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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

PROTECTION OF PURCHASER FROM ONE WHO ACQUIRES GOODS BY GIVING BAD CHECK —MISSOURI LAW

For a number of years there has been considerable conflict of authority involving the right of the seller of goods, in a "cash sale" transaction, who has delivered the goods to the buyer, and received from the buyer a check which subsequently has been dishonored, to retake such goods after they have passed into the hands of a bona fide purchaser, for value without notice, from the buyer.

Those courts that protect the seller proceed on the theory that, unless the parties to a sale agree otherwise, payment by check is only a conditional payment until cashed. Thus, if the check is dishonored the goods still belong to the seller and no sale has been made. Since the would-be purchaser has no title he can transfer none and the seller can recover the goods even from an innocent sub-purchaser.[1] This reasoning has been the subject of a vigorous attack by Professor Williston.[2] As he points out, such a condition should not exist unless it has been expressly agreed to by the parties, in view of the fact that, in the normal case, the seller actually accepts the check itself as payment and, by delivering the goods to the buyer, assents to a transfer of ownership in the goods.

Those courts that protect the bona fide purchaser generally agree that, as between the immediate parties to a sale of personal property, a check, given for the purchase price, constitutes a conditional payment only and until such check is paid title does not pass. Yet, as against a bona fide purchaser for value and without notice, the seller is held by these courts to have no recourse.[3] This result is most often explained on some theory of estoppel.[4] But such an explanation seems unsatisfactory because it has never been held generally by Anglo-American courts that the mere placing of personalty in the possession of another will estop the owner from asserting his title. Furthermore, if it is held that, as between the original parties to the transaction, the seller actually retains the legal title to the goods until the check is cashed, then it would seem that such legal title would not be cut off even by an innocent sub-purchaser.

The same result of protection to the innocent sub-purchaser may be based on what is perhaps sounder reasoning by following the suggestion of Professor Williston referred to above *i.e.*, that, by accepting the check and delivering the

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1. National Bank v. Chicago, B. & N. R.R., 44 Minn. 224, 46 N.W. 342, 9 L.R.A. 263, 20 Am. St. Rep. 566 (1890); Johnson v. Iankovetz, 57 Ore. 24, 110 Pac. 398 (1910).

2. WILLISTON, SALES (2d ed. 1924) § 346a.

3. "As between the plaintiffs below and Dickinson & Co. (original buyer), the sale being for cash, and the delivery of the warehouse receipts being with the expectation that the checks were good and would be paid, upon its turning out that they were not good, we think West, Address & Co. were at liberty to regard such delivery as conditional, and at once reclaim the property.

"But we are also of the opinion that, under the circumstances of the case, if the bank stood in the relation of a *bona fide* purchaser, for a valuable consideration, without notice, then West, Andress & Co. had no right to reclaim the property in question, as against the bank." Hide & Leather Nat. Bank v. West, 20 Ill. App. 61, 66 (1886).

4. ". . . there was here no intent to part with the property, or to give Ames any control over it, until they were paid. Nevertheless, the fact remains that they placed the highwines in the store of Ames, and gave him apparent dominion and disposing power over them, and enabled him to exercise the same, as he did. . . .

"The sellers did not see fit to exact payment at the time . . . and the consequence of this misplaced confidence should be borne by them rather than that the bank should be the sufferer by it." Michigan Central Railroad Co. v. Phillips, 60 Ill. 190, 195 (1871); Crescent Chevrolet Company v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941); Goddard Grocer Co. v. Freedman, 127 S.W. 2d 759 (Mo. App. 1939).

property, a vendor actually assents to a transfer of ownership. Thus if the check is later dishonored, either the assent of the seller has been procured by fraud or there has been a failure of consideration, so that the seller may rescind and reclaim the goods from the buyer. But the seller's equitable power to rescind, under either mode of analysis, would be cut off by a bona fide purchaser from the fraudulent buyer.[5]

Apart from the application of legal principles, which view is apt to reach the more desirable results? Some authorities have felt that adherence to that view protecting the bona fide purchaser would lead to unfortunate consequences. The following quotation illustrates this argument.

> "We feel safe in saying that, as a matter of custom and convenience, most of the cash transactions of the country are paid with checks. A farmer brings in his cotton, tobacco, or wheat to town for sale and sells same, and, as a general rule, is paid by check, although all of such sales are treated as cash transactions. If, in such a case, the purchaser can immediately re-sell to an innocent party and convey good title, it would follow that vendors would refuse to accept checks and would require the actual money, which would result in great inconvenience and risk to merchants engaged in buying such produce, since it would require them to keep on hand large sums of actual cash. This would result in revolutionizing the custom of merchants in such matters."[6]

To the present writer it does not seem probable that any such drastic and far-reaching results would follow the application of the view protecting the innocent sub-purchaser. Perhaps sellers would be prompted to exercise greater care in the acceptance of checks, but this would not seem to be an imposition of an unreasonable burden. On the other hand, the view protecting the seller appears to require that the innocent sub-purchaser must ascertain the validity of the check when he is not even in a position to know that a check has been given. Certainly the seller is better able to protect himself. So it is suggested that the view protecting the innocent sub-purchaser is the more just and desirable. Although earlier case collections indicate that the weight of American authority was in support of that theory protecting the seller,[7] later writings imply that the trend of legal thinking has been the other way, until today it is probable that the majority of the courts in this country would afford protection to the bona fide purchaser, for value and without notice, from the original buyer.[8]

Missouri is generally classed as one of those states adhering to that view which protects the seller.[9] The case most widely quoted and relied upon as establishing this precedent in Missouri is *Johnson-Brinkman Commission Company v. Central Bank.*[10] The plaintiff in that case sold wheat under a cost sale

5. Parr v. Helfrich, 108 Neb. 801, 189 N. W. 281 (1922).
6. Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S.W. 125, 127, 54 A.L.R. 516 (1924).
7. Note 29 L.R.A. (N.S.) 709 (1910).
8. Note 31 A.L.R. 579, 581 (1924); 46 AM. JUR. 644; 20 CHI-KENT L. REV. 182, 187 (1942).
9. Note 13 L.R.A. (N.S.) 697, 699 (1908).
10. 116 Mo. 558, 22 S.W. 813, 38 Am. St. Rep. 615 (1893).

to the Imboden Company, giving a negotiable bill of lading and receiving a check drawn on the defendant bank. The Imboden Company surrendered the original bill of lading to the carrier in exchange for a new bill of lading which named Imboden as consignee and deposited that bill of lading, together with a draft drawn on another, with the defendant which, in the course of business, received payment thereon and applied such credit to the Imboden Company's already overdrawn account. When the check that had been given to the plaintiff was presented for payment it was dishonored by the defendant and plaintiff sued defendant for the value of the goods. In deciding this case the Supreme Court of Missouri drew a distinction between the delivery of chattels and the delivery of a bill of lading; and stated that, while the title does not pass upon the delivery of personal property to be paid for in cash where a worthless check is given in payment, even as to subsequent bona fide purchasers, yet, as the bill of lading was here negotiable, if the vendor, upon receipt of a check, delivers such a bill of lading, this is such negligence on his part as will estop him from claiming the property covered by the bill of lading in the hands of a bona fide purchaser for value without notice. However, the court found further that the defendant had notice of the nature of this sale and therefore held in favor of the plaintiff. So it appears that the leading case in Missouri which is cited as establishing the proposition that a seller who has taken a bad check may recover from a bona fide purchaser for value without notice is a case that does not involve such a bona fide purchaser. While the dictum in the case is strong, it cannot be said that the holding is directly in point. Nevertheless the *Johnson-Brinkman* case has since been looked upon by legal writers and by courts as authority in favor of the doctrine which protects the seller.

Thomas v. Farmer's National Bank of Ludlow,[11] decided nearly thirty years later by the Kansas City Court of Appeals, seems to conflict with this doctrine, although the Johnson-Brinkman case was not mentioned in the court's decision. Here a cattle buyer had purchased the plaintiff's cattle and hogs giving the plaintiff a check payable by the defendant bank. The cattle buyer sold the stock, along with other animals that he had purchased, and deposited the proceeds with the defendant bank which applied such proceeds to the cattle buyer's already overdrawn account. Then the defendant refused to honor the check that had been given to the plaintiff. Plaintiff contended that since it was a cash sale, title had never passed and thus it was his money that the cattle buyer had deposited with defendant. The judgment was for the defendant, the court holding that in order for the plaintiff to recover, it was necessary for him to show that the bank received the money with knowledge that it was the plaintiff's money.

However, that doctrine so generally assigned to the *Johnson-Brinkman* case still serves as somewhat of a stumbling block to the Missouri courts, as two more recent cases illustrate.[12] In these cases, both decided by courts of appeals, the

11. 217 S.W. 860 (Mo. App. 1920).

12. Goddard Grocer Company v. Freedman, 127 S. W. 2d 759 (Mo. App. 1939); Pettus v. Powers, 185 S.W. 2d 872 (Mo. App. 1945).

decisions were in favor of the bona fide purchaser. Recognizing the injustice of allowing a recovery by the seller, the courts experienced some difficulty in distinguishing their decisions from the supposed doctrine of the *Johnson-Brinkman* case. In *Goddard Grocer Company v. Freedman*,[13] decided by the St. Louis Court of Appeals in 1939, the plaintiff agreed to a cash sale of a quantity of sugar to one Freedman who made payment with a forged certified check. In holding that the plaintiff could not recover the sugar from an innocent sub-purchaser, the court reaffirmed that doctrine attributed to the *Johnson-Brinkman* case but held that the plaintiff here, in accepting a check from a stranger without attempting to ascertain its validity, and in delivering the sugar together with a receipt to the stranger, was guilty of such laches as to estop it from reclaiming the property in the hands of the bona fide purchaser. The weakness of this estoppel theory has been pointed out earlier in this note, and it might be added that if estoppel may be found in the *Goddard* case then it must exist in the usual case where a check is accepted from a stranger. However, at one place in its decision the court did make the following statement:

> "It is manifest that the plaintiff in the present case intended to pass title with the delivery of the sugar to Freedman."[14]

The present writer suggests that the above quotation would be true in the case of the usual sale where a check is accepted and the goods delivered, for it seems that normally the parties to such a transaction intend that the buyer should thereafter treat such goods as his own and be free to deal with them as he may choose. As earlier pointed out, if one starts with this idea, that title has actually passed, then if the check is dishonored, the vendor may recover the goods from the original buyer on a theory of rescission for fraud or failure of consideration, but the bona fide sub-purchaser would be protected in every such case.[15]

In *Pettus v. Powers*,[16] decided by the Springfield Court of Appeals in 1945, the plaintiff, pursuant to an agreement to make a cash sale of a truck, delivered the truck to one Williams and accepted his check. Williams then sold the truck to the Neosho Motor Company which in turn sold the truck to the defendant. Both the Neosho Motor Company and the defendant were bona fide purchasers for value and without notice. When the plaintiff presented the check which he had received from Williams to the bank for payment, payment was refused on the ground that Williams had no deposit in that bank. In the plaintiff's replevin suit for the truck, the trial judge, sitting as a jury, found in favor of the defendant. On appeal the plaintiff contended that, where a check is given pursuant to a cash sale of personal property, the seller does not part with the ownership of the chattel until such check is paid, and can pursue it even in the possession of an innocent

13. 127 S.W. 2d 759 (Mo. App. 1939), cited *supra* note 12.
14. Goddard Grocer Company v. Freedman, 127 S.W. 2d 759, 762 (Mo. App. 1939).
15. *Supra*, note 5.
16. 185 S.W. 2d 872 (Mo. App. 1945), cited *supra* note 12.

sub-purchaser. The Springfield Court of Appeals agreed that the supreme court had so declared the law, but apparently proceeded on the theory that this rule was changed by the Act of March 15, 1877,[17] and affirmed the judgment for the defendant. The pertinent part of this statute is as follows:

> ". . . and no sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition whatever as against creditors of the vendee, or subsequent purchasers from such vendee in good faith, unless such condition shall be evidenced by writing, executed and acknowledged by the vendee, and recorded as now provided in cases of mortgages of personal property."

It is true that this statute has changed the rule of three of the cases relied upon by the plaintiff in *Pettus v. Powers,* for these cases involved sales subject to express conditions.[18] But it is hard to justify the court's application of this statute to *Pettus v. Powers.* In the first place the statute applies to "sales" of goods, while according to the theory of cash sales that supposedly is followed in Missouri, where payment is made by check, the sale does not take place until the check is cashed and thus when the check is dishonored there has been no sale. Furthermore, it has been expressly held in Missouri that this statute does not apply to the cash sale situation.[19] And similar statutes in other states have been interpreted as not applicable to the condition arising from cash sales.[20] So it appears that the Act of March 15, 1877, providing for recordation of express conditions to sales, would not control the situation presented by *Pettus v. Powers.*

However, the Springfield Court of Appeals might have intended that its decision in *Pettus v. Powers* rest on other grounds. For the court concludes its discussion of the *Johnson-Brinkman* case with the following statement.

> "Besides, as we understand that case (the Johnson-Brinkman case), the defendant bank attempted to apply the money rightfully belonging to the vendor to the overdraft of the vendee, and the case was not decided at all on the theory that the particular wheat did not belong to an innocent purchaser from the vendee."[21]

Thus, the Springfield Court of Appeals has recognized that the portion of the *Johnson-Brinkman* decision, which has so long been referred to as establishing in Missouri that rule of law which protects the seller, is really nothing more than dictum. Apparently there is no other decision, which controls Missouri courts, that holds directly in support of that doctrine of protection to the seller. So it

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17. Mo. Rev. Stat. § 3513 (1939).

18. Parmlee v. Catherwood, 36 Mo. 479 (1865); Little v. Page, 44 Mo. 412 (1869); Griffin v. Pugh, 44 Mo. 326 (1869).

19. Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, at 571, 22 S.W. 813, 38 Am. St. Rep. 615 (1893); Skinner v. Lammert Furniture Co., 182 Mo. App. 549, 166 S.W. 1079 (1914).

20. National Bank v. Chicago, B. & N. R.R., 44 Minn. 224, 46 N.W. 342 (1890) *supra* note 1; Millhiser v. Erdman, 98 N.C. 292, 3 S.E., 521, 2 Am. St. Rep. 334 (1887).

21. Pettus v. Powers, 185 S.W. 2d 872, 874 (Mo. App. 1945).

would seem that the Springfield Court of Appeals was free to reach the desirable result that it did in *Pettus v. Powers.*

Thus there is every indication that the trend of judicial thinking in Missouri is moving strongly in the direction of support to that view which refuses to allow a seller, who has received a bad check, to recover the goods from a bona fide sub-purchaser. However, since the *Johnson-Brinkman* case has so long been referred to as establishing the opposite doctrine, the Missouri law on this issue must remain uncertain until the supreme court has an opportunity to settle the question.

HERBERT CAIN CASTEEL

EFFECT OF APPROVED BURDEN OF PROOF INSTRUCTION IN A CASE BASED ON THE DOCTRINE OF RES IPSA LOQUITUR

The usual rule of law is that the plaintiff must bear the burden of proof from the beginning to the end of the case. Under the doctrine *res ipsa loquitur,* where the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords a reasonable inference, in the absence of explanation by defendant, that the accident arose from want of care.[1] In attempting to apply the usual burden of proof instruction in a *res ipsa loquitur* case, two questions arise: 1. In the absence of explanation by defendant, what weight shall be given the doctrine in instructing the jury? 2. What effect, if any, does the application of the doctrine have on the usual rule that the plaintiff must bear the burden of proof from the beginning to the end of the case?

The decided weight of authority on the first question is that the doctrine *res ipsa loquitur* raises only a mere permissible inference of negligence.[2] Until recent times, many cases may be found in which courts, when speaking of the effect of *res ipsa loquitur* referred to it as raising a presumption of negligence.[3] It has been pointed out that there is still much confusion of language among the courts in speaking of this question and that they often carelessly use the term presumption when really no more needed be decided than that the weight to be given *res ipsa loquitur* facts was that they amounted to a mere permissible inference which the jury would be permitted to find and return a verdict for plaintiff.

The question whether *res ipsa loquitur* facts amount to a presumption or a mere permissible inference of negligence would be squarely presented for decision

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1. Scott v. London, etc. Docks Co., 3 H. & C. 596, 601 (1865); 45 C.J. *Negligence* § 768(1)(a), p. 1193.

2. See annotation 167 A.L.R. 658 (1947).

3. Southeastern Greyhound Lines v. Callahan, 244 Ala. 449, 13 So. 2d 660 (1943); Rudolph v. Elder, 105 Colo. 105, 95 P. 2d 827 (1939); Loprestie v. Roy Motors, 191 La. 239, 185 So. 11 (1938); Dehmel v. Smith, 200 Wis. 292, 227 N.W. 274 (1939). But see Davis v. Teche Lines, Inc. 200 La. 1, 7 So. 2d 365 (1942) (presumption or inference used alternatively).

where the plaintiff moves for a directed verdict after defendant has failed to put in countervailing evidence tending to show proper care. If the weight to be given the doctrine amounts to a presumption, plaintiff would be entitled to a directed verdict. If, however, *res ipsa loquitur* amounts only to a mere permissible inference of negligence, plaintiff would not be entitled to a directed verdict, the question of defendant's negligence being for the jury. Also, if truly a presumption of law were created, then *res ipsa loquitur* would shift the burden of going forward with the evidence to the defendant, and as indicated below, the burden of going forward with the evidence does not shift to the defendant. The better reasoned cases follow this analysis and hold that the weight to be given *res ipsa loquitur* is it creates a mere permissible inference of negligence, which the jury is entitled to find and weigh.[4]

The early Missouri cases on this point held that the effect of the doctrine *res ipsa loquitur* in a case was to raise a presumption of negligence and that this presumption became conclusive unless rebutted by opposing evidence.[5] The cases seemed to lack uniformity, however, as other decisions from about the same time spoke of an inference of negligence[6] and stated that the inference of negligence does not disappear when rebutting testimony is put in by the defendant,[7] and one case seemed to indicate that the weight to be given the doctrine might vary in degree according to the case.[8]

The recent case of *Duncan v. St. Louis Public Service Co.*[9] definitely establishes the rule in Missouri that the doctrine *res ipsa loquitur* raises only a mere permissible inference and not a presumtion of negligence.[10] Hence this point has been clarified in Missouri law.

As to the second question presented above, the majority of the cases follow the rule that *res ipsa loquitur* does not shift the burden of proof to the defendant, but that the risk of non-persuasion rests with the plaintiff from the beginning to the end of the case.[11] Early Missouri cases decided on the theory that *res ipsa*

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4. Lavine v. Union & N.H. Trust Co., 127 Conn. 435, 17 A. 2d 500 (1941); Johnson v. Stevens Building Catering Co., 323 Ill. App. 212, 55 N.E. 2d 550 (1944); Droppelman v. Willingham, 293 Ky. 614, 169 S.W. 2d 811 (1943); Gordon v. Muehling Packing Co., 328 Mo. 123, 40 S.W. 2d 693 (1931); Angerman Co. v. Edgemon, 76 Utah 394, 290 Pac. 169 (1930).

5. Price v. Metropolitan Street Ry., 220 Mo. 435, 119 S.W. 932 (1909); Brown v. Consolidated Light, Power & Ice Co., 137 Mo. App. 718, 109 S.W. 1032 (1908); Norris v. St. Louis, I. M. & S. Ry., 239 Mo. 695, 144 S.W. 783 (1912); Thompson v. St. Louis S. W. Ry., 243 Mo. 336, 148 S.W. 484 (1912); Mayne v. K. C. Rys., 287 Mo. 235, 229 S.W. 386 (1921).

6. Mitchell v. Chicago & A. Ry., 132 Mo. App. 143, 112 S. W. 291 (1908).

7. Bond v. St. Louis-S. F. Ry., 315 Mo. 987, 288 S.W. 777 (1926).

8. Myers v. City of Independence, 189 S.W. 816 (Mo. 1916) (*res ipsa loquitur* is a rule of evidence arising in some cases to the height of a presumption).

9. 197 S.W. 2d 964 (Mo. 1946).

10. 197 S.W. 2d 964 (Mo. 1946).
75 S.W. 2d 1001 (1934); Gordon v. Muehling Packing Co., 328 Mo. 123, 40 S.W. 2d 693 (1931).

11. Rayl v. Syndicate Building Co., 118 Cal. App. 396, 5 P. 2d (1931); Motiejaitis v. Johnson, 117 Conn. 631, 169 Atl. 606 (1933); Edwards v. Cumberland

loquitur created a presumption of negligence also held that the effect of the presumption was to shift the burden of proof to the defendant.[12] One case even held that the defendant in a *res ipsa loquitur* case had the burden of proving no negligence *and* inevitable accident.[13] Such, however, is not the law in Missouri today,[14] as it seems now to be well established that the burden of proof rests upon the plaintiff from the beginning to the end of the case and never shifts to the defendant.[15]

As pointed out above, the usual rule of law is that the burden of proof is on the plaintiff to prove his allegations of negligence. This rule arises from the concept that the plaintiff, having asserted something to be true, must persuade the jury that such thing is true, and therefore the risk of non-persuasion is upon him. Consequently, the defendant is entitled to an instruction that the burden of proof is on the plaintiff to prove his case by the preponderance or greater weight of the credible evidence.

Recently, the Supreme Court of Missouri approved a uniform burden of proof instruction as follows: "A short, simple instruction, telling the jury that the burden of proof is on plaintiff to prove his case by a preponderance or greater weight of the credible evidence, and that unless he had done so the jury must find for defendant, ought to be sufficient to inform the jury what plaintiff is required to do. A plain declaration to that effect will be easily understood by the jury."[16]

The *res ipsa loquitur* doctrine is a concept that in a certain type case, where the defendant is in sole control and management of the agency causing the injury and where it would be difficult for the plaintiff to prove specific negligence, and the occurrence of such accident does not usually happen without negligence, the plaintiff is relieved of the duty of alleging and proving specific negligence. He can allege general negligence only and upon proof of *res ipsa loquitur* facts make out a submissible case. Since the effect of *res ipsa loquitur* is to allow an inference of negligence, the plaintiff is entitled to an instruction that the jury may infer from his facts proved that the defendant was negligent.

County Power & Light Co., 128 Me. 207, 146 Atl. 700 (1929); Gordon v. Muehling Packing Co., 328 Mo. 123, 40 S.W. 2d 693 (1931); Glossip v. Kelly, 228 Mo. App. 392, 67 S.W. 2d 513 (1934); Nemecz v. Morrison & Sherman, 109 N.J.L. 517, 162 Atl. 622 (1932).

12. Brown v. Consolidated Light, Power & Ice Co., 137 Mo. App. 718, 109 S.W. 1032 (1908); Norris v. St. Louis, I. M. & S. Ry., 239 Mo. 695, 144 S.W. 783 (1912); Thompson v. St. Louis, S. W. Ry., 243 Mo. 336, 148 S.W. 484 (1912); Mayne v. K. C. Rys., 287 Mo. 235, 229 S.W. 386 (1921).

13. Price v. Metropolitan Street Ry., 220 Mo. 435, 119 S.W. 932 (1909).

14. For change parallel to change from presumption theory, see Bond v St. Louis, S. F. Ry., 315 Mo. 987, 288 S.W. 777 (1926); Myers v. City of Independence, 189 S.W. 816 (Mo. 1916).

15. Duncan v. St. Louis Public Service Co., 197 S.W. 2d 964 (Mo. 1946); McCloskey v. Koplar, 329 Mo. 527, 46 S.W. 2d 557, 92 A.L.R. 641 (1932).

16. Mengel v. City of St. Louis, 341 Mo. 994, 1003, 111 S. W. 2d 5, 10 (1937); Nelson v. Evans, 338 Mo. 991, 999, 93 S. W. 2d 691, 695 (1936); Rouchene v. Gamble Const. Co., 338 Mo. 123, 134, 89 S. W. 2d 58, 63 (1935), 7 Mo. L. REV. 441 (1942).

The problem arises from the fact that the plaintiff's proof is by indirect evidence. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not itself conclusively establish the fact in issue, but which affords an inference of its existence.[17] On the other hand, the defendant's evidence tending to rebut any negligence on his part will be direct evidence. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. It is in its nature, specific and detailed. In such a case, where the law allows a submissible case to be made by inference from general facts, is the instruction approved by the Missouri Supreme Court requiring the plaintiff to prove his case "by a preponderance or greater weight of the credible evidence" standing alone exactly appropriate, or would it tend to confuse the jury and detract from the instruction that they might infer negligence from the general facts proved by the plaintiff?

The recent case of *Duncan v. St. Louis Public Service Co.*[18] presented this question. The instruction used and approved by the court in the *Duncan* case was as follows: "The court instructs the jury that the charge . . . by . . . plaintiff . . . is one of negligence. Recovery may not be had . . . except when such charge is sustained by the preponderance, that is, the greater weight of the credible evidence. By the term preponderance or greater weight of the credible evidence as used in this instruction is meant evidence which is more convincing to you as worthy of belief than that which is offered in opposition thereto by the defendant. It does not devolve upon the defendant to disprove said charge, but rather the law casts the burden of proof in reference to said charge upon the plaintiff, and said charge must be sustained by the preponderance, that is, the greater weight of the credible evidence."[19]

This instruction was objected to because it was unduly favorable to the defendant in this case, and because it was not the law of this case. The plaintiff conceded the rule of *McCloskey v. Koplar*[20] that the burden of proof never shifts even in a *res ipsa loquitur* case, but relied strongly on *Harke v. Haase*,[21] where the following instruction offered by the defendant was held properly refused. "The charge of negligence made by plaintiff . . . by this action must be proved to the satisfaction of the jury by the greater weight of the evidence. . . . The jury have no right to presume negligence, nor to speculate upon the facts, and if the evidence does not preponderate in favor of the plaintiff, then your verdict should be for the defendant."[22]

The court in the *Harke* case thought the instruction improper as confusing and misleading in a *res ipsa loquitur* case because there was technically no specific charge of negligence since the petition only alleged general negligence, and because

17. California Jury Instructions, No. 22 (3d ed. 1943).
18. 197 S. W. 2d 964 (Mo. 1946).
19. Duncan v. St. Louis Public Service Co., 197 S.W. 2d 964, 965 (Mo. 1946)
20. 329 Mo. 527, 46 S. W. 2d 557, 92 A.L.R. 641 (1932).
21. 335 Mo. 1104, 75 S. W. 2d 1001 (1934).
22. Harke v. Haase, 335 Mo. 1104, 1108, 75 S. W. 2d 1001, 1002 (1934).

the jury did have the right to presume (infer) negligence from the facts shown in plaintiff's case.

In the *Duncan* case the court, while not wholeheartedly approving the instruction, held it not to be reversible error. The instruction in the *Duncan* case, the court thought, did not contain the serious defect as the instruction in the *Harke* case precluding the jury from inferring negligence, nor were the references to the charge of negligence similar to those in the *Harke* case.

Still there seems to be merit in the argument that separate instructions to the jury on each concept might tend to confuse the jury.[23] An instruction that the jury may infer negligence from plaintiff's general facts, in the face of specific proof rebutting negligence, and an instruction to the effect that plaintiff must prove his case by the preponderance or greater weight of the credible evidence may well appear contradictory in the mind of the ordinary juror and result in a miscarriage of justice. The problem is how to explain to the jury these two concepts. It is clear that the plaintiff must persuade the jury that the defendant was negligent. But the jury must reach this conclusion by way of inference from plaintiff's general facts proved.

Perhaps, since the *res ipsa loquitur* theory is based on a special doctrine of the law which may be applied only under special circumstances, a general instruction, educational in its nature, would be of value to aid the jury in understanding the doctrine. The following instruction, approved for use in the Superior Court of Los Angeles County, California, is an example of the type of instruction intended. 'The instruction just given (the *res ipsa loquitur* instruction) may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

"First: The fact that some certain instrumentality, by which injury to the plaintiff was proximately caused, was in the posssession and under the exclusive control of the defendant at the time of the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act of omission incidental to defendant's management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

"Third: The fact that the circumstances surrounding the causing of the accident were such that the plaintiff is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident.

"When all these conditions are found to have existed, you are entitled to draw an inference that the defendant has been negligent, and such inference may support a verdict for the plaintiff.[24]

23. See Gantt, J., dissenting in McClosky v. Koplar, 329 Mo. 527, 46 S.W. 2d 557, 92 A.L.R. 641 (1932).

24. See California Jury Instructions, No. 206-C (3d ed. 1943).

Following this, an instruction informing the jury that if they find the certain facts (those necessary in the particular case to raise the *res ipsa loquitur* inference) to be true, they may infer that the defendant has been negligent.[25]

The next instruction to be considered is the burden of proof instruction. As has been pointed out, the burden of proof instruction approved by the Supreme Court of Missouri requires the plaintiff to prove his case by a preponderance or greater weight of the credible evidence. Yet, in the *res ipsa loquitur* case, the plaintiff will have put in evidence only general facts, and the jury has been instructed that they may infer from these general facts that the defendant was negligent. The question arises whether this inference is really evidence. At best it is indirect evidence, because, by the doctrine, the law says that proof of those general facts is sufficient evidence of the happening of the particular facts to support a verdict. But aside from the argument whether the inference is in the true sense of the word evidence, the fact remains that plaintiff's case rests upon this inference and that this inference will support a verdict for him.

With the object in mind to avoid any possible confusion in the minds of the jury concerning the reference to plaintiff's case as an inference, the following suggestion for a *res ipsa loquitur* burden of proof instruction is set out to demonstrate the idea: The court instructs the jury that the burden of proof is on plaintiff to prove his case by a preponderance or greater weight of the credible evidence. Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just explained which allows the drawing of an inference of negligence. In order to hold the defendant liable, the inference of negligence must have greater weight, more convincing force in the mind of the jury, than the explanation offered by the defendant. A preponderance must be found to exist in plaintiff's favor to recover. But, if it does not exist, if the evidence preponderates in defendant's favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant.[26]

While these instructions may prove somewhat lengthy, it is believed that they can be sufficiently comprehended by the jury so as to avoid the possible ambiguity latent in the *res ipsa loquitur* case.

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25. Compare California Jury Instructions, No. 206 (3d ed. 1943). "If, and only in the event, you should find that there was an accidental occurrence *as claimed by the plaintiff*, namely: ..... and if you should find that from that accidental event, as a proximate result thereof, plaintiff has suffered injury, you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he (it) did, in fact, exercise ordinary (the utmost) care and diligence or that the accident occurred without being proximately caused by any failure of duty on his (its) part." See also Nos. 206-A & B.

26. See California Jury Instructions, No. 206-D (3d ed. 1943).

CONTRIBUTION IN MISSOURI BETWEEN JOINT TORT-FEASORS: HOW AFFECTED BY THIRD-PARTY PRACTICE, CROSS-CLAIMS, AND CONSOLIDATION OF ACTIONS

A recent case before the St. Louis Court of Appeals[1] opened up the problem of contribution in Missouri between joint tort-feasors and how it is affected by the new Civil Code.[2] Various problems arise in connection with this subject, *e.g.*, when and if one not a party to an action can be brought in as a third-party defendant for contribution, whether the plaintiff can dismiss as to a joint defendant or one brought in as a third-party defendant.

Missouri, by statute,[3] allows contribution between joint tort-feasors only if a joint judgment has been recovered against them. Under this statute the Missouri courts have held that the right to contribution between joint tort-feasors could not arise until after a joint judgment has been rendered against them.[4] Therefore the plaintiff need not sue all joint tort-feasors in one action, he may proceed against one, two out of three, or any he may choose, or he may release any he chooses after beginning the action.[5] Also the courts have held that release of one joint tort-feasor will not release the others unless such release be in full settlement of the plaintiff's claim.[6] With these decisions in mind, consider then the effect of third-party practice on the questions of contribution between joint tort-feasors.

Section 20(a) of the Missouri civil code allows a defendant to bring in a party as a third-party defendant who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him.[7] This provision is the same as Rule

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1. Camden v. St. Louis Public Service Co., 206 S. W. 2d 699 (Mo. App. 1947).

2. Mo. Laws 1943, pp. 353-397, Mo. REV. STAT. ANN. §§ 847.1-847.145 (Supp. 1947).

3. Mo. REV. STAT. § 3658 (1939). "Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. It shall be lawful for all persons having a claim or cause of action against two or more joint tort-feasors or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrong doers against whom such person or persons has such claim or cause of action, and not so realeased." See post note 4.

4. Judd v. Walker, 158 Mo. App. 156, 138 S. W. 655 (1911); Farrell v. Kingshighway Bridge Co., 117 S. W. 2d 693 (Mo. App. 1938).

5. Judd v. Walker, *supra* note 4; Flenner v. Southwest Missouri R. Co., 221 Mo. App. 160, 290 S. W. 78 (1927); Moudy v. St. Louis Dressed Beef and Provision Co., 149 Mo. App. 413, 130 S. W. 476 (1910).

6. McEwen v. Kansas City Public Service Co., 225 Mo. App. 194, 19 S. W. 2d 557 (1929); Kahn v. Brunswick-Balke-Collander Co., 156 S. W. 2d 40 (Mo. App. 1941); Judd v. Walker, *supra* note 4.

7. Mo. Laws 1943, p. 362, Mo. REV. STAT. ANN. § 847.20(a) (Supp. 1947). "Before filing his answer, a defendant may move ex parte or, after the filing of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to file a petition and serve summons upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. . . ."

14(a) of the Federal Rules of Civil Procedure[8] prior to its recent amendment. There has been only one case[9] decided in Missouri on this problem and therefore the cases that have been decided by the federal courts prior to the amendment of Rule 14(a) are valuable in determining what construction should be placed upon this provision for third-party practice as it affects contribution between joint tort-feasors. For this reason, then, the decisions of the federal courts have been studied in attempting to answer this problem.

The first case to consider is one in which A sues B in tort, B files a third-party petition seeking to bring in C, a joint tort-feasor, as a third-party defendant, and A refuses to amend his petition to state a cause of action against C. This is the case that has probably caused the most difficulty in impleader in tort cases in the federal practice, and it is very likely that it will give rise to many and similar problems in Missouri practice.

The better view, and that followed by the majority of the federal courts when dealing with a contribution statute like that in Missouri, is to deny B leave to bring in C as a third-party defendant. This is also the view that was reached by the New York Court of Appeals in the case of *Fox v. Western New York Motor Lines, Inc.*[10] A New York statute[11] allows contribution between joint tort-feasors only after a joint judgment has been recovered against them and one of the judgment debtors has paid more than his pro rata share of the judgment. The similarity to the Missouri statute on contribution is obvious. However, New York allows a party to be brought in as a third-party defendant only if there is alleged liability over to the defendant (third-party plaintiff).[12]

If B was allowed to bring in C as a third-party defendant it would be necessary to construe Section 20(a) of the civil code, which is a procedural statute, as a substantive law amending the statutes providing for contribution. Here A has an action against both B and C, but elects to sue only B. To allow B to bring in C and force A to also sue C would necessarily mean that a procedural rule is construed to enlarge the substantive right to contribution. In other words, to hold otherwise then as here suggested would be holding that any time a joint tort-feasor is sued he may bring in the other joint tort-feasor for contribution alleging the latter's liability to the plaintiff, which would in effect allow contribution between joint tort-feasors in Missouri prior to a joint judgment against them. This is clearly opposed to the legislative intent as set out in Section 3658[13] because, as was discussed previously, under a contribution statute such as that in Missouri the right to contribution does not arise until a joint judgment has been rendered against joint tort-feasors.

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8. Rule 14(a) of the Federal Rules of Civil Procedure, 28 U.S.C. following § 723c (1940).
9. *Supra* note 1.
10. 257 N. Y. 305, 178 N. E. 289 (1931).
11. N. Y. CIV. PRAC. ACT § 211a.
12. *Id.* § 192(2).
13. *Supra* note 3.

This is one of the reasons given by the majority of the federal courts for their decision. In the case of *Malkin v. Arundel Corp.*[14] the district court had before it a case very similar to the hypothetical situation under discussion and was controlled by the Maryland statute on contribution[15] which is similar to the one in Missouri. The court denied leave to the defendant to bring in a third-party defendant on the ground that the latter was a joint tort-feasor and liable to the plaintiff. The court decided that unless the plaintiff amended his complaint to state a joint claim against the original defendant and the third-party defendant, an alleged joint tort-feasor cannot be brought in as a third-party defendant where the applicable state law allows contribution between joint tort-feasors only where a joint judgment has been recovered against them, that the original defendants cannot enforce contribution against a third-party defendant unless there is a joint judgment in favor of the plaintiff against the original defendant and the third-party defendant, and that this cannot be obtained unless the plaintiff amends his complaint. Other federal cases have reached the same conclusion where a similar contribution statute has been before the court.[16]

Contrast with these cases the case by *Gray v. Hartford Accident & Indemnity Co. v. Robison,*[17] decided by the Federal District Court in Louisiana, where the court allowed a joint tort-feasor to be brought in as a third-party defendant. The court held that the legal relation is established in its substance the moment of the accident and that the parties thereafter, by technical pleading, may not alter the substantive law. Note, however, that the substantive law of Louisiana is that the liability of joint tort-feasors for damages resulting from their concurrent negligence is solidary, and as a necessary consequence joint tort-feasors may demand contribution from one another.[18]

Furthermore, the plaintiff cannot be forced to amend his petition to state a cause of action against the third-party defendant. Section 20(a) of the civil code is permissive, stating, "The plaintiff *may* (italics mine) amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant."[19] Therefore, it would seem that if the plaintiff refuses to amend his petition to state a cause of action against the third-party defendant it would be futile to allow the defendant to bring in a third-party defendant. The reason for this being that contribution does not exist until a joint judgment has been obtained, and such judgment for plaintiff against a third-party defendant cannot be recovered unless the

14. 36 F. Supp. 948 (D. Md. 1941).
15. MD. CODE Art. 53, § 13 (Flack, 1939).
16. Baltimore and Ohio R. Co. v. Saunders, 159 F. 2d 481 (C.C.A. 4th 1947). Here the court had before it a statute which allows contribution between joint tort-feasors only if a joint judgment has been obtained against them. Thompson v. Cranston, 2 F.R.D. 270 (W. D. N. Y. 1942), *affirmed* 132 F. 2d 631 (C.C.A. 2d 1942). Contribution statute similar.
17. 32 F. Supp. 335 (W. D. La. 1940).
18. LA. CIV. CODE Arts. 2104, 2324 (1932).
19. *Supra* note 7.

plaintiff asserts a cause of action against the third-party defendant. The case of *Crim v. Lumbermen's Mutual Casualty Co.*[20] is in accord, the court inclining to believe that, if the plaintiff declines to amend his complaint and assert a claim for relief against a third-party defendant, judgment cannot be awarded against the third-party defendant, in favor of the plaintiff. In the case of *Satink v. Holland Township*[21] the court allowed a defendant to bring in a third-party defendant on the ground that the third-party defendant was primarily liable to the plaintiff. The court then stated that if the plaintiff declines to amend his complaint so as to pray for relief against the third-party defendant, the order granting leave to bring in the third-party should be vacated. There are other cases in accord with this view.[22] Therefore it would seem that impleader in such case amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. This futility was recognized by the recent amendment of Federal Rule 14(a).[23] Rule 14(a) has been changed to allow a defendant to bring in only a third-party defendant who will be liable to the defendant (third-party plaintiff). No provision is made for allowing a third-party defendant to be brought in who is or may be liable to the plaintiff, as was allowed under the original Rule 14(a).

Another problem closely associated with this is that of allowing a defendant to bring in a third-party defendant on the ground that the third-party defendant is solely liable for the plaintiff's claim against the defendant. Under such circumstances, the defendant is not seeking contribution, as he is not claiming that his negligence combined with that of the third-party in causing damage to the plaintiff, but, rather, he is alleging that damage to the plaintiff was due solely to the negligence of the proposed third-party defendant. In the case of *Sklar v. Hayes v. Singer*[24] this was allowed. The court held that, in a personal injury action, the defendant may implead a third-party defendant for the determination of the primary responsibility between himself and the third-party defendant irrespective of the right to contribution among joint tort-feasors. A contrary result was reached by the court in *Brady v. Black Diamond Steamship Co. v. Isthmian Steamship Co.*[25] In this case the court held that Rule 14(a) of the Federal Rules of Civil Procedure does not permit a defendant to implead a third party on the ground that the third party alone, not

20. 26 F. Supp. 715 (D.D.C. 1939).
21. 28 F. Supp. 67 (D.N.J. 1939).
22. Connelly v. Bender, 36 F. Supp. 368 (E.D. Mich. 1941). Here plaintiff had covenanted not to sue the proposed third-party defendant and declined to amend his complaint to ask for relief against the proposed party. Genl. Taxicab Ass'n., Inc. v. O'Shea, 109 F. 2d 671 (App. D.C. 1940); Rutherford v. Pennsylvania Greyhound Lines, Inc. v. Commercial Motor Freight, Inc., 8 Fed. Rules Serv. 14a.513, case 4 (S.D. Ohio, 1945); Delano v. Ives v. Botfield, 40 F. Supp. 672 (E.D. Pa. 1941); Whitmire v. Partin v. Milton, 2 F.R.D. 83, 5 Fed. Rules Serv. 14a.513, case 2 (E.D. Tenn. 1941); Bull v. Santa Fe Trail Transp. Co., 6 F.R.D. 7, 9 Fed. Rules Serv. 14a.513, case 1 (D. Neb. 1946).
23. 28 U.S.C.A. following § 723c (Supp. 1947).
24. 1 F.R.D. 415, 3 Fed. Rules Serv. 14a.223, case 2 (E.D. Pa., 1940).
25. 45 F. Supp. 338 (S.D. N.Y. 1941).

the defendant, is liable to the plaintiff. This is a matter of defense. The latter view would seem to be the more sound of the two. Such is a matter of defense and, by pleading in defense that the third party is solely liable for the plaintiff's damage, the rights of the defendant are as well protected as if he were allowed to bring in a third-party defendant. Furthermore, in such view of the matter the problem discussed above does not arise if the plaintiff declines to amend his petition to pray for relief against the third-party defendant, the case is more expeditiously handled, and the rights of all parties before the court are as well protected as if the defendant had been allowed to bring in a third-party defendant.

The case of *Schroeder v. Longenecker*[26] which presented a similar question recently came before the Federal District Court, Eastern District of Missouri. In this case the plaintiff, while riding with her husband, was injured in a collision with another automobile. She brought an action against the driver of the other vehicle, and the defendant sought to bring in the plaintiff's husband as a third-party defendant on the ground that he was either jointly or solely liable for the plaintiff's injuries. The court refused permission to the defendant to bring in the plaintiff's husband as a third-party defendant. It held that where the substantive law of Missouri prevents recovery against a spouse for injuries to the person, the Federal Rules of Civil Procedure cannot in a diversity case allow a contrary result. Consequently the plaintiff's husband could not be impleaded as a joint tort-feasor even though the husband was protected by insurance, since the result would be, if the husband was found jointly or solely liable, a judgment in favor of the wife against her husband. Here is another illustration of denying to the defendant leave to bring in a third-party defendant where it is contrary to the substantive law.

On reviewing the decisions cited, and the problems involved, it appears that in a case in which a plaintiff sues one of two or more joint tort-feasors, and refuses to bring an action against the others, leave to bring in the other joint tort-feasors as third-party defendants should be denied to the defendant under third-party and contribution statutes like those in Missouri.

The other view has been reached by some of the federal cases.[27] The leading case among these is probably *Atlantic Coast Line R. Co. v. U. S. Fidelity and Guaranty Co.*[28] In this case the court held that the Federal Rule 14(a) permits a third party alleged to be solely or jointly liable with a defendant to be made a third-party defendant without regard to any question of contribution, and, if a joint judgment is rendered, then in a state where contribution is allowed, the judgment would bind the third party in any proceeding for contribution, whereas, in a state where contribution is not allowed, the defendant could not enforce contribu-

26. 7 F.R.D. 9, 10 Fed. Rules Serv. 14a.241, case 1 (E.D. Mo. 1947).

27. Sussan v. Strasser, 36 F. Supp. 266 (E.D. Pa., 1941); Lensch v. Boushell Carrier Co., Inc. v. Casari, 1 F.R.D. 200, 3 Fed. Rules Serv. 14a.224, case 1 (S.D. N.Y. 1940). Note, however, a contrary result has been reached by the Federal courts in applying New York Law in Thompson v. Cranston, *supra* note 16.

28. 52 F. Supp. 177 (M.D. Ga., 1943).

tion. Also, the court held that when the third-party complaint alleges that the third party is liable to the plaintiff, alone or jointly, the plaintiff and the third party are opposing parties without amendment of his complaint by the plaintiff. This is the view that is followed by Carr in *Missouri Civil Procedure.* There it is stated, "The new code qualifies the right of the party injured to select the joint tort-feasors against whom he desires to obtain judgment. He can still sue one or more of them as he desires but under the code the joint tort-feasor sued may by third-party petition, with leave of the trial court, cause the joinder of additional or all joint tort-feasors as parties in the one action. If joint liability is supported by the evidence, based upon the issues made by plaintiff's petition, the third-party petition and other pleadings, and a joint judgment is obtained, the joint judgment defendant making payment is entitled to contribution from the other judgment debtors."[29] This question has not yet been before the Missouri courts, but *dicta* in the case of *Camden v. St. Louis Public Service Co.*[30] seemed to adopt Carr's view. The reasoning behind this is probably that all third-party practice requires is a claim of liability of the third-party defendant to the third-party plaintiffs and, if such a joint judgment was rendered, then such liability would arise.

Another case which might arise in connection with contribution among tort-feasors is that in which A sues B in tort, B is allowed to bring in C, a joint tort-feasor, for contribution, and A amends his complaint to state a claim for relief against C. Afterwards, before judgment, A releases C. If the view is followed that C, a third-party defendant, cannot be forced upon A against his will, then it would seem as if such release is effective. Of course, this differs somewhat from the case where A releases C, a joint defendant originally, but, if it is held that C could not have been brought in originally without A's amending, it would seem that A controls the action and should later be allowed to dismiss or settle with and release the third-party defendant. The Missouri courts have held that this can be done in the case of joint defendants.[31] A different result would be reached if it was held in the first place that, without plaintiff's amending, defendant could bring a joint tort-feasor as a third-party defendant.

Assume the case where A sues B and C in tort, and the action is prosecuted to a final joint judgment in favor of A against B and C. C now moves for a new trial and A dismisses as to C. B then seeks to have C brought in as a third-party defendant for contribution. This was the case in *Camden v. St. Louis Public Service Co.*[32] There the court refused to allow B to bring C in as a third-party defendant, holding, "The right of a defendant to file a petition as a 'third-party plaintiff' under Section 20 of the Civil Code . . . is to be exercised against 'a person not a party to the action.'" The court then held that such a defendant as C did not fall within the designation of a person not a party to the action, but, on the contrary,

29. 1 CARR, MISSOURI CIVIL PROCEDURE 205 (1947).
30. *Supra* note 1.
31. *Supra* note 4.
32. *Supra* note 1.

was a party to the action, having been made a defendant along with B at the very institution of the action.

Section 77 of the civil code[33] provides for cross-claims. This provision is the same as Federal Rule 13(g).[34] Suppose the case again that A sues B and C, joint tort-feasors. B now files a cross-claim against C for contribution. It would seem as if this could be done. It was so held in *Bohn v. American Export Lines*[35] on similar facts. There the court said, "Although at common law, . . . the liability sued upon had first to become fixed by a judgment, I think under Rule 13(g), Federal Rules of Civil Procedure, . . . that element is no longer requisite for it is plain that a cross-claim permitted thereunder may 'include a claim that the party against whom it is asserted is or may be liable to the cross-claimant.'" Conceding that B may file a cross-claim against C, afterwards may A dismiss as to C. It would seem as if he should be able to do so. The basis of B's cross-claim is contribution from C. However, right to contribution does not arise until a joint judgment has been recovered against both B and C.[36] Therefore, until a final joint judgment against B and C, A should be able to dismiss as to C. Could A after judgment and before it becomes final dismiss as to C? Probably he could not. The reason would be that the judgment would include a joint judgment against B and C in favor of A, and a judgment on the cross-claim for contribution against C in favor of B. In that case, A would not be allowed to prejudice B's judgment by dismissing as to C.

Suppose that A sues B in tort, and in a separate action sues C, a joint tort-feasor. B now moves to consolidate the actions, so that A would be suing B and C. This should be denied. Section 97 of the civil code provides that "Whenever several suits founded alone upon liquidated demands shall be pending . . . the court in which the same shall be prosecuted may, in its descretion, if it appear expedient, order such suits to be consolidated into one action."[37] It will be noticed that the code provides for consolidation of actions only when the suits are founded upon liquidated demands. The actions by A in tort are not upon liquidated demands, and therefore the court should refuse to consolidate the actions.

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33. Mo. Laws 1943, p. 377, MO. REV. STAT. ANN. § 847.77 (Supp. 1947). "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

34. Rule 13(g) of the Federal Rules of Civil Procedure, 28 U.S.C. following § 723c (1940).

35. 42 F. Supp. 228 (S.D. N.Y. 1941).

36. *Supra* note 3.

37. Mo. Laws 1943, p. 384, MO. REV. STAT. ANN. § 847.97 (Supp. 1947).