 1569. "*Costs, how adjudged.* In all cases of interplea, costs may be adjudged for or against either party, as in ordinary actions."

Section 1571. "*Courts may prescribe rules.* The court having jurisdiction may prescribe, by rule, the time and manner of excepting to and denying the answer of garnishees, of interpleading, exhibiting or filing papers, or taking any needful step in garnishment cases where the same are not prescribed by law."

vention only where garnishment is based on attachment, and not where it is based on a general execution.⁷⁰

The real interpleader statute⁷¹ in connection with garnishment does not use the word "interpleader," but speaks of the court's making an order to appear on the claimant of the debt or property attached in the hands of the garnishee. It will be noticed that this section has language providing for substituted service and suggesting an *in rem* action, but that it does not purport to cut off the rights of the non-resident claimant who is notified but does not appear.

In *Schawacker v. Dempsey*,⁷² a case of garnishment on execution, the court recognized that Section 1568 did not authorize the intervention of a claimant, but sanctioned the action of the lower court under Section 1586 in ordering the appearance of the claimant on the motion of the garnishee.

The procedure under Section 1586 would seem to be properly labeled defensive interpleader, since that section provides that when the applicant-garnishee is sued by one claimant of the debt which he owes the defendant in the garnishment suit, that claimant claiming through a debt which the defendant in turn owes him, the applicant may bring into the suit another claimant, who now claims the debt which the applicant owes the defendant, through assignment from the defendant. The interpleader is conditioned upon getting personal jurisdiction over the other claimant, but that is always the case. And at the end of the proceedings, the applicant will pay or owe only one of the claimants, and will be discharged as to the other. True, the statute provides expressly for discharge only in one way: as to

70. *Wimer v. Pritchardt*, 16 Mo. 252 (1852); *Schawacker v. Dempsey*, 83 Mo. App. 342 (1900); *Potter v. Whitten*, 170 Mo. App. 108, 155 S. W. 80 (1913).

71. Mo. REV. STAT. (1939) §1586. "*Claimants of debts assigned or property sold, may be made parties, how—notice, how given—trial.* If the garnishee disclose in his answer, and declare his belief, that the debt owing by him to the defendant; or the supposed property of the defendant in his hands, has been sold or assigned to a third person, and the plaintiff contests or disputes the existence, force or validity of such sale or assignment, the court shall make an order upon the supposed vendee or assignee, to appear at a designated time and sustain his claim to the property or debt. A copy of such order shall be served upon him, as in the case of a summons, if he can be found; if not, it shall be published once a week, for three consecutive weeks, in some newspaper published in or nearest the county in which the action is pending, which shall be equivalent to service. If the party so notified fail to appear as required, the garnishee's averment of such sale or assignment shall be disregarded; but if he appear, and, in writing, filed in the cause and verified by affidavit, claim under such sale or assignment, a trial of his right shall be had, without unnecessary delay, upon an issue made thereon; and if the same be determined in his favor, the garnishee shall, as to the property or debt in question, be discharged."

72. 83 Mo. App. 342 (1900).

the plaintiff in case the other claimant establishes his claim. But it is a necessary inference that if the other claimant does appear and fail to establish his claim, so that there is judgment for the plaintiff, the applicant will be discharged as to that other claimant.

Thus the procedure under this statute serves the fundamental purpose of interpleader, the prevention of double vexation. But if it is interpleader, it has many unusual aspects. The applicant does not tender the fund or pay it into court, but simply awaits the outcome of the litigation between the claimants. And if the third-party claimant wins, there is no provision for the court's giving judgment in his favor. The intention is apparently to bring him in so that he may defend his claim, but not so that he may recover on it. Indeed, the debt may not yet be due to him, or he may not yet want payment. If he later sues on the debt, however, the judgment in the garnishment interpleader ought to be *res judicata* in his favor.

It has been held that this section is directory and not mandatory, in that the garnishee may take on himself the defense that the fund rightly belongs to the third party.⁷³ This is a sensible result, but seems somewhat inconsistent with the words of the statute that "If the party so notified fail to appear as required, the garnishee's averment of such sale or assignment shall be disregarded . . ." These words apply to the case where the attempt to bring in the non-resident claimant has been made and has failed, and not to the case where the garnishee has simply used that claimant's claim as a defense, but it is illogical to treat the two cases differently.

Another limitation on this statutory interpleader is shown by the case of *Potter v. Whitten*.⁷⁴ A garnished bank was held not authorized by this statute to interplead the judgment debtor's wife, to whom it charged that he had made a fraudulent conveyance, because the statute was held to contemplate bringing in a new party where the assignment or sale had occurred *after* the thing garnished had been placed in the garnishee's hands. Here it had taken place *before*. But a more striking aspect of the case is the further holding that if the wife was really a necessary party, as alleged by the bank, it could have concluded her by any judgment, by serving her with notice and inviting her to defend.⁷⁵ If this were so, it would amount, in this

73. *Taylor v. Dollins*, 205 Mo. App. 246, 222 S. W. 1040 (1920).

74. 170 Mo. App. 108, 155 S.W. 80 (1913).

75. The chief authority the court gives for this proposition is *City of St. Joseph v. Union Ry.*, 116 Mo. 636, 22 S. W. 794 (1893). That case holds that where a person is responsible over to another, either by operation of law or by express contract, and is given notice of the action against such other person and

narrow field, to interpleader *in rem*, and that in turn would run counter to the Supreme Court decision⁷⁶ that a decree cutting off the right of a claimant served only by publication is not entitled to full faith and credit in another state. The question is interesting in connection with the proposed amendment to the Missouri substituted service statute to cover interpleader cases, considered later in this paper. But it has little intrinsic importance, because the *Potter* case, though not overruled on this point, has not been followed on it either.

The next statute on interpleader is one providing for the remedy as a defense in actions against banks.⁷⁷ It expressly supplements, and does not supersede, the old chancery practice. Moreover, in *Williams v. People's Bank of Springfield*,⁷⁸ the court took advantage of the slight departures of this remedy from ordinary interpleader to hold that the statute did not provide for strict interpleader, and hence that a dispute between a claimant and the bank as to the amount of the fund did not bar the remedy. The court relied on the provision calling for the adjudication of "the rights and interests of the several parties," inferring that this meant more than the

an opportunity to control it, the judgment in that action shall be conclusive against him. It is something of a jump from that proposition to the doctrine that a third party with a claim against the defendant rather than a liability to him can also be so concluded. The other authority given in the *Potter* case is to the same effect as the *St. Joseph* case, or to the effect that a third party who actually conducts the defense of the case because of some interest in it, is bound by the judgment in it.

76. *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518 (1916).

77. MO. REV. STAT. (1939) §7979. "*Interpleader in certain actions—costs.*
1. In all actions against any bank to recover for moneys on deposit therewith, if there be any person or persons, not parties to the action, who claim the same fund, the court in which the action is pending may, on the petition of such bank, and upon eight days' notice to the plaintiff and such claimants, and without proof as to the merits of the claim, make an order amending the proceedings in the action by making such claimants parties defendant thereto; and the court shall thereupon proceed to determine the rights and interests of the several parties to the action in and to such funds. The remedy provided in this section shall be in addition to and not exclusive of remedies now or hereafter existing.

"2. The funds on deposit which are the subject of such an action may remain with such bank subject to the order of the court until final judgment therein, and be entitled to the same interest as other deposits of the same class, and shall be paid by such bank in accordance with the final judgment of the court; or in the discretion of the court, the deposit in controversy may be paid into court to await the final determination of the action, and when the deposit is so paid into court such bank shall be struck out as a party to the action, and its liability for such deposits shall cease.

"3. The costs in all actions against a bank to recover deposits shall be in the discretion of the court, and may be charged upon the fund affected by the action."

78. 257 S. W. 192 (Mo. App. 1923).

two claimants; and the discretion placed in the court as to whether the fund should be paid into court, and as to how the costs should be taxed.

The remaining statutes on interpleader⁷⁹ are parts of the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act, both law in Missouri. They provide for both an original bill and defensive interpleader, but add nothing to the remedy already extant in equity.

The question may arise whether the statutory remedies are at law or in equity. There are no cases on this point, but it may be assumed that like the non-statutory interpleader they are all in equity, with the exception of Section 1586. Under this statute interpleader, if indeed it is interpleader, arises only incidentally in a proceeding at law. Furthermore, it is unlikely that the interpleader aspects of this remedy are sufficiently appreciated for it to be regarded as of equitable cognizance.

IV. CHANGES UNDER THE PROPOSED NEW CODES

The Missouri Supreme Court Committee on Civil Procedure, appointed by the court to assist in preparing suggestions to the 61st General Assembly for a revised code and rules of civil procedure, has submitted two plans: Plan I, calling for a number of amendments in the present code and certain new sections, and Plan II, being a complete new code.

Section 12 of Article 2 of Plan II is the codification of interpleader, being, *mutatis mutandis*, Rule 22 of the Rules of Civil Procedure for the district courts of the United States. It reads:

"Persons having claims against the plaintiff may be joined as defendants and are required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the title on which their claims depend do not have a common origin or are not identical, but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule sup-

79. Mo. REV. STAT. (1939) §15515. "*Interpleader of adverse claimants.* If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead."

Section 15575. "*Interpleader of adverse claimants.* If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate."

plement and do not in any way limit the joinder of parties permitted in section 9 above."⁸⁰

Consider first the words "is or may be exposed to double or multiple liability." Actual double liability, of course, precludes the remedy, in that if the applicant is liable to both claimants he cannot compel them to litigate between themselves the question of to which of them he is liable. But exposure to double liability undoubtedly means being subject to the risk of two judgments for the same liability, since once the two judgments were given, each would constitute a separate liability. Under this construction, the "is or may be" would indicate that the claims which might ripen into liability through judgment could be either actual or potential. In either case the applicant ought to be afforded protection against them. Of course, if the applicant sought to interplead two claimants, and one of them showed that he had no claim by refraining from answering, interpleader would not lie.

It will be observed that this section does not expressly require that the claims be mutually exclusive, wholly or in part. But the above construction introduces such a requirement, and of course a court acting under this section will not abandon that fundamental characteristic of the remedy.

As for the four requirements of Pomeroy's, this section expressly abolishes all but the last. The Missouri courts will be free, if this section becomes law, to treat the requirement of freedom from independent liability with the liberality they have always shown toward it.

The Missouri courts are also so liberal with the requirements of identity and privity as almost to reduce the pair of them to the single and necessary requirement of mutual exclusion. Thus the greatest reform will be worked by the words "It is not ground for objection . . . that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants," abolishing the requirement of disinterestedness. The strong Missouri policy in favor of this requirement is best expressed by Judge Blair in *Pope v. Missouri Pacific Ry.*:⁸¹

"No case is cited authorizing a tort-feasor to require persons, each claiming the sole right to damages for the same tort, simultaneously to litigate with it the question of its liability and, with each other, their conflicting claims. The remarkable situation which would

80. Section 9 is a liberal provision for the permissive joinder of plaintiffs and defendants.

81. 175 S. W. 955, 957 (Mo. 1915).

result would be far more productive of injustice than it will be to require defendant to take his chances on two juries coming to the same conclusion on the facts."

This cautious stand is squarely subverted by the new section. It is impossible to see any ground for Judge Blair's fear of injustice. The advance is really not a rash one, for all it does is add a new issue to the first stage of the suit. It is certainly worth making, in view of the wide class of cases that belong in interpleader and that will be admitted by the letting down of this barrier.

An interesting question under this section arises in connection with bills in the nature of interpleader. In these the applicant has some special ground for coming into equity. A good example is the prayer for an injunction against foreclosure of a mortgage which the applicant made in *Brown v. Curtin*,⁸² coupling it with his bill praying that the claimants of the mortgage debt be made to interplead. In this case the plaintiff was denied relief. He denied the title of one of the claimants, and for that reason among others the court held that not even a bill in the nature of interpleader would lie.⁸³ The general rule, however, is that set forth in a dictum in *W. A. Ross Construction Co. v. Chiles*⁸⁴ to the effect that with a bill in the nature of interpleader the applicant need not be an indifferent stakeholder, but may have an interest in the subject matter. Indeed, there would be no point in having a remedy requiring a special ground if it did not give a corresponding special privilege. Coming to the new section, it is evident that its words embrace both straight bills and bills in the nature. The two are assimilated. For one the section does away with the requirement of disinterestedness; for the other, with the requirement of a special ground beyond that of double vexation. A glimpse at federal practice will show that this is so. In *John Hancock Mutual Life Insurance Co. v. Kegan*,⁸⁵ decided before the new federal rules went into effect, the objection was made to plaintiff's bill that it was not a bill of interpleader because of plaintiff's interest, and not a bill in the nature of interpleader because of the absence of a special ground. The court found authority for allowing inter-

82. 330 Mo. 1156, 52 S. W. (2d) 387 (1932).

83. A much better reason, however, is that there was only one claimant, and it was his title that the applicant denied. Another possible claimant would have been the trustee in bankruptcy of the actual claimant's assignor, but the estate had been closed and the trustee discharged.

84. 344 Mo. 1084, 1093, 130 S. W. (2d) 524, 528 (1939).

85. 22 F. Supp. 326 (D. Md. 1938).

pleader anyway, but pointed out that when Rule 22 went into operation, interpleader would clearly lie in such a situation. That it does is confirmed by the recent case of *Standard Surety & Casualty Co. v. Baker*.⁸⁶

Thus the adoption of the new section would work one distinct reform, the abolition of the requirement of disinterestedness, and would also clear up a number of doubtful points and misunderstandings.

Section 6 of Article 5 of this same plan⁸⁷ deals with the cases in which substituted service may be used, and will undoubtedly be construed to include interpleader.⁸⁸ In this respect it corresponds to Amendment 4⁸⁹ of Plan I, the plan calling for piecemeal reform. That amendment would expressly include interpleader among the remedies in which a non-resident

86. 105 F. (2d) 578 (C. C. A. 8th, 1939).

87. "Substituted service. Service by mail or by publication shall be allowed only in cases affecting specific property or status. If the defendant so served does not appear, judgment may be rendered affecting said specific property or status as to said defendant, but such service shall not warrant a general judgment against a defendant."

88. Indeed, the present statute (MO. REV. STAT. (1939) §891) is already construed to include interpleader, within the words "actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court . . ." (State *ex rel.* Reid v. Barrett, 234 Mo. App. 684, 118 S. W. (2d) 33 (1938)). The words "cases affecting specific property or status" are perhaps better calculated to include interpleader, but since this proposed section does not expressly mention interpleader either, it makes little advance in this respect over the present statute.

89. MO. REV. STAT. (1939) §891. "*Orders of publication.* (The italicized words are the additions proposed by the committee.) In suits in partition, divorce, attachment, suits for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens and all other liens against either real or personal property, and in all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against or affecting rights in or to any real or personal property within the jurisdiction of the court, and including, but not by way of limitation, interpleader suits or suits in the nature of interpleader, or proceedings by way of answer or cross-petition of such a character and suits or other proceedings for the construction of wills or trusts, if the plaintiff or other party or other person for him shall allege in his petition, or other pleading or at the time of filing same, or at any time thereafter shall file an affidavit stating, that part or all of the defendants or other new party or parties if service by publication is sought by a defendant are non-residents of the state or is a corporation of another state, kingdom or country, and cannot be served in this state in the manner prescribed in this chapter, or have absconded or absented themselves from their usual place of abode in this state, or that they have concealed themselves so that the ordinary process of law cannot be served upon them, the court in which said suit is brought, or in vacation the clerk thereof, shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition, or other pleading, and in suits in partition, describing the property sought to be partitioned, and requiring such defendant or defendants or other party or parties to appear on a day to be named therein, which shall be at least forty-five days after the first publication of said notice, and answer the petition, or that the petition will be taken as confessed."

party (a claimant in this case) can be bound by a judgment resting on service by publication on him. The note to this amendment says, "Something of this nature is badly needed,"⁹⁰ but goes on to concede that there is a constitutional difficulty in the way. Indeed there is, and it appears insurmountable so far as it goes. It finds expression in the case of *New York Life Insurance Co. v. Dunlevy*,⁹¹ denying the need to give full faith and credit to just such a decree as this amended statute authorizes. It is true that that decision is hard to reconcile with *Harris v. Balk*,⁹² which holds that full faith and credit must be given to the judgment in a garnishment case rendered with personal jurisdiction over the garnishee but without jurisdiction over the defendant debtor, provided that the latter is notified and given an opportunity to defend, or treated in an equivalent manner. The *Dunlevy* decision is subsequent to that of *Harris v. Balk*, but the doctrine of the *Harris* case was substantially reaffirmed in *Pennington v. Fourth National Bank*⁹³ the year after the *Dunlevy* case. The analogy between the garnishment and interpleader situations is pretty clear. In debt it is sought to affect the title of the claimant of a debt through jurisdiction over the debtor. The cases are indistinguishable when put in terms of territorial jurisdictional conceptualism. But in terms of practical justice, there is something of a difference between letting a creditor get at the debt owed to his debtor, the existence of which debt is not disputed, and the creditor's right to which the debtor is not willing to contest; and letting a debtor compel his possible creditor to come in and prove his claim then or be forever cut off. At any rate, the *Dunlevy* case still stands.

Though a state does not have to give full faith and credit to an interpleader decree of a sister state rendered without jurisdiction over the claimant who now brings suit, it might choose to do so anyway. But with one exception, wherever one state has given such a decree, the other state asked to recognize it has refused to do so.⁹⁴

90. If it is intended that interpleader should be included in the substituted service statute, it is desirable that the statute say so, and for this reason Plan I would seem to be better in this respect than Plan II. Yet it is apparently not necessary that it say so, for the reasons given *supra*, n. 88.

91. 241 U. S. 518 (1916).

92. 198 U. S. 215 (1905).

93. 243 U. S. 269 (1917). This case, however, was an easier one in which to allow a valid judgment on substituted service, than *Harris v. Balk*, *supra*, n. 92. In this case the garnishee was a bank in the jurisdiction, and therefore it was easier to think of the debt owing to the defendant debtor, his bank deposit, as a *res* having its *situs* within the jurisdiction.

94. *Gary v. Northwestern Masonic Aid Ass'n*, 87 Iowa 25, 50 N. W. 27, 53 N. W. 1086 (1893); *Expressmen's Mutual Benefit Ass'n v. Hurlock*, 91 Md.

The *Dunlevy* case permits the non-resident claimant whom the interpleader decree purports to cut off, to recover from the applicant in an action does not permit him to recover in the state where the decree was given. To save him from being bound by the decree there, it would be necessary to hold that that decree was given without due process of law. The nearest approach to such a holding is that of *Hanna v. Stedman*,⁹⁵ a New York case. There an interpleader decree was given in New York against a non-resident claimant without jurisdiction over him. He later sued the applicant in Maryland, and got a judgment against it. Then he sued on the judgment in New York, and recovered. The New York court gave full faith and credit to the Maryland judgment that ran counter to the New York decree.

But whatever may be the difference in general between the vice stigmatized as lack of due process, and that which renders a decree unworthy of full faith and credit, it is hard to see any difference where the vice consists in lack of the necessary jurisdiction over the party sought to be affected, as it does in the class of cases we are considering. Thus while the *Dunlevy* case, considered on the basis of its facts and result, permits the party improperly served to recover against the applicant only in some state other than that where the defective decree was granted against the party, on principle it would also seem to warrant recovery in the same state, in derogation of the decree.⁹⁶ Until the matter is tested, Missouri will probably continue to grant interpleader decrees on substituted service, and to

585, 46 Atl. 957 (1900); *Ward v. Bankers' Life Co.*, 99 Neb. 812, 157 N. W. 1017 (1916); *Hanna v. Stedman*, 230 N. Y. 326, 130 N. E. 566 (1921); *Hinton v. Penn. Mutual Life Ins. Co.*, 126 N. C. 10, 35 S. E. 182 (1900); *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160 (1887); *Washington Life Insurance Co. v. Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123 (1898).

In *Washington Life Ins. Co. v. Gooding*, *supra*, it was Missouri that gave the decree that Texas refused to recognize. *Contra*: *Ely v. Hartford Life Insurance Co.*, 128 Ky. 799, 110 S. W. 265 (1908).

In *Cross v. Armstrong*, 44 Ohio St. 613, 626, 10 N. E. 160, 165 (1887), the court says: ". . . Does the mere fact that the company (the debtor) being sued, voluntarily delivers money to the clerk of the court, rather than keeps it in its own safe, or to its credit in bank, or loaned upon call, change the action from one *in personam* to one *in rem*? We think not."

95. *Ibid.*

96. Most of the ideas in this section on interpleader based on substituted service are taken from Chafee, *Interstate Interpleader* (1924) 33 YALE L. J. 685. Professor Chafee, however, does not think that the absence of due process follows in this case from the lack of a basis for full faith and credit.

respect such decrees, at least its own.⁹⁷ If the question is ever carried to the United States Supreme Court on the contention of denial of due process, it will probably be found that on the authority of the *Dunlevy* case this practice is denial of due process as well as unworthy of full faith and credit, or else the *Dunlevy* case will be overruled.

The amended statute, or the new provision construed to include interpleader, would certainly be effective in the few cases where the *res* is a chattel. An *in rem* proceeding to determine the rights to it would be in order. Finally, the statute would at least authorize a procedure for inviting non-resident claimants to come in and litigate their claims, and such invitations would probably be accepted in a good many cases.

Thus it would be highly desirable to enact the interpleader section of Plan II, and to enact the substituted service provisions of Plan I or II would be, among other things, an endeavor toward the commendable goal of extending the scope of interpleader, an endeavor calculated to enjoy some success in any case, and sure to work a great reform if the Supreme Court changes its notion of interpleader.

97. In this it would be following *State ex rel. Reid v. Barrett*, 234 Mo. App. 684, 118 S. W. (2d) 33 (1938), wherein the court recognized the validity of interpleader proceedings resting on service under the substituted service statute, by denying a writ of prohibition to a non-resident claimant served under that statute, who had unsuccessfully pleaded to the jurisdiction of the Missouri court entertaining the interpleader suit.