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Pleadings and Practice--Evidence--Admissibility of Pleadings into Evidence in Missouri

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question. *Quaere*, whether the courts could get any more specific than they have without laying down a rule that would require extensive explanation and exceptions. As Moore said: "[I]t would not be accurate, however, to attempt to lay down a strict rule that answers to interrogatories cannot limit proof."[76] Maybe the courts feel that the converse of this is also true. That is, it would not be worth while to lay down an all inclusive rule as to when interrogatories can limit evidence. After considering the difficulty that might arise in such efforts the present situation does not seem so chaotic. Also, giving the trial court a wide range of discretion to deal with the problems as they arise may prove to be the most satisfactory method.

The practical consideration to be realized here is that failure to use care when answering interrogatories may result in unexpected consequences at trial.

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PLEADINGS AND PRACTICE—EVIDENCE—ADMISSIBILITY OF PLEADINGS INTO EVIDENCE IN MISSOURI

I. INTRODUCTION

It is the function of the pleadings in a cause to define and to isolate the controverted issues so as to expedite the trial of a cause on the merits.[1] It has been said that pleadings are designed to put a party on notice as to the issues involved and to advise the court sufficiently of the parties' respective claims so that the court may declare the law of the case.[2] Unless there is a general denial, certain allegations of fact in the pleadings will be admitted; these are known as judicial admissions.[3] A judicial admission is not evidence, but a waiver of the necessity of introducing any evidence to establish a fact. It establishes the fact with which it is concerned and is thus a limitation of the issues.[4] Occasionally, however, facts alleged in a pleading may be used to impeach the pleader or prove his opponent's case. In such situations it may come as a surprise to the pleader to find that the facts alleged in the pleading contain an admission against the interest of his client.

The use of pleadings for their evidentiary value may arise in several ways. The pleadings alone may be offered for the purpose of establishing the truth of the facts which they set out, that is, to establish a substantive part of a party's case.[5] A pleading may be offered for purposes of impeaching a witness upon the

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76. 4 MOORE, *op. cit. supra* note 73.

1. Johnson v. Flex-o-lite Mfg. Corp., 314 S.W.2d 75, 79 (Mo. 1958).

2. Phillips, *Admissibility of Pleadings in Evidence*, GOLDSTEIN, TRIAL LAWYER'S GUIDE 2 (1958).

3. TRACY, EVIDENCE 9 (1952).

4. Wehrli v. Wabash R.R., 315 S.W.2d 765, 773 (Mo. 1958); 4 WIGMORE, EVIDENCE § 1064 (3d ed. 1940).

5. See note 62 *infra* and accompanying text.

stand.[6] It is proper to admit the pleadings of another action in order to protect a defendant from paying for injuries suffered in another accident.[7]

It shall be the purpose of this comment to attempt to define the instances in which pleadings may be introduced into evidence for their admissions. Primary focus will center on the state of the law in Missouri, although some attention will be paid to the rules governing admissibility in other jurisdictions.

It was not always possible to admit pleaded allegations into evidence, whether in the case being tried or those of other actions. At common law, pleadings were of a formal and fictitious nature so as to include situations of which the client was wholly unaware. Under the old equity system, the bill was a discovery device and the statements in the bill were regarded as mere surmises of the pleader.[8] The practice of pleading inconsistent counts and inconsistent defenses, each unqualified in form, necessitated the rule that as to each separate issue only the pleadings leading up to that particular issue could be considered against the pleader and not the other counts or defenses upon which the issues were raised.[9] Thus, considering the technical and fictitious nature of pleadings at common law and equity, it is not surprising that as a general rule allegations in pleadings could not be used for evidentiary purposes. A rule allowing admission for purposes of evidence would have been intolerable. However, under the old chancery practice, the answer to the bill in equity could be used to impeach the pleader if the defendant's testimony was at variance with his answer. The answer was required to be under oath and was intended to be taken as true.[10]

With the advent of the codes,[11] and the introduction of fact pleading,[12] the objections to the use of pleadings for their evidentiary value have diminished. Since the parties are required to plead facts, it is reasonable to assume that they have some knowledge whereof they speak and thus admissions contained in the pleadings do have some evidentiary value.

II. Admissibility in General

The test to be applied in determining whether admissions against interest in pleadings may be introduced into evidence is whether, under the circumstances, the party against whom they are offered can fairly be supposed to have had personal knowledge of the making of the admission at the time the pleadings were drawn.[13] There is some controversy as to the extent of knowledge required. Most courts

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6. See notes 51, 52, 53, & 61 *infra* and accompanying text.
7. See notes 63 & 64 *infra* and accompanying text.
8. Morgan, *Admissions*, 12 Wash. L. Rev. 181, 188 (1937).
9. McCormick, Evidence 509 (1958).
10. *Ibid.*
11. New York led the reform movement with the "Field Code" which was passed in 1848. This code served as the model for all succeeding codes in this country. Clark, Code Pleading 22 (2d ed. 1947). Missouri adopted the New York system in 1849.
12. Clark, *op. cit. supra* note 11, at 22. See, *e.g.*, § 509.050, RSMo 1959; see also, Mo. R. Civ. P. 55.06(1).
13. 1 Greenleaf, Evidence § 186 (16th ed. 1899).

will permit pleadings to be introduced in evidence for their admissions against interest though the pleadings are unverified,[14] but others require verification unless a foundation has been laid showing the pleader had knowledge of the making of the statement.[15] Cases denying admissibility to unverified pleadings rest on the ground that the admissions are not those of the pleader himself, but mere suggestions of counsel.[16] The Missouri rules do not generally require verification,[17] and the Missouri cases do not seem to require verification as a prerequisite to admissibility.

The objection that statements in pleadings cannot be said to be those of the party if he has not signed or otherwise verified them can be met with the argument that they are those of his authorized attorney and thus there is prima facie authority to make relevant judicial admissions by pleadings.[18] An attorney's admissions can affect his client only so far as he has authority to act as agent in his client's behalf. His authority can be implied from his appointment as the attorney in the cause and should extend to the management of the cause, including all statements made in the pleadings.[19]

Since pleadings, in the sense they are dealt with here, are only evidence, they are subject to the same rules respecting admissibility as any other evidence.[20] It is therefore necessary that the admissions for which they are introduced be relevent and material to some issue in the case.

III. Pleadings of the Case Being Tried

There is a split of authority as to how admissions in the pleadings of a case being tried are to be brought to the jury's attention. The majority of courts hold that pleadings are part of the record of the case and any admission contained in it may be brought to the jury's attention at any time during trial.[21] The minority view is that a concession in a pleading is an admitted fact that does not become part of the record of the case until it is introduced into evidence.[22] In Missouri it would seem that it is not necessary to introduce the pleadings upon which the

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14. *E.g.*, Alabama Water Co. v. Anniston, 223 Ala. 335, 135 So. 585 (1930); Tieman v. Red Top Cab Co., 117 Cal. App. 40, 3 P.2d 381 (1931); Linn v. Clark, 295 Ill. 22, 128 N.E. 824 (1920).

15. *E.g.*, Buehman v. Smelker, 50 Ariz. 18, 68 P.2d 946 (1937); Welpston v. Marshall, 186 N.W. 854 (Iowa 1922); Jackson v. Schine Lexington Co., 305 Ky. 823, 205 S.W.2d 1013 (1947).

16. Jones, Evidence § 995 (2d ed. 1926).

17. § 509.030, RSMo 1959; Mo. R. Civ. P. 55.04.

18. 4 Wigmore, *op. cit. supra* note 4, § 1066; McCormick, *op. cit. supra* note 9, at 520. But see, Taylor v. Evans, notes 41 and 56 *infra*.

19. 4 Wigmore, *op. cit. supra* note 4, § 1063.

20. Eckner v. Western Hair & Beauty Supply Co., 162 S.W.2d 621, 626 (St. L. Ct. App. 1942); Jones, *op. cit. supra* note 16, § 993.

21. Tracy, *op. cit. supra* note 3, at 10; 4 Wigmore, *op. cit. supra* note 4, § 1064. See, *e.g.*, Wehrli v. Wabash R.R., *supra* note 4, at 773; Kozer v. Hornbeck, 75 Idaho 24, 265 P.2d 988, 993 (1954).

22. Tracy, *op. cit. supra* note 3, at 10.

case is being tried as they are a part of the record and before the court.[23] It has been held not to be prejudicial error to do so,[24] although the practice ordinarily is frowned upon.[25] Reading the pleadings to the jury will constitute reversible error if it appears that the jury was confused or misled.[26]

Illustrative of the manner in which the problem arises is *Huber v. Western & So. Life Ins. Co.*[27] Plaintiff brought an action on a group accident and health policy. The policy contained a clause to the effect that insurance would terminate when the services of the insured with the company were terminated without regard to the cause. The defendant offered in evidence and read to the jury that portion of plaintiff's petition which alleged that he was discharged as an employee prior to his claim for any disability. On appeal, the court held that it was error for the trial court to deny defendant's motion for directed verdict. Plaintiff's judicial admission showed that he had no case.

Modern codes permitting a party to plead inconsistent counts,[28] or in the alternative or hypothetically,[29] present a problem in that they might be compared to the old common law practice allowing fictitious assertions.[30] Where inconsistent counts are permitted, the allegations of one count should not be permitted to be used as admissions against another allegation. To do so would be to deprive the pleader of the advantage given him by the rules. On the other hand, where the statute merely gives permission to plead in the alternative or hypothetically, it has been argued that this is not permission to plead inconsistently, but to meet a practical need of the pleader who is justifiably uncertain as to what he can prove.[31] If this be so, it would seem to be inappropriate to restrict the use of admissions on separate issues.[32] The Missouri rule, however, is that multiple pleas may not be used as

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23. Wahl v. Cunningham, 332 Mo. 39, 40, 56 S.W.2d 1052, 1060 (Mo. 1932) (en banc). Compare, Hildreth v. Hudloe, 282 S.W. 747, 748 (Spr. Ct. App. 1926) (dictum).

24. Wehrli v. Wabash R.R., *supra* note 4, at 773; Van Campen v. St. Louis-San Francisco Ry., 358 Mo. 655, 659, 216 S.W.2d 443, 445 (1948). In *Van Campen* plaintiff's counsel was permitted to read the allegations of negligence, proximate cause and injury in the petition and the denials in the answer after defendant's counsel in argument to jury said that defendant had never denied it wasn't to blame.

25. Van Campen v. St. Louis-San Francisco Ry., *supra* note 24, at 445; Gorman v. St. Louis Merchants' Bridge Terminal Ry., 325 Mo. 326, 334, 28 S.W.2d 1023 (1930).

26. Van Campen v. St. Louis-San Francisco Ry., *supra* note 24, at 445 (dictum).

27. 341 S.W.2d 29 (St. L. Ct. App. 1960).

28. FED. R. CIV. P. 8(e)(2).

29. § 509.110, RSMo 1959; Mo. R. CIV. P. 55.12.

30. MCCORMICK, *op. cit. supra* note 9, at 509.

31. *Id.* at 510. *Cf.*, Comment, 23 Mo. L. REV. 63 (1958). The writer notes that the area is confused in Missouri, but argues that one may plead two or more repugnant claims or defenses provided he draft his pleadings in the alternative or the hypothetical, or at least draft them in a manner which will make it very clear to the opposing party that the pleader is relying on one *or* the other of his inconsistent allegations, but not on both.

32. MCCORMICK, *op. cit. supra* note 9, at 510.

admissions upon another issue in the same case.[33] The reason given for not allowing such pleas to be used as admissions is that they do not possess the characteritics inherent in admissions against interest.[34]

IV. Superseded, Withdrawn or Abandoned Pleadings

Once a pleading is amended or withdrawn, the superseded portion disappears from the case. Thus it no longer stands as a judicial admission limiting the issues and putting certain facts beyond dispute.[35] Even so, it retains its value as an extrajudicial admission[36] having the same effect as any other out of court statement made by a party. A few courts however, deny admissibility to an original pleading that has been superseded by amendment.[37] Such courts view amendments as the correction of an innocent mistake of fact.[38] There is authority to the effect that where the original pleading was drafted under a misapprehension of fact it is not to be admitted when later superseded.[39] In *Koons* v. *St. Louis Car Co.*,[40] plaintiff entered into a written contract to do certain painting for defendant. Plaintiff sued on the contract, but did not set it out in the petition. Defendant answered, admitting the contract. Subsequently, it appeared that plaintiff had altered his duplicate copy of the contract without knowledge on the part of the defendant. Upon learning of the alteration, defendant amended his answer. The supreme court held that the original answer was not admissible in evidence as an admission against interest because the defendant was unaware of the alteration at the time the contract was admitted in the answer. To admit the original answer under such circumstances would be to enable the plaintiff to take advantage of his own wrong in altering the contract.

The great weight of authority recognizes the rule that where a pleading has been superseded by amendment, or abandoned, the original pleading is admissible in evidence against the pleader in the proceeding in which it is filed for the purpose of showing admissions against interest, whether the pleading is filed by the plain-

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33. Johnson v. Flex-o-lite Mfg. Co., *supra* note 1, at 77; Hardwicke v. Kansas City Gas Co., 355 Mo. 100, 109, 195 S.W.2d 504, 509 (1946).

34. *Ibid.*

35. Locasio v. Ford Motor Co., 240 Mo. App. 269, 203 S.W.2d 518, 521 (K.C. Ct. App. 1947); 4 Wigmore, *op. cit. supra* note 4, § 1067.

36. Anderson v. McPike, 86 Mo. 293, 301 (1885); Overton v. White, 117 Mo. App. 576, 93 S.W. 363, 373 (St. L. Ct. App. 1906); Bailey v. O'Bannion, 28 Mo. App. 39, 48 (K.C. Ct. App. 1887).

37. Jackson v. Pacific Gas & Elec. Co., 95 Cal. App. 2d 204, 212 P.2d 591 (1949); North Ave. Bldg. & Loan Ass'n v. Huber, 187 Ill. App. 42, *rev'd on other grounds*, 270 Ill. 75, 110 N.E. 312 (1911); Bernard v. Pittsburg Coal Co., 137 Mich. 279, 100 N.W. 396 (1904); Belver v. Calvo, 16 Puerto Rico 342 (1910). By statute in Massachusetts, a pleading is not to be deemed evidence on trial. Woodworth v. Fuller, 235 Mass. 443, 126 N.E. 781 (1920); Phillips v. Smith, 110 Mass. 61 (1872).

38. Jackson v. Pacific Gas & Elec. Co., *supra* note 37.

39. Koons v. St. Louis Car Co., 203 Mo. 227, 101 S.W. 49 (1907); Macabee v. Miller, 316 Ill. App. 157, 44 N.E.2d 341 (1942).

40. *Supra* note 39.

tiff,[41] or the defendant.[42] In *City of St. Louis* v. *Sheahan*,[43] a condemnation proceeding to condemn a pipeline right of way, the plaintiff's original petition alleged that underground conduits and waterways were "to be placed so that the top of the same shall be a minimum of approximately three feet under the surface of the ground." This did not appear in the amended petition upon which the case was tried. The court held that the original petition was competent as an admission by the city regarding the character of excavation and the depth to which the conduits were to be placed as affecting the damage to the defendant's property. The court went on to say that the city could have neutralized that admission by showing, if true, that its present purpose and the proceeding would not have such effect. But no explanation of the kind was offered. In *Knorp* v. *Thompson*,[44] a wrongful death action submitted to the jury under the humanitarian doctrine, the defendant's original answer alleged that the truck driver negligently drove from a place of safety to and upon the defendant's railroad track, immediately in front of a train, without stopping, looking, or listening. Defendant abandoned the answer to the original petition upon the filing of the amended petition. The court held that the trial court correctly admitted the abandoned answer into evidence on the theory that the facts

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41. Campbell v. Webb, 356 Mo. 466, 202 S.W.2d 35 (1947); Davidson v. Rothschild, 49 Ala. 104 (1873); Taylor v. Evans, 102 Ark. 640, 145 S.W. 564 (1912); Bowes v. Cannon, 50 Colo. 262, 116 Pac. 336 (1911); Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517 (1948); Linn v. Clark, *supra* note 14. *But see,* North Ave. Bldg. & Loan Ass'n v. Huber, *supra* note 37; Lawrence v. Tschirgi, 244 Iowa 386, 57 N.W.2d 46 (1953); Torkowski v. Banks, 151 Kan. 898, 101 P.2d 893 (1940); Carlson v. Fredsall, 228 Minn. 461, 37 N.W.2d 744 (1949); McDonald v. Peters, 128 Mont. 241, 272 P.2d 730 (1954); Johnson v. Griepenstroh, 150 Neb. 126, 33 N.W.2d 549 (1948); Maylender v. Fulton County Gas & Elec. Co., 131 Misc. 514, 227 N.Y. Supp. 209 (1928); Edmondston v. Holder, 203 Okla. 189, 218 P.2d 905 (1948); Mount v. Welsh, 118 Ore. 568, 247 Pac. 815 (1926); Braceland v. Hughes, 184 Pa. Super. 4, 133 A.2d 286 (1957); Corbett v. Clough, 8 S.D. 176, 65 N.W. 1074 (1896); Berkley v. Burlington Cadillac Co., 99 Vt. 227, 131 Atl. 16 (1925); Schotis v. North Coast Stevedoring Co., 163 Wash. 305, 1 P.2d 221 (1931).

42. Knorp v. Thompson, 352 Mo. 44, 175 S.W.2d 889 (1943); Alabama Water Co. v. Anniston, *supra* note 14; Burris v. Anderson, 27 Colo. 506, 62 Pac. 362 (1900); Hertz Driv-Ur-Self Stations v. Benson, 83 Ga. App. 866, 65 S.E.2d 191 (1951); Lalaker v. Laupahoekoe Sugar Co., 33 Hawaii 745 (1936); Stout v. McNary, 75 Idaho 99, 267 P.2d 625 (1954); Chambers v. Appel, 392 Ill. 294, 64 N.E.2d 511 (1945). *But see,* Macabee v. Miller, *supra* note 39; Heeter v. Fleming, 116 Ind. App. 644, 67 N.E.2d 317 (1946); Beery v. Glynn, 214 Iowa 635, 243 N.W. 365 (1932); Edwards v. Mattingly, 107 Ky. 332, 53 S.W. 1032 (1899); Neilson v. Union State Bank, 165 Minn. 25, 205 N.W. 453 (1925); Gardiner v. Eclipse Groc. Co., 72 Mont. 540, 234 Pac. 490 (1925); Miller v. Nicodemus, 58 Neb. 352, 78 N.W. 618 (1899); Standard Oil Co. v. Boyle, 231 App. Div. 101, 246 N.Y. Supp. 142 (1930); Stone v. Guion, 222 N.C. 548, 23 S.E.2d 907 (1943); Republic Nat'l Bank v. First State Bank, 110 Okla. 299, 237 Pac. 578 (1925); Beck v. General Ins. Co., 141 Ore. 446, 18 P.2d 579 (1933); Stewart v. Hooks, 372 Pa. 542, 94 Atl. 756 (1953); Willis v. Tozer, 44 S.C. 1, 21 S.E. 617 (1895); Lesiker v. Lesiker, 251 S.W.2d 555 (Tex. Civ. App. 1952); Kilpatrick-Koch Dry-Goods Co. v. Box, 13 Utah 494, 45 Pac. 629 (1896); Scoville v. Brock, 79 Vt. 449, 65 Atl. 577 (1907); Williams v. Jenson, 202 Wis. 19, 231 N.W. 279 (1930).

43. 327 Mo. 305, 36 S.W.2d 951 (1931).

44. *Supra* note 42.

pleaded were equivalent to an admission that the truck driver and plaintiff's decedent were oblivious to danger.

Under the majority rule, a superseded pleading is out of the case and no longer serves as a judicial admission. Therefore, in order that admissions therein may be taken advantage of, the original pleading must be introduced into evidence.[45] The Missouri cases are in accord with this view.[46] Under the Missouri rule, the entire pleading must be admitted into evidence.[47] However, this does not mean that the party introducing the abandoned pleading must run the risk of having statements favorable to the adverse party deemed admitted. As mentioned before, the pleading stands on the same footing as any other statement made out of court by the adverse party. Only that part of the pleading being introduced which is against the interest of the pleader has probative value and is evidence of the truth of what is there stated.[48] Whatever appears that is in favor of the party making the statement is not evidence of that fact.[49] Admissions contained in abandoned and amended pleadings are not conclusive. They are only evidence to be weighed by the jury like any other admission.[50]

Related to the subject of the admissibility of pleadings to prove a substantive part of a party's case is the use of pleadings to impeach or discredit the pleader when he becomes a witness, either in his own action or another, and makes statements inconsistent with the allegations of the pleading. As a general rule, statements in pleadings are admissible for this purpose.[51]

In *Kambourian* v. *Gray*,[52] an assault and battery case, plaintiff used defendant's original answer to impeach defendant by showing that in the earlier pleading he had denied striking plaintiff, while in his testimony he admitted having struck him. The court held it was proper to permit the use of the original verified pleading for the purpose of impeachment.

In *Browder* v. *Southern Ry.*,[53] plaintiff brought an action for personal injuries suffered while in defendant's service. Plaintiff's original petition stated that

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45. Lammers v. Gruelich, 262 S.W.2d 861, 864 (Mo. 1953); Fruco Constr. Co. v. McCelland, 192 F.2d 241 (8th Cir. 1951). *But see,* Corley v. McKeag, 9 Mo. App. 38 (1880), *disapproved by* Murphy v. St. Louis Type Foundry, 29 Mo. App. 541 (St. L. Ct. App. 1888).

46. Wahl v. Cunningham, *supra* note 23; Knorp v. Thompson, *supra* note 42; Lammers v. Gruelich, *supra* note 45; Bailey v. O'Bannion, *supra* note 36.

47. Hildreth v. Hudloe, *supra* note 23, at 748.

48. *Ibid.*

49. *Ibid.*

50. Eckner v. Western Hair & Beauty Supply Co., *supra* note 20, at 626; Campbell v. Webb, *supra* note 41; Hesston State Bank v. Lutley, 137 S.W. 66 (K.C. Ct. App. 1911).

51. Kambourian v. Gray, 81 Cal. App. 2d 783, 185 P.2d (1947); Browder v. Southern Ry., 107 Va. 10, 57 S.E. 572 (1907); Lindsay v. Dutton, 227 Pa. 208, 75 Atl. 1096 (1910); Wells v. Stratton, 1 Tenn. Ch. 328 (1873); Johnson v. Hawthorne Ditch Co., 32 S.D. 499, 143 N.W. 959 (1913); Lee v. Chicago, St. P. M. & O. R.R., 101 Wis. 352, 77 N.W. 714 (1898). *Contra,* Leistikow v. Zuelsdorf, 18 N.D. 511, 122 N.W. 340 (1909).

52. *Supra* note 51.

53. *Ibid.*

it was plaintiff's duty to inspect defendant's cars to ascertain whether any of them needed or required repairs. Under the Virginia rule an inspector could not recover for injuries sustained because of defects in machinery which he had neglected to inspect. On direct examination plaintiff had testified that he did not consider himself an inspector of cars. The court held that it was proper to use the abandoned pleading to impeach the plaintiff.

Admission into evidence is apparently not a prerequisite to the use of an abandoned pleading for purposes of impeachment. In *Hoffman* v. *Illinois Terminal R.R.*,[54] an action by a passenger against a bus company for injuries allegedly sustained when a bus stopped suddenly, plaintiff's original petition charged that plaintiff had been thrown from defendant's bus "to the pavement." According to his testimony, he was thrown from the front door of the bus into a telephone pole which dazed him and then he reeled around and struck a building with his left hip. He did not at anytime testify that he fell to the pavement. Defendant's counsel did not press an offer of the original petition into evidence after a suggestion by the court that such an offer would constitute a waiver of defendant's right to request a directed verdict. The court then ruled that defendant might not cross-examine plaintiff on the contents of the petition. The court of appeals held that this restriction of the scope of cross-examination was error, for counsel for the defendant had a right to cross-examine the plaintiff with respect to apparent discrepancies between his pleadings and his testimony. The variance between plaintiff's pleadings and testimony bore directly on plaintiff's credibility as a witness.

An exception to the rule permitting impeachment by pleadings exists where the pleader cannot personally be charged for the allegations in the pleading.[55] In *Taylor* v. *Evans*,[56] plaintiff brought an action against his employer to recover for personal injuries received while in the latter's service. On cross-examination the trial court refused to permit defendant's counsel to read in evidence the original complaint, and also refused to permit cross-examination of plaintiff concerning the allegations of the original complaint. Plaintiff had been asked on cross-examination whether he had alleged certain facts in the original complaint, and he replied that he did not know anything about what the complaint contained. The appellate court held that while an abandoned pleading is admissible for purposes of impeachment, it is not admissible where it does not appear that the plaintiff knew of the allegations of the original complaint, or at least where it affirmatively appears that he was not aware of the contents of the pleading. It would be without probative force either as an admission or as a contradictory statement unless it was shown that the plaintiff was aware of the contents of the paper. It can be argued, however, that the pleading should be admitted for the purpose of discrediting or impeaching a party, since he is there and has the opportunity to explain the discrepancy or contradiction.[57]

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54. 274 S.W.2d 591 (St. L. Ct. App. 1955).
55. *Supra* note 41.
56. *Ibid.*
57. Johnson v. Powers, 65 Cal. 179, 3 Pac. 625, 626 (1884).

V. Admissibility of Pleadings of Other Actions

It is well settled that admissions contained in pleadings entered in one case are admissible in a record action, whether it is a new trial upon the same cause of action[58] or a different cause of action.[59] It is not grounds for objection that one was a suit in equity and the other an action at law.[60] Where one case is on trial and the pleader has pending in another suit a pleading which states facts relative to an issue being tried, the pleading in the other suit is admissible in the suit on trial as an admission.[61]

In *Helton* v. *Huckeba*,[62] a passenger in the defendant's car testified in an action against defendant by a third person that defendant was driving between forty and forty-five miles an hour, that defendant was driving on the right hand side of the road and that approaching headlights of the other vehicle were on defendant's side of the road, that when the other headlights came into view, defendant turned his car and slowed down and the impact took place. A petition filed by the attorney of the witness in a pending action charged defendant with negligence in driving at a high rate of speed, failing to keep and maintain a properly vigilant lookout for other vehicles on the highway; failure to drive as near to the right-hand side of the road as practicable; failure to turn to the right of the center of the highway so as to pass without interference and other similar allegations. It was held that the petition in the pending action was properly admitted in evidence at defendant's trial in the instant case to impeach the witness' testimony.

Pleadings of other actions may be used to make out a substantive part of a party's case. In *Reid* v. *Brotherhood of R.R. Trainmen*,[63] plaintiff's petition alleged that defendant was an insurance corporation duly organized and existing according to law, but not organized under the laws of Missouri, and was engaged in the insurance business in this State, but without license to do so issued by the superintendent of insurance. Defendant, in its verified answer, denied that it was a corporation and alleged that it was a voluntary unincorporated association organized under and by virtue of the laws of Ohio. To prove that defendant was a corporation as alleged plaintiff introduced into evidence defendant's answer in another case. The court held that the allegation in the answer introduced was an express affirmative statement, an admission on the part of the defendant.

Pleadings in other actions may be used to establish prior injuries suffered by a party. In *Craig* v. *United Rys.*,[64] a suit for damages for personal injuries arising out of a streetcar accident, defendant's attorney was permitted, over plaintiff's

58. Spurlock v. Missouri Pac. R.R., 125 Mo. 404, 407, 28 S.W. 634, 635 (1894).
59. Simmons v. Kansas City Jockey Club, 334 Mo. 99, 107, 66 S.W.2d 119, 122 (1933); Kirkpatrick v. Metropolitan St. Ry., 109 S.W. 682, 686 (Mo. 1908); Frank R. Jelleff Inc. v. Braden, 98 U.S. App. D.C. 180, 233 F.2d 671 (1956).
60. State *ex rel.* Standard Regulator Co. v. Fidelity & Deposit Co., 228 S.W. 865, 868 (K.C. Ct. App. 1921).
61. Johnson v. Flex-o-lite Mfg. Co., *supra* note 1; Hardwicke v. Kansas City Gas Co., *supra* note 33.
62. 365 Mo. 93, 276 S.W.2d 78 (1955) (en banc).
63. 232 S.W. 185 (K.C. Ct. App. 1921).
64. 185 S.W. 205, 14 A.L.R. 17 (Mo. 1916).

objections, to read into evidence all of the petition of a former case by plaintiff against defendant for injuries received while in the act of leaving one of defendant's cars. There was nothing in the petition in the first case to contradict the allegations in the petition in this case, nor to contradict plaintiff's evidence in this cause. It did show that about half the injuries alleged in the first case were alleged in the instant case. On appeal from judgment for defendant, the court held that it was proper for defendant to read in evidence so much of plaintiff's petition as referred to her injuries sued for therein. But it did not have the right to read any other portion of such petition in evidence, nor to cross-examine plaintiff with reference to the facts in that suit, except so far as they showed plaintiff's injuries sued for in that case. The defendant should be protected from paying for the same injuries twice by showing the extent of said former injuries, and thus making it possible for the jury to distinguish between the injuries of the latter date, if any, and those involved in the former suit. In *Grayson* v. *Pellmounter*,[65] plaintiff alleged personal injuries suffered in a cab accident. Defendant introduced into evidence the petition of a prior suit by plaintiff against the Public Service Company that alleged substantially the same injuries as alleged in this suit. On appeal, the court held it was proper to admit the pleading of the other action because a defendant should be protected from paying for the same injuries twice.

An admission of fact contained in a pleading that has been used in another cause is not a judicial admission with regard to its use in another action, but must qualify, if at all, as an extrajudicial admission. As such it is subject to the same rules respecting the admissibility of any other out of court declaration of a party. While a litigant is conclusively bound by the judicial admissions contained in the pleadings of the case being tried, the rule does not apply to a pleading in another suit. A party's extrajudicial admissions are not conclusive upon him, but may be explained.[66]

Pleadings signed by an attorney are admissible against the interest of his client in another suit regardless of whether the client had knowledge of the contents of the pleading.[67] An attorney, in all matters relating to the progress and trial of the cause, may bind his client,[68] the act of the attorney being deemed to be the act of the party.[69] The admission of facts recited in a pleading are considered prima facie to be made with the acquiesence of the client, and the attorney's statement to be his statement. However, the pleading is not admitted as conclusively establishing the facts therein, and is treated according to the rules governing extrajudicial admissions.[70] In some jurisdictions, the presumption shifts if the pleading is superseded by amendment.[71]

65. 308 S.W.2d 311 (K.C. Ct. App. 1957).
66. Simmons v. Kansas City Jockey Club, *supra* note 59, at 107, 66 S.W.2d at 122; Creighton v. Missouri Pac. R.R., 66 S.W.2d 980 (K.C. Ct. App. 1933); Dowzelot v. Rawlings, 58 Mo. 75, 77 (1874).
67. *But see*, Taylor v. Evans, *supra* note 56 and accompanying text.
68. Nichols, Shepard & Co. v. Jones, 32 Mo. App. 657, 664 (K.C. Ct. App. 1933).
69. Dowzelot v. Rawlings, *supra* note 66, at 77.
70. Nichols, Shepard & Co. v. Jones, *supra* note 68, at 664.
71. Weber v. Mixter, 121 Atl. 673, 677 (Me. 1923).

VI. Conclusion

The use of statements of fact in pleadings as evidence to establish an admission against interest or to impeach the testimony of a party or witness is a valuable tool to the trial lawyer. When available for such purposes, certain matters of proof may be simplified and the trial expedited. These are desirable ends, but the courts should use caution in admitting the pleading.

The greatest concern of the courts in determining the proper use of statements in pleadings as evidence has been with their reliability for that purpose. An effort must be made to establish identification of the statement with the party. The strongest indicia of reliability is where the pleadings have been verified. A party's signature to his pleading is an indication that he has read it and is aware of the contents and their import. On the other hand, where pleadings have been signed only by an attorney some reliability is lost. Rules requiring that evidence must conform to the pleadings may lead an attorney to "pad" the pleadings somewhat, especially in instances where he is not sure of the sufficiency of his theory of the case. Time factors may lead to hastily drawn petitions and perhaps increase the possibility of mistake, or lead to the drafting of pleadings where insufficient facts have been obtained. A lawyer will, of course, be more concerned with the prospects of the immediate litigation and thus will not be concerned with possible effects his work may have upon other actions his client may become involved in. Even though an error may be corrected by amendment, the statement in the original pleading remains, lying in the background for possible use by an alert opponent.

Our legal system, based upon the adversary principle, may sometimes put a premium on the particular abilities (or failings) of the lawyers involved. Thus, in the interests of fairness and equity, the courts should exercise caution in permitting the use of pleadings as evidence. It is, after all, the interests of the client with which the court should be most concerned, and fairness to the client would seem to require that he not be penalized for the mistakes of his attorney.

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