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Recent Cases

CRIMINAL LAW—ATTEMPT—IMPOSSIBILITY AS A DEFENSE

*United States v. Thomas*¹

The defendants were tried by general court-martial for rape, conspiracy to commit rape, and lewd and lascivious conduct. The evidence showed that the accused had sexual intercourse with a woman they thought to be, and who apparently was, unconscious from intoxication. In fact, however, she was dead as the result of a heart condition which caused her death prior to the defendants' acts. The court-martial acquitted the defendants of rape but found them guilty of attempted rape and the two other crimes with which they were charged. The Board of Review reversed on the ground that since the crime of rape was impossible there could be no attempt or conspiracy to commit that crime. The Court of Military Appeals, with one judge dissenting, reversed the Board of Review.²

Can there be a criminal attempt under circumstances such as those found in the instant case where it would not be possible to consummate the offense attempted? The courts and legal writers have belabored impossibility as a defense to attempt since its appearance in *Regina v. McPherson*.³ Many efforts have been made to reconcile the myriad decisions that have since ensued and to classify them into logical categories as to when impossibility should be a defense to criminal attempt.⁴ The broadest and most frequently discussed classification is that which distinguishes legal from factual impossibility. Basically, factual impossibility is where extraneous circumstances unknown to the actor or beyond his control prevent the consummation of the intended crime while legal impossibility is where the intended conduct even if completed would not

1. 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962).

2. This note does not treat the question of conspiracy since the Court of Military Appeals confined its discussion principally to attempt.

3. 7 Cox Crim. Cas. 281, 169 Eng. Rep. 975 (1857). For discussion generally see 14 AM. JUR. *Criminal Law* §§ 69-70 (1938); 22 C.J.S. *Criminal Law* § 77 (1961); 1 BURDICK, *THE LAW OF CRIME* §§ 143-47 (1946); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 586-99 (2d ed. 1960); PERKINS, *CRIMINAL LAW* 486-500 (1957); WILLIAMS, *CRIMINAL LAW—THE GENERAL PART* §§ 205-07 (2d ed. 1961).

4. See Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930); Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464 (1954); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821 (1928); Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422 (1957); Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962 (1930); Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U.L. REV. 1170 (1957).

be criminal. Legal impossibility is generally held to be a valid defense⁵ while factual impossibility is not.⁶ But into which of these categories (to the exclusion of the other) a particular set of facts may be placed has presented a difficult and constantly recurring problem.

Such technical distinctions are frequently difficult to understand, harder to apply, and unsatisfactory in their result. Three Missouri cases cited in the *Thomas* opinion provide examples of the confusion and inconsistency that can evolve from a more or less mechanical application of the legal-factual impossibility doctrine. In *State v. Mitchell*⁷ the defendant fired a revolver into the room of the intended victim's house where he customarily slept though on this particular night he had chosen to sleep in another room. The court affirmed the trial court's conviction for attempted murder. It reasoned that since criminal intent and present capacity were clearly expressed along with a sufficient overt act toward the completion of the crime, the defendant could not be allowed to defend himself successfully by showing that, because of circumstances unknown to him, his acts could not have resulted in the completed offense.

In *State v. Taylor*⁸ the court held that the defendant could not be guilty of attempting to corrupt a summoned juror where the individual involved had in fact not been summoned to be a juror, regardless of what the defendant thought his status was. The *Mitchell* case was distinguished on the basis that there, if the accused had accomplished his object, it would have been a crime, while here, even if the defendant had succeeded in influencing the person approached, it would not have been a crime under the statute. The court hypothesized that in the *Mitchell* case had the intended victim been dead the defendant would not have been guilty of attempted murder even though he did not know of the fact, for he could not kill (and hence murder) a person already dead. "If the thing defendant attempted to do would not and could not, under the statute, have been a crime if accomplished, how can it be said that he attempted

5. See *e.g.*, *State v. Guffey*, 262 S.W.2d 152 (Spr. Mo. App. 1953); *State v. Porter*, 125 Mont. 503, 242 P.2d 984 (1952); *Marley v. State*, 58 N.J.L. 207, 33 Atl. 208 (1895); *People v. Teal*, 196 N.Y. 372, 89 N.E. 1086 (1909); *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906); *Frazier v. State*, 48 Tex. Crim. 142, 86 S.W. 754 (1905); *Foster v. Commonwealth*, 96 Va. 306, 31 S.E. 503 (1898); *Rex v. Percy Dalton (London), Ltd.*, 33 Crim. App. R. 102 (1949).

6. See, *e.g.*, *People v. Siu*, 126 Cal. App.2d 41, 271 P.2d 575 (1954); *People v. Grant*, 105 Cal. App.2d 347, 233 P.2d 660 (1951); *People v. Fiegelman*, 33 Cal. App.2d 100, 91 P.2d 156 (1939); *People v. Huff*, 339 Ill. 328, 171 N.E. 261 (1930); *Clark v. State*, 86 Tenn. 511, 8 S.W. 145 (1888); *State v. Damms*, 9 Wis.2d 183, 100 N.W.2d 592 (1960).

7. 170 Mo. 633, 71 S.W. 175 (1902). *Accord*, *People v. Lee Kong*, 95 Cal. 666, 30 Pac. 800 (1892); *U.S. v. Cruz-Gerena, C.M.* 228955, 49 B.R. 245 (1943).

The current Missouri general attempt statute provides: "Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows: . . ." § 556.150, RSMo 1959.

8. 345 Mo. 325, 133 S.W.2d 336 (1939). See also *State v. Butler*, 178 Mo. 272, 77 S.W. 560 (1903); *State v. Lawrence*, 178 Mo. 350, 77 S.W. 497 (1903).

to commit the denounced crime, however reprehensible may have been his intent from the standpoint of morals."⁹

Following this line of reasoning in *State v. Guffey*¹⁰ it was held that to shoot a stuffed deer though believing it to be alive was not an attempt to take game out of season. "If the dummy had been actually taken (it could not be pursued), defendants would not have committed any offense. It is no offense to attempt to do that which is not illegal. . . . Neither is it a crime to attempt to do that which it is legally impossible to do."¹¹

Logically these decisions are in conflict. A consistent line of reasoning would have reached the same outcome in all three cases. In the *Mitchell* case the court noted that the intended victim was actually in the house and had he been in the room in which the defendant believed him to be the contemplated offense of murder would undoubtedly have been effected. It classified this mere physical absence as within the purview of factual impossibility and therefore held that a conviction for attempted murder should not be barred. In the latter two cases the courts looked instead to the circumstances as they actually were and found that the defendants' acts even if consummated could not have constituted the intended offense. Invoking the doctrine of legal impossibility the courts found no attempt.

The courts seem to vary between an objective and a subjective approach to the problem. Where the court takes an objective view—that the results intended are those actually occurring or those that would have occurred had the defendant carried his acts to completion—and finds that this fails to constitute an offense, then it may apply the doctrine of legal impossibility and hold that no criminal attempt exists. On the other hand the court may reason that the results intended are merely those which the defendant contemplates in his mind and which would follow from defendant's acts if the circumstances were as the defendant believed them to be. If these results would constitute an offense the impossibility will generally be viewed as only one of fact and the defendant may be convicted of the attempt. This latter subjective approach if used consistently would relegate to the area of legal impossibility only those situations where doing what the actor has in mind would not constitute an offense.

The courts apparently confuse the intent of the accused, which is a state of mind, with the external realities, where his intention manifests itself and which may make it either possible or impossible for the intent to be effectuated.¹² This confusion is increased by the use of the word "intent" (or "intend") in reference to both the accused's state of mind and the physical realities, known or unknown to him, which control and determine the actual consequences of his acts. What the accused does, however, and what he intends to do are two different and separate concepts. In each of the three cases discussed above, if the

9. *State v. Taylor*, *supra* note 8, at 331, 133 S.W.2d at 340.

10. 262 S.W.2d 152 (Spr. Mo. App. 1953).

11. *Id.* at 156.

12. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 596-99 (2d ed. 1960).

acts the accused intended, viewed as the results he anticipated and sought to achieve (the killing of a living person, the bribery of a summoned juror, the shooting of a deer), had in fact occurred, the *actus reus* of the offense would have been established. Since the necessary *mens rea* could be found along with an overt act tending toward the commission of the offense, it is submitted that each case made out an attempt to commit the offense. On the basis of these decisions as they stand, however, it seems likely that, had the Missouri courts been called upon to decide the *Thomas* case, they would have found no attempted rape.

Which interpretation a court will follow in a given case appears to depend on whether or not the court believes the defendant's conduct should be punished. Thus a court is able to find an attempt when it feels the conduct is particularly noxious, reprehensible, and within a dangerous proximity of the completed crime. This in itself is not undesirable, for flexibility is necessary to enable courts to adequately handle diverse fact situations in reaching their decisions. However, when the traditional legal rules are seemingly conflicting, difficult to understand and hard to apply to obvious fact situations then clarification of some sort is needed. Such are conditions in the area of impossibility where the most discerning court would be confused by the plethora of vague legal doctrine confronting it. Nor will the exigencies of the bench allow judges sufficient opportunity for sorting through this maze for remnants of sound legal doctrine in order to effectively reach or support acceptable decisions.

The Court of Military Appeals in deciding the *Thomas* case refused to become involved with the close and complicated distinctions within the area of impossibility.¹³ The defendants had done all they could on their part to consummate the crime of rape. It was through fortuitous circumstances unknown to the defendants and beyond their control that their acts fell short of the *actus reus* of that crime. Their state of mind, however, was no less blameworthy as a result, nor was there any lack of overt acts manifesting this state of mind and constituting a danger to society. The court, recognizing this and feeling as a matter of policy that such conduct should be included within the scope of the general attempt statute and punished accordingly, gave the statute a broad interpretation.¹⁴ The majority agreed that the doctrine of impossibility, which acts as a narrowing and limiting factor on the scope of criminal attempts, should not just be sidestepped but disposed of ceremoniously. Thus in holding that the facts of the case before

13. "We must reject the possibility of adopting for the military an antiquated and discredited rule involving such nebulous distinctions as factual and legal impossibility. Nor can we expouse formulae for the solution of this question which have been universally condemned as unsound, unworkable, absurd, or nonsense." *Supra* note 1, at 287, 32 C.M.R. at 287.

"[Such a decision] . . . would lead military jurisprudence into the morass of confusion as to criminal attempts in which civilian jurisprudence finds itself immobilized, and from which heroic efforts are being made to extricate it." *Supra* note 1, at 286, 32 C.M.R. at 286.

14. "(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." Uniform Code of Military Justice art. 80, 10 U.S.C. § 880 (1958).

them satisfied all elements necessary for attempted rape, the court took a position which in effect does away with the defense of impossibility in the law of attempts, reserving only that area where the results which the accused had in mind would not be criminal.

The Court of Military Appeals in reaching this decision relied heavily on the position taken by the American Law Institute in its Model Penal Code.¹⁵ Under the definition of attempt set forth there, the defense of impossibility is unavailable. The view taken is that criminal liability of the accused should turn on his purpose, considered in light of his beliefs, and not on what is actually possible under existing circumstances.

In a recent New York case¹⁶ the court cited the position taken in the Model Penal Code and the *Thomas* case with approval and stated that, though this was the more progressive and modern view, it was barred in New York by existing law.¹⁷ The court stated: "The defendant's moral guilt is unquestionable. He intended to commit the crime of grand larceny and did everything that he could

15. MODEL PENAL CODE § 5.01 (Tent. Draft No. 10, 1960). Attempt is there defined as follows:

(1) Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

The major results of this proposed statute are clearly set forth in the comment to art. 5 at 25:

(a) to extend the criminality of attempts by sweeping aside the defense of impossibility, including the distinction between so-called factual and legal impossibility, and by drawing the line between attempt and non-criminal preparation further away from the final act; the crime becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose; . . .

See also MODEL PENAL CODE § 5.01 (Proposed Official Draft, 1962). This changes § 5.01(1)c to read, "purposely does or omits to do anything which, under the circumstances as he believes them to be, is *an act or omission constituting* a substantial step in a course of conduct planned to culminate in his commission of the crime." [Emphasis added.]

16. *People v. Rollino*, 37 Misc.2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962).

17. See *People v. Jelke*, 1 N.Y.2d 321, 135 N.E.2d 213, 152 N.Y.S.2d 479 (1956) (approving holding of *Jaffe* case); *People v. Teal*, 196 N.Y. 372, 89 N.E. 1086 (1909); *People v. Jaffe*, 185 N.W. 497, 78 N.E. 169 (1906). *But see* *People v. Boord*, 260 App. Div. 681, 23 N.Y.S.2d 792 (1940); *People v. Moore*, 142 App. Div. 402, 127 N.Y. Supp. 98 (1911), *aff'd mem.*, 201 N.Y. 570, 95 N.E. 1136 (1911); *People v. Gardner*, 144 N.Y. 119, 38 N.E. 1003 (1894); *People v. Morgan*, 123 N.Y. 254, 25 N.E. 412 (1890).

to implement and effectuate his criminal purpose and intent."¹⁸ It felt, however, that the existing state of decisional and statutory law was a matter for the legislature to remedy and not the judiciary. This was the same position taken by the dissenting judge in the *Thomas* case.

California has also adopted a subjective view, holding that the criminal purpose of the actor is the important consideration in attempt cases. In a recent case¹⁹ the court pointed out that California courts have ceased to be concerned with the niceties of distinction between factual and legal impossibility but, rather, focus on the defendant's intent to commit the substantive offense. It stated that in California it is enough to sustain a conviction for attempt if the *mens rea* necessary for the completed offense exists, along with acts capable of consummating the crime had the circumstances been as the defendant believed them to be.

In a South African case²⁰ the question was whether, where the completed common law crime of procuring abortion required that the foetus be alive at the time of the act, there could be an attempt to procure abortion when the foetus was already dead. The court, saying that this was analogous to the question of whether there could be an attempt to murder a corpse, reached an affirmative answer in an exceptionally well reasoned opinion. Adopting a subjective view of the actor's intent the court eliminated the defense of impossibility in its jurisdiction.

The decision of the majority in the *Thomas* case holding the defendants guilty of attempted rape and refusing to apply technical rules of impossibility to exculpate them, seems sound both as a matter of logic and policy. It is in accord with the present trend of the courts in the area of criminal attempts, as well as with the better reasoned cases of the past, and provides the military with a utilitarian rule well suited to the problems presented and the ends of justice.

Generally impossibility has been invoked to verify criminal purpose or to exonerate the defendant in certain entrapment cases and in cases where little danger of actual harm is presented to anyone.²¹ Though attempt should always be viewed in light of the statute setting forth the substantive offense, it does not depend on the occurrence of the evil which the statute was designed to prevent. Every person who engages in conduct directed toward a criminal end presents a threat to the peace and well being of society. Such an intent plus a willingness to carry it out is the essence of criminality. It is in protecting against such potential harm to society from the hands of those who intend to injure it that the concept of criminal attempt is rooted. In a society such as ours, which is ex-

18. *People v. Rollino*, *supra* note 16, at 22, 233 N.Y.S.2d at 58.

19. *People v. Meyers*, 213 Cal. App.2d 518, 28 Cal. Rptr. 753 (1963). *Accord*, *People v. Rojas*, 55 Cal.2d 252, 358 P.2d 921 (1961); *Faustina v. Superior Court*, 174 Cal. App.2d 830, 345 P.2d 543 (1959). See also *People v. Camodeca*, 52 Cal.2d 142, 338 P.2d 903 (1959); *People v. Fratianno*, 132 Cal. App.2d 610, 282 P.2d 1002 (1955); *People v. Lavine*, 115 Cal. App. 289, 1 P.2d 496 (1931); *In re Magidson*, 32 Cal. App. 566, 163 Pac. 689 (1917).

20. *Regina v. Davies* [1956] 3 So. Afr. L.R. 52, 73 S.A.L.J. 361.

21. Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571 (1961).

tremely complex and interrelated, and whose citizens are becoming more and more dependent upon and subject to the conduct of one another, it becomes increasingly necessary to provide effective law enforcement and judicial sanction in the area of inchoate crimes—solicitation, conspiracy and attempt. Society must constrain by apprehension and punishment those individuals who have chosen to bring about consequences forbidden by criminal law before their design can be culminated in the commission of the intended offense. The criminal intent alone should not be enough for conviction but when it is coupled with acts which go beyond preparation, toward the commission of the offense itself, then the actor should be punished. And such should be the outcome even though, as the result of some fact or circumstance unknown to the accused, the intended offense is impossible of commission. Where the accused's failure to satisfy all the elements of the completed offense is due to fortuitous circumstances his conduct is still inimical (and he is no less culpable) and he should not be absolved from criminal liability.

WILLIAM W. FERGUSON

JURISDICTION IN PERSONAM—SINGLE ACT STATUTES—MINIMUM CONTACTS—A NASCENT DOCTRINE OF FORUM CONVENIENS

*Singer v. Walker*¹

Defendant corporation manufactured a geologist's hammer in Illinois. The hammer, labeled unbreakable, was shipped, f.o.b. Rockford, Illinois, to a New York retailer in response to a direct mail order. Plaintiff's aunt purchased the hammer from the retailer and gave it to plaintiff. While in Connecticut on a field trip, plaintiff's eye was injured because the hammer broke while being wielded in rock-breaking. Plaintiff's complaint alleged two causes of action, one in breach of warranty and one in negligence. Defendant corporation maintained no registered office or agent in New York. Although it had been judicially determined in a prior action that defendant was not doing sufficient business in the state to confer jurisdiction, service of process was had on defendant corporation in accord with a subsequent statute. The statute permitted the court to exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from the transaction of any business or the commission of a tortious act (except defamation) within the state or the ownership, use or possession of any real property situated in the state in the same manner as if he were a domiciliary.² Defendant corporation's motion to quash service under this statute was denied.

1. 250 N.Y.S.2d 216 (Sup. Ct. 1964).

2. N.Y. CIV. PRAC. LAW AND RULES § 302 (1963):

Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction.

A court may exercise personal jurisdiction over any non-domiciliary or his executor or administrator, as to a cause of action arising from any

The court, noting the cause of action arose in Connecticut under traditional analysis, found a tortious act was committed by defendant in New York when it sent the mislabeled defective hammer into the state knowing that it would be circulated in the New York market. "The fact that the infant plaintiff obtained possession of the hammer in New York is an essential nexus to sustain jurisdiction."³ The court then reasoned that a defective hammer was an instrument dangerous to life and health, that this was of "paramount importance" and concluded the alleged facts satisfied the requirements of the statute and also the constitutional limitations which require some contacts within the forum state's territory in order to sustain personal jurisdiction.⁴

For almost seventy years the territorial power concept of *Pennoyer v. Neff*,⁵ requiring personal service within the state's territory or on domiciliaries of the state temporarily elsewhere, had limited the cases under the due process clause where personal jurisdiction could be maintained. Certain fictional concepts of "presence," "consent" or "doing business" limited the doctrine's application to foreign corporations.⁶ Service under nonresident motorist statutes was upheld as a valid exercise of the state's police power.⁷ Then in 1945, in *International Shoe Co. v. Washington*⁸ the Supreme Court refused to employ the past fictive language and looked to the corporate or individual defendant's contacts, ties, or relations with the forum state.⁹ In considering the minimum contacts, the court felt it was relevant to consider the inconveniences which would result to the corporation from

of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state.

3. 250 N.Y.S.2d at 221.

4. *Ibid. Accord:* *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). *Contra:* *Grobark v. Addo Machine Co.*, 16 Ill.2d 426, 158 N.E.2d 73 (1959); *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957).

5. 95 U.S. 714 (1878).

6. *E.g. Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917); *Kane v. New Jersey*, 242 U.S. 160 (1916); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917); *Wein v. Crockett*, 113 Utah 301, 195 P.2d 222 (1948).

7. *Hess v. Pawloski*, 274 U.S. 352 (1927).

8. 326 U.S. 310 (1945); see also *Ehrenzweig, Pennoyer is Dead—Long Live Pennoyer*, 30 ROCKY MOUNT. L. REV. 285 (1958).

9. The court said:

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding him. * * * But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and justice." 326 U.S. 310, 316 (1945).

a trial away from its place of business.¹⁰ In *Perkins v. Benguet Consolidated Mining Co.*¹¹ it was held the cause of action did not have to be connected with the commercial activity if the activity was substantial. In *McGee v. International Life Ins. Co.*¹² a single insurance transaction involving California governmental interests and a California plaintiff was a sufficient base to uphold service by mail on a foreign corporation which had never solicited or done business in California other than the insurance contract.¹³ In assaying the contacts, the court found that the residents would be at a severe disadvantage if they were forced to follow the defendant to a distant state; that when claims were small, plaintiffs could not in many cases afford the cost of obtaining a foreign remedy, thus making the company judgment-proof; and that the crucial witnesses would be found in plaintiff's locality.¹⁴

The New York statute and its application indicates the movement of several states to take advantage of the Supreme Court's invitation to broaden bases of personal jurisdiction. Illinois¹⁵ and Wisconsin¹⁶ have passed similar "omnibus" statutes, and most states have passed "single-act" or "single-tort" statutes.¹⁷ Jurisdictional facts must not offend traditional notions of fair play and justice; they will not offend these notions if there is present some territorial nexus (a single act, transaction or real property—possibly less) and certain other ambiguous facts indicating the entertainment of jurisdiction is convenient to the court or the parties.

The Texas federal district courts ascertain if the due process requirements are met by looking to the nature and character of defendant's business, the number and type of activities within the state, whether such activities gave rise to the

10. 326 U.S. 310, 317 (1945).

11. 342 U.S. 437 (1952).

12. 355 U.S. 220 (1957).

13. The court did not limit the language to foreign corporations:

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity. [Emphasis added.] *McGee v. International Life*, 355 U.S. 220, 223-24 (1957).

14. *Ibid.* For a comprehensive study of minimum contacts see Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla; A Review*, 25 U. CHI. L. REV. 569 (1958); Reese & Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959); Comment, *State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

15. ILL. CIV. PRAC. ACT §§ 16-17; ILL. REV. STAT. ch. 110, §§ 16-17 (1963).

16. WIS. STAT. ANN. § 262.05 (1963 Supp.).

17. §§ 351.630(2)-(5), 355.375(2)-(5), RSMo 1961 Supp.

cause of action, whether the forum has some special interest in granting relief, and the relative convenience of the parties.¹⁸ Professor Leflar has said:

There is today increasing acceptance of the idea that fair play and substantial justice are satisfied if: (a) the cause of action involves local elements which make it reasonably desirable from the plaintiff's point of view that the case be tried at the selected forum, (b) the defendant has sufficient causal responsibility for the presence of these elements in the forum state to permit us reasonably to conclude that he has by his own volition subjected himself to answering for them there, and (c) relevant public interests are reasonably served, or not disserved, by allowing the cause to be determined at that forum.¹⁹

Professor Reese, the reporter for the *Restatement of Conflict of Laws (Second)*, who assisted the New York Advisory Committee on Practice and Procedure, undoubtedly felt the statute cited above was designed to take advantage of the constitutional power of the state to subject nonresidents to personal jurisdiction.²⁰

The Missouri courts have failed to accept the changing concepts, and in some cases have indicated a tendency in the other direction.²¹ The courts after *International Shoe* still talked in terms of "doing business."²² While other states gave their statutes retrospective effect,²³ Missouri declined to do so.²⁴ The Missouri "single-tort" statute²⁵ is couched in terms of "doing business" and "appointment of an agent." In the one case which utilized the statute to obtain jurisdiction over a foreign corporation, the court based its holding on the "minimum contacts" rationale.²⁶ As Professor Anderson hoped, this statute and the vistas it opens may "jar the Missouri courts out of their lethargy" and "bring Missouri more in line with the present American trend."²⁷ Missouri should consider further amendments to its present statutes to provide a broader base as New York, Illinois and Wisconsin have.²⁸ But a conservative statute,²⁹ similar to one proposed by a

18. See *Hearne v. Dow-Badische Chemical Co.*, 224 F. Supp. 90, 99 (S.D. Tex. 1963).

19. Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282, 285-86 (1960).

20. 250 N.Y.S.2d at 220, fn. 1, citing the "2nd Prel. Report of Advisory Comm. on Proc. and Prac. [1958 Report, Temp. Comm. on Courts] Leg. Doc. 1958, No. 13, p. 39."

21. Anderson, *Personal Jurisdiction Over Outsiders*, 28 Mo. L. REV. 336, 375, 386 (1963). See *Jennings v. McCall Corp.*, 218 F. Supp. 662 (W.D. Mo. 1962), *aff'd*, 320 F.2d 64 (8th Cir. 1963).

22. *Id.* at 380.

23. See *Owens v. Superior Court*, 52 Cal.2d 822, 345 P.2d 921 (1959); *Nelson v. Miller*, 11 Ill.2d 378, 143 N.E.2d 673 (1957).

24. *State ex rel. Clay Equipment Corp. v. Jensen*, 363 S.W.2d 666 (Mo. En Banc 1963).

25. §§ 351.630(2)-(5), 355.375(2)-(5), RSMo 1961 Supp.

26. *Higginbotham v. United Iron & Metal Co., Inc.*, 228 F. Supp. 1 (W.D. Mo. 1964).

27. Anderson, *supra* note 21, at 382, 384.

28. See notes 14 and 15. Also see MONT. REV. CODES ANNOT. § 93-2702-2 (Rule 4)(b) (1963); N.C. GEN. STAT. §§ 55-144, 146 (1960).

29. House Bill No. 718, 72nd General Assembly (1963).

critic of the "omnibus" statutes, which would considerably broaden the present Missouri base, was rejected by Missouri's 72nd General Assembly.³⁰

What remains in progressive states of the territorial concept and its concomitant transient jurisdiction may eventually be abolished; certainly all that remains is a hollow shell. The principle *actor sequitur forum rei* is no longer the first consideration. As bases are expanded and more decisions are reported, minimum contacts will become minimal. Efforts to stay within the present omnibus statutes and their "in the state" contact, act or transaction will result in vague, case-to-case rules. Courts have relied on the place of the injury as the place where the tort was committed, but when the injury occurred elsewhere have looked no further than defendant's conduct.³¹ In the instant case, the New York court wrestled with the facts to find some third nexus. If the commission of a tortious act requirement is strictly interpreted, the court will stretch tort concepts to find a sufficient jurisdictional act. When minimal contacts become the sole criteria for personal jurisdiction, Professor Ehrenzweig notes:

The question will then arise whether this formula whose extreme flexibility is hardly preferable to the extreme rigidity of the classical rule of physical personal service, will not need to be supplemented by criteria developed within the civilian law of competency or, more likely, within the common law of *forum non conveniens*.³²

In companion areas, the courts have begun to move from traditional territorial concepts completely. In New York the traditional rules for choice of law problems have been expressly rejected in both tort and contract cases as inadequate and meaningless.³³ The California court speaking through Justice Traynor refused to incant the territorial fictions, rejected the situs of intangibles as a base for jurisdiction and looked to certain contacts with the forum state.³⁴

30. Stimson, *Omnibus Statutes Designed to Serve Jurisdiction Over Out-of-State Defendants*, 48 A.B.A.J. 725, 729 (1962). The Stimson statute is worded:

Any cause of action arising out of acts done in this state by an individual in this state or by an agent or servant in this state of a foreign corporation may be sued upon in this state (although the defendant has left this state) by process served upon or mailed to the individual or corporation outside of this state.

House Bill No. 718 would also have removed the insulation granted nonresident individuals who have committed torts within the state.

31. Compare *Farmer v. Ferris*, 133 S.E.2d 492 (N.C. 1963) (place of tort is place of injury) and *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), with *Moss v. City of Winston-Salem*, 119 S.E.2d 445 (N.C. 1961), *Putnam v. Triangle Publications, Inc.*, 96 S.E.2d 445 (N.C. 1957), and *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D.Ill. 1957).

32. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289, 312 (1956). Also see, *Transient Jurisdiction—Remnant of Pennoyer v. Neff: A Round Table*, 9 J. PUB. L. 281 (1960).

33. See the tort case of *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1964); and earlier contract cases, e.g., *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

34. *Atkinson v. Superior Court*, 49 Cal.2d 338, 316 P.2d 960 (1957).

Ehrenzweig in his recent treatise³⁵ and in his other writings³⁶ desires a rule that will assume the positive function of identifying the *forum conveniens* in terms of substantial contacts such as the plaintiff's residence, the origin of the cause of action or the presence of property.³⁷ Accompanying this is a discretionary dismissal subject to selection of a more appropriate or convenient forum. Ehrenzweig acknowledges that the ultimate goal of subject-matter jurisdiction on a national basis combined with the procedural safeguards as to notice and fair hearing similar to that of civil law competency is hardly possible at this time. But, he insists: "Here we are dealing with machines rather than values, and a bad machine can and must be more cheaply replaced than repaired."³⁸

For over a century the English courts have efficiently used a system providing for discretionary acceptance of jurisdiction if certain contacts or events are present.³⁹ From an early date, the Australian constitution, establishing a state-federal system akin to ours, has provided for nation-wide service.⁴⁰ In casting a penetrating gaze at the American Gordian knot of personal jurisdiction, Judge Learned Hand remarked:

[T]he court must balance the conflicting interests involved; i.e., whether the gain to the plaintiff in retaining the action where it was, outweighed the burden imposed upon the defendant; or vice versa. That question is certainly indistinguishable from the issue of "forum non conveniens."⁴¹

It is no longer a case of one academician attempting to persuade the bench and the bar to reject a traditional concept that has been learned, practiced and almost enshrined. Under present rules the suggested inquiry is required in part by the courts: If the requisite jurisdictional amount is present, a foreign defendant, brought before plaintiff's state court, may remove to a federal court and once there move under Rule 1404(e)⁴² for a more convenient forum.

There remains the reluctance of the legislatures to expand present statutes or frame their statutes in other than territorial terms. This will continue to result in states denying their citizens an equal forum. Constitutional and legislative

35. EHRENZWEIG, *CONFLICT OF LAWS* (1963). See book reviews on EHRENZWEIG, *PART ONE JURISDICTION AND JUDGMENTS* (1959): Cavers, 47 CALIF. L. REV. 414 (1959); Currie, 73 HARV. L. REV. 801 (1960); Leflar, 13 STAN. L. REV. 696 (1961); Rheinstein, 8 J. PUB. L. 281 (1960).

36. Ehrenzweig, *Ehrenzweig in Reply*, 9 J. PUB. L. 328 (1960); article *supra* notes 8 and 32.

37. Ehrenzweig, *supra* note 32.

38. Ehrenzweig, *op. cit. supra* note 36, at 331.

39. For a complete discussion of the English discretionary jurisdiction: CHESHIRE, *PRIVATE INTERNATIONAL LAW*, 112 (1961); Cowen, *A British View*, 9 J. PUB. L. 303, 308 (1960); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 18, 19 (1945).

40. Cowan and Jackson, *op. cit. supra* note 39.

41. *Kilpatrick v. Texas & P. R.R.*, 166 F.2d 788, 790 (2d Cir. 1948).

42. 28 U.S.C. § 1404(e) (1958): For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

grants of power to the courts may be the solution which will allow them to proceed under their own rule-making. Certainly, the courts must be allowed to have jurisdiction if meaningful factors are present even though they cannot find a geographic accident or defendant physically present.

JACK L. WHITACRE

PROCEDURE—INSURANCE COMPANY'S INTERVENTION AS A MATTER OF RIGHT—UNINSURED MOTORIST

*State ex rel. State Farm Mutual Automobile Insurance Co. v. Craig*¹

Relator State Farm had insured Arthur Allen agreeing to pay all sums which Allen as insured "shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured." The policy also provided that "for the purposes of this coverage, determination as to whether the insured . . . is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured . . . and the company, or, if they fail to agree, by arbitration." An "Exclusion" provided that such insurance should not apply to any injury with respect to which the insured should, without written consent of the company, make settlement with or prosecute to judgment any action against the person legally liable therefor.

On March 31, 1962, the insured sued Hobert Crader, Aleen Crader and State Farm. The suit was in two counts. Count I alleged that plaintiff was struck and injured by a car driven by defendant Hobert Crader and prayed for \$5,000 damages. In Count II plaintiff alleged that he had been injured by an uninsured motorist and that his policy with defendant State Farm Insurance Company required the latter to pay for such damages, and that he had demanded payment from State Farm but was refused.

State Farm did not deny the contract of insurance, nor did it rely on the arbitration clause nor on the fact that insured had failed to obtain the written consent of State Farm before initiating suit against defendant Crader as provided in the policy. On the contrary, State Farm acknowledged that the policy was in full force as of the date of the accident, that the defendant Crader was uninsured and that State Farm "will have to pay, under its contract of insurance with plaintiff, any judgment that is recovered by plaintiff against the defendants, Crader," in this cause.

Defendants defaulted and State Farm moved to dismiss Count II for failure to state a claim and to intervene in Count I. In this motion, State Farm alleged "that it has a direct interest in the outcome in Count I and its interest is not being adequately represented; that petitioner may be bound by a judgment entered on Count I, on both the issues of liability and the amount of damages." The trial

1. 364 S.W.2d 343 (Spr. Mo. App. 1963).

court ruled that State Farm should not be allowed to intervene as a matter of right. This decision was reversed on appeal by the Springfield Court of Appeals.

This decision is noteworthy because of the anomalous situation it presents. If the court permits State Farm to intervene the insured will find himself opposed by the very company which insured him. If insurer is denied the right to intervene there will be no one to contest the validity of plaintiff's claim or the extent of his damages. If the latter, State Farm would presumably be bound by the default judgment on the issue of liability and extent of damages.²

Missouri Rule of Civil Procedure 52.11 provides "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" a party shall be entitled to intervene as a matter of right.

Before the *right* to intervene exists the Rule requires: (1) that the representation of the applicant's interest by existing parties is or may be inadequate³ and (2) that the applicant is or may be bound by a judgment in the action. As to the first part, the court recognizes, "It is not the duty of the trial court to subpoena and interrogate witnesses who might contradict the testimony of plaintiffs or those who might testify to compelling facts which show that plaintiff is not 'legally entitled to recover' the damages he claims. . . . Every practicing lawyer knows that, in so far as the issues of fact are concerned, the defaulting defendants are not 'adequately represented.'"⁴ Thus, the court found that intervenor's interests were not adequately represented in the pending action and that the first test was satisfied. The next, and most troublesome problem in applying this rule is in determining whether the intervenor "is or may be bound."⁵

2. *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960); *Ford Motor Co. v. Bisanz Bros., Inc.*, 249 F.2d 22 (8th Cir. 1957); *Clark v. Sandusky*, 205 F.2d 915 (7th Cir. 1953); *Matthews v. Allstate Ins. Co.*, 194 F. Supp. 459 (E.D. Va. 1961); *United States v. C. M. Lane Lifeboat Co.*, 25 F. Supp. 410 (E.D.N.Y. 1938); *Young v. Janas*, 37 Del. Ch. 14, 136 A.2d 189 (1954); *State ex rel. Duggan v. Kirkwood*, 357 Mo. 325, 208 S.W.2d 257 (En Banc 1948); *London Guaranty & Accident Co. v. Strait Scale Co.*, 322 Mo. 502, 15 S.W.2d 766 (1929); *Gerber v. Kansas City*, 311 Mo. 49, 277 S.W. 562 (1925); *Boughton v. Farmers Ins. Exch.*, 354 P.2d 1085 (Okla. 1960).

3. *Raterman v. Raterman*, 341 S.W.2d 280, 288 (St. L. Mo. App. 1960):

Accordingly, the fact that a judgment is or may be binding upon one seeking intervention does not afford a basis for mandatory intervention under § 507.090, subd. (1)(2) unless the representation afforded that party is at the same time "inadequate" as that term is used within the meaning of subsection (1)(2) of the statute.

4. *Supra* note 1 at 346.

5. In *State ex rel. Duggan v. Kirkwood*, 357 Mo. 325, 208 S.W.2d 257 (En Banc 1948), Magidson brought a declaratory judgment action against Seco-Lite to ascertain and declare the respective rights, duties and obligations of Seco-Lite under a contract between them. The relator, Duggan, was a trustee in the reorganization of Christopher Engineering Company. Duggan based his right to intervene on the contention that whatever the court determined was due Magidson in the Seco-Lite case lawfully and equitably belonged to the relator under a contract between Christopher and Magidson whereby Magidson agreed to devote all of his time, skill, ability and services to Christopher and that Magidson would not, directly or indirectly, engage in like or similar employment.

The Supreme Court of Missouri held that relator Duggan was entitled to

That relator, State Farm, in the instant case will be bound by a judgment may be more easily seen from a statement of the rule that "where a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit against the person to whom he is responsible over, and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he appeared or not."⁶

Thus, it becomes more obvious that if the relator is not allowed to intervene in the instant case the issue of liability and amount thereof due from Crader to Allen will be conclusively adjudicated and relator will not have the opportunity thereafter to contest this finding in the action by Allen against relator to recover this amount under the policy.

The rule adopted by the United States Supreme Court has been the more strict one of requiring the main action to be *res judicata* before the party seeking to intervene may do so as a matter of right.⁷ However, the severity of this rule has been limited in its application by the lower federal courts⁸ and the "more practical" interpretation of "bound" has been used. In *Ford Motor Co. v. Bisanz Bros., Inc.*,⁹ the court said: "Since the Company is not an indispensable or even a necessary party to this case, and has been denied intervention, it cannot be said that, in a technical or literal sense, it would be bound by a judgment against the

intervene as a matter of right because facts were pleaded which if proved, entitled him to whatever Magidson might recover from Seco-Lite. It therefore is obvious that relator was not adequately represented in the case between Magidson and Seco-Lite because, as the court points out at p. 261:

Magidson could settle his claim with Seco-Lite for a far less sum than he might be entitled to if that case were tried on the merits. Also relator would be bound by the amount of recovery that Magidson obtains in the Seco-Lite case, this is for the reason that the amount recovered by Magidson would show the profits he illegally made by breaching his contract with Christopher. . . . For instance, if upon trial of that case it is found that Magidson is not entitled to any recovery, relator would be bound by that judgment.

6. This language is used in cases where the indemnitor has had notice of the pending action and has *refused* to come in and defend the indemnitee as provided in the particular contract. But it would seem to state a valid basis on which defendant, State Farm, could be bound as to the question of liability and amount of damages if the court in the principal case had not allowed State Farm to intervene. *Gerber v. Kansas City*, 311 Mo. 49, 62, 277 S.W. 562, 565 (1925), quoting 15 R.C.L. 1017; *cf. United States v. C. M. Lane Lifeboat Co.*, *supra* note 2; *State of Missouri ex rel. Farmers Mut. Auto. Ins. Co. v. Weber*, 364 Mo. 1169, 273 S.W.2d 318 (En Banc 1954); *State ex rel. Duggan v. Kirkwood*, *supra* note 5; *London Guaranty & Accident Co. v. Strait Scale Co.*, *supra* note 2; *Boughton v. Farmers. Ins. Exch.*, *supra* note 2.

7. *Sutpen Estates v. United States*, 342 U.S. 19 (1951). See generally 84 A.L.R.2d 1423.

8. *International Mortgage & Inv. Corp. v. Von Clemm*, 301 F.2d 857, 861 (2d Cir. 1962); *Kozak v. Wells*, *supra* note 2 at 110; *Ford Motor Co. v. Bisanz Bros., Inc.* *supra* note 2; *Clark v. Sandusky*, *supra* note 2 [but for a criticism of this case see Note, *Intervention and the Meaning of "Bound" Under Federal Rule 24(a)(2)*, 63 YALE L.J. 408 (1954)]; *Tatum v. Cardillo*, 11 F.R.D. 585 (S.D.N.Y. 1951); *United States v. C. M. Lane Lifeboat Co.*, *supra* note 2.

9. *Supra* note 2 at 28.

Railroad; but we think that in a very real sense it would be bound. . . ." And in *Kozak v. Wells*,¹⁰ the court said: "The presence of the words 'may be' in the Rule clearly indicates that the judgment does not always need to be strictly *res judicata*."

Thus in this case it can be similarly said that State Farm would not be bound in a technical or a literal sense. However, as in the *Ford Motor Co.* case, State Farm would be bound in a very real sense because of its inability to contest the question or extent of damages found in the suit between Allen and Crader. Therefore, the more liberal interpretation of "bound" recognized by Missouri¹¹ and some of the lower federal courts dictate that State Farm should be allowed to intervene as a matter of right.

L. W. HANNAH

TORTS—DUTY TO REMOVE IGNITION KEYS—THEFT OF AUTOMOBILE

*Hergenrether v. Collier*¹

A California district court of appeals has affirmed a judgment for defendants in a case where plaintiffs were injured when their pickup was struck by a truck negligently driven by an unidentified and unapprehended thief. Plaintiffs sued the truck owner and employees to whom the truck had been entrusted before the accident. Plaintiffs' theory was that the employees had negligently left the truck parked unattended and without removing the key from the truck's ignition switch, on a street characterized by a plaintiffs' witness as "skid row." During the night the truck was stolen and in the early morning hours the accident occurred which seriously injured plaintiffs.

The district court of appeals decided defendants owed no duty to plaintiffs and therefore were not negligent in leaving the keys in the truck's ignition. The court held that a discussion of the thief being an intervening cause was not appropriate by stating: "Disposition of a case of this type on this theory seems to us to be an illogical cart-before-the-horse determination. Before we reach proximate cause, there must be negligence and to reach negligence, there must be a duty violation."²

The court in a realistic manner came to grips with the problem of defining duty in terms of foreseeable risk: "The test of defining liability in terms of foreseeable risk adopted by Justice Cardozo in the *Palsgraf Case*,³ has a Cheshire cat evanescence when one tries to use it to peg down liability in the case of the unlocked, parked car."⁴ The court cited several earlier cases which had difficulty in

10. *Supra* note 2 at 110.

11. *State ex rel. Duggan v. Kirkwood*, *supra* note 2; *London Guaranty & Accident Co. v. Strait Scale Co.*, *supra* note 2; *Gerber v. Kansas City*, *supra* note 2.

1. 223 A.C.A. 757, 36 Cal. Rptr. 88 (1963). A complete review of this subject is found in 51 A.L.R.2d 624 (1957).

2. *Id.* 36 Cal. Rptr. at 91.

3. *Palsgraf v. Long Island RR*, 248 N.Y. 339, 162 N.E. 99 (1928).

4. *Supra* note 1, 36 Cal. Rptr. at 91.

finding a legal duty on the basis of foreseeability of risk. Language in one of the cited cases stated:

It bears emphasis that foreseeability of harm is but one of the half dozen factors. Nor is it the most important; indeed, in all save the most obvious of cases, harm is foreseeable only if, in the final analysis, a court or jury says that it is.⁵

With this background in mind the court decided four factors were to be considered in finding a duty: "(1) the magnitude of the risk, (2) the moral blame attached to defendant's conduct, (3) workability of a rule of care, and (4) the body of statutory and judicial precedents."⁶ In applying these factors to the case it was found that no duty existed because, in terms of risk, the ratio of "stolen unlocked cars to unstolen [un?]locked cars" cannot be great; that because this was a two ton truck it was less likely to be selected by a thief for a getaway or a joyride; that the area from which the vehicle was stolen was not necessarily more conducive to thievery than a darker, less-populated area; that defendants were not very blameworthy for leaving the keys in the ignition because they were in the habit of acting in that manner since their work required such an act while on the job; and finally, the defendants, being strangers in town, were less chargeable with knowledge of the neighborhood.

Courts have struggled with this problem of finding an owner negligent who merely leaves the keys in an unlocked vehicle. There is a clear split in the cases, with one view holding a duty exists and the other holding no duty exists without a statute or other special circumstances.⁷

An example of the latter view is language in a California case,⁸ relied upon by plaintiffs in the instant case, recognizing that special circumstances might impel a court to find a duty. The court said there that the defendant motorist "did not leave her car in front of a school where she might reasonably expect irresponsible children to tamper with it. . . ." ⁹ nor did she leave it in charge of an intoxicated passenger.¹⁰ Plaintiffs, however, were unable to convince the court that their case presented the "special circumstances" to which the above case referred.

A search of Missouri cases uncovered only one case in point.¹¹ There, defendant stopped his car on Olive Street, a main thoroughfare in St. Louis. He stepped into a nearby alley to relieve himself and failed to remove the keys from the ignition. A thief drove the car away and struck plaintiff's parked car in the next block. The court found for defendant, but went on to say:

5. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295, 310, 29 Cal. Rptr. 33, 42, 379 P.2d 513, 522 (1963).

6. *Supra* note 1, 36 Cal. Rptr. at 92.

7. 51 A.L.R.2d 624 (1957). See particularly section 9 at 646 which reviews cases holding both views on this question.

8. *Richards v. Stanley*, 43 Cal.2d 60, 271 P.2d 23 (1954).

9. RESTATEMENT, TORTS § 302, Illustration 7 (1934).

10. As did the defendant in *Morris v. Bolling*, 31 Tenn. App. 577, 218 S.W.2d 754 (1948).

11. *Gower v. Lamb*, 282 S.W.2d 867 (St. L. Mo. App. 1955). This case is noted in 21 Mo. L. REV. 197 (1956); 25 U. Kan. City L. Rev. 58 (1958).

While under certain circumstances even this intervening act might be expectable, as suggested by the passage quoted above from Restatement of Torts, Sec. 449,¹² as well as by dicta in *Curtis v. Jacobson*, . . .¹³ yet the criminal nature of the act certainly lessens its realizable likelihood and requires the evidence of foreseeability of the theft be clear and convincing.¹⁴

The implication from this language and from the language quoted from the previous California case¹⁵ is that in a situation where thieves or children are clearly a risk, a duty arises to remove the keys from the ignition. The problem is finding a situation where a court will say a duty clearly exists.

Even assuming the owner is negligent in not locking and removing the keys, a further problem involving the intervening act of the thief arises. Is this merely a concurring act of negligence with the act of the defendant, or is it an independent intervening cause?¹⁶ A thorough treatment of this problem is beyond the scope of this note, but the problem is clearly presented in *Wannebo v. Gates*.¹⁷ There, the court pointed out that although the parking of the car under the circumstances was admittedly negligent and the theft might reasonably have been foreseen, nevertheless, the original actor should not be held liable for the tortious acts of a thief (or his successor in possession of the car) if such acts took place hours, days, or weeks after the crime.

Using the same reasoning, the original actor should not be liable after the thief reaches a certain distance from the scene of the crime. It is a difficult question to determine at what point the thief becomes an intervening cause. In *Ostergard v. Frisch*,¹⁸ the thief was six and one half blocks from the place of the theft when the damage occurred and the court affirmed a judgment for plaintiff. The cases in this area seem to turn on whether the thief was still in flight from the scene of the crime. For example, the court above said:

He [the owner of the car] must foresee that the thief who steals his car will not be concerned, when fleeing from the scene of the theft, about the rule of care and diligence in driving the car, which a driver is required under the law to exercise.¹⁹

This language implies that after the flight from the crime has terminated, the thief could very well be an intervening cause.

12. RESTATEMENT, TORTS § 449 (1934).

13. 142 Me. 351, 54 A.2d 520 (1947).

14. *Supra* note 19, at 871.

15. *Supra* note 7.

16. See PROSSER, TORTS § 49 (3rd ed. 1964), 65 C.J.S. Negligence § 111 (1950) for treatment of this subject.

17. 227 Minn. 194, 34 N.W.2d 695 (1948). *Accord*: *Corinti v. Wittkopp*, 355 Mich. 170, 93 N.W.2d 906 (1959).

18. 333 Ill. App. 359, 77 N.E.2d 537 (1948).

19. *Id.* at 368, 77 N.E.2d at 541. *But see* *Wannebo v. Gates*, *supra* note 17, which held the thief to be an intervening cause where the accident was five miles from scene of theft; and *Wagner v. Arthur*, 73 Ohio L. Abs. 16, 134 N.E.2d 409 (1956), which held thief to be an intervening cause where theft was in Columbus, Ohio, and the injury was in Cleveland, Ohio, but where police were in "hot pursuit" at the time of injury.

It is very evident that at some point the act of the thief becomes an intervening cause and relieves the owner of liability even though up to that point both acts may have concurred in producing the harm. Some courts may release defendant under the older doctrine of "last human wrongdoer" but this rule has been largely discarded today.

The facts of the present case would seem very close to being the "special circumstances" in which a duty arises to remove the keys from a parked vehicle. With an expanding population concentrating in many areas of our nation the number of automobiles is fast increasing. Crime is also keeping pace with these increases. In view of this situation it would seem that a court should not be hard pressed to hold a duty exists in a situation as presented here. If there is a breach of this duty based on foreseeability of risk, then the owner should be held liable unless the thief is found to be an intervening cause.

KERRY MONTGOMERY

TORTS—EFFECT OF PLEADING SPECIFIC NEGLIGENCE IN RES IPSA LOQUITUR CASE—MISSOURI

*Marquardt v. Kansas City Southern Ry.*¹

Plaintiff was one of a crew of laborers employed by defendant to load sand into a sand tank and then to blow the sand by air pressure into overhead tanks for later use by the trains. Defendant installed a new tank which was partly buried, leaving wet clay around it. Other employees connected this tank to the air pressure, attached the exhaust apparatus from the old tank and tested the assembly. When plaintiff's crew came on the job at midnight to make the first use of the new tank, the installation failed to work, and the foreman of the crew shut off the air pressure and told plaintiff to release the exhaust. When plaintiff turned the valve, a bleed pipe on the exhaust began to spin and all three of the men near it ran away. As plaintiff started to run, he slipped in the wet clay around the new tank and was injured.²

Plaintiff's petition was in one count. It alleged general negligence in the sudden and unusual movement of the pipe. It also alleged specifically that defendant failed to furnish a safe place to work because of the presence of the wet clay upon which the plaintiff slipped. Plaintiff offered proof of general and specific negligence and at the close of the evidence plaintiff submitted two instructions, the first being based on the doctrine of res ipsa loquitur and the second being based on the pleading and proof of specific negligence. The trial court submitted the case on the res ipsa loquitur theory but refused the specific negligence instruction. On appeal the Missouri Supreme Court held that the case involved two successive oc-

1. 358 S.W.2d 49 (Mo. En Banc 1962).

2. For a good summary of this case see 18 J. Mo. BAR 299 (1962).

currences of negligence, each separate and distinct from the other. The court stated that the rule that pleading specific negligence bars the use of general negligence is properly applied where the allegations of specific and general negligence are both directed to the same negligent act, but that it was not applicable here. The court concluded:

We hold that the submission of general negligence was proper, but we do so on the peculiar facts of this case. We do not mean to impair in any way the general rule that the pleading or precise proof of the specific negligence constitutes a bar to the submission of general negligence as to the same act or occurrence, or as to an occurrence which the specific negligence explains.³

Four different views have been expressed by various courts as to the effect of specifically pleading negligence in a *res ipsa loquitur* case:⁴

1. One group holds that allegations of specific negligence do not waive the right to rely on the *res ipsa loquitur* doctrine. It is available without regard to the form of pleading. The specific allegations are treated as surplusage and do not affect the general allegations. This is often referred to as the surplusage theory.
2. A second group of courts holds that allegations of specific negligence do not waive the right to rely on the *res ipsa loquitur*, when accompanied by allegations of general negligence.
3. A third group holds that a plaintiff who alleges specific negligence waives his right to rely on the *res ipsa loquitur* doctrine. This has been referred to as the waiver theory.
4. A fourth group allows a plaintiff who pleads specific negligence to take advantage of the doctrine, but it is limited to the specific acts alleged. This is sometimes referred to as the limitation theory.

The doctrine of *res ipsa loquitur* was not firmly established until 1863.⁵ In the beginning the principle was nothing more than a inference drawn from the circumstances of an unusual accident; that is, that it was probably the defendant's fault.⁶ Only seventeen years later the Missouri Supreme Court stated: "When such general allegations are used in connection with a specific statement of a cause of action, they do not enable the plaintiff to recover for any cause of action, except that specifically alleged."⁷ In *McManamee v. Missouri Pac. Ry.* the supreme court stated, "The practice is well established in this state that when a general allegation of negligence is followed by an enumeration and averment of specific acts of negligence, the plaintiff will be confined to the negligence specifically assigned."⁸

3. *Supra* note 1, at 55.

4. See generally: PROSSER, *TORTS* 214 (2d ed. 1955); Divilbiss, *Res Ipsa Loquitur—Effect of Pleading Specific Negligence*, 13 *MO. L. REV.* 110 (1948); Comment, 27 *FORDHAM L. REV.* 411 (1958); Note, 1 *MINN. L. REV.* 467 (1917); Annots., 160 *A.L.R.* 1450 (1946), 79 *A.L.R.* 48 (1930).

5. See *Byrne v. Boadle*, 2 *H. & C.* 722, 159 *Eng. Rep.* 299 (1863).

6. PROSSER, *TORTS* 201 (2d ed. 1955).

7. *Waldheier v. Hannibal & St. J. R.R.*, 71 *Mo.* 515, 516 (1880).

8. 135 *Mo.* 440, 447, 37 *S.W.* 119, 121 (1896).

In general the Missouri decisions prior to *Sanders v. City of Carthage*⁹ followed the waiver theory.¹⁰ But, the limitation theory (that is, the doctrine is limited to the specific acts of negligence alleged) also seems to have been followed in some early cases.¹¹ The surplusage theory was rejected in *Kirkpatrick v. Metropolitan Street Ry.*¹² In *Sanders v. City of Carthage*,¹³ the Springfield Court of Appeals held that a charge of specific negligence will not waive the doctrine as long as there is a general allegation of negligence. The court in *Sanders*, not being able to reconcile its decision with the previous cases applying the waiver theory, certified the question to the supreme court, which overruled the court of appeals and held that pleading of specific negligence effects an abandonment of general negligence.¹⁴ This case seems to have settled the issue. All of the subsequent cases have held in accordance with the waiver rule.¹⁵

The statement by Missouri courts of the rule that the specific allegations abandon the doctrine has been consistent, but the rule has not been applied quite

9. 330 Mo. 844, 51 S.W.2d 529 (1932).

10. *Porter v. St. Joseph Ry., Light, Heat & Power Co.*, 311 Mo. 66, 277 S.W. 913 (1925); *Bonnarens v. Lead Belt Ry.*, 309 Mo. 65, 273 S.W. 1043 (1925); *Kuhlman v. Water, Light & Transit Co.*, 307 Mo. 607, 271 S.W. 788 (1925); *Pate v. Dumbauld*, 298 Mo. 435, 250 S.W. 49 (1923); *White v. Rice*, 239 S.W. 141 (Mo. 1922); *Byers v. Essex Inv. Co.*, 281 Mo. 375, 219 S.W. 570 (1920); *Zasemowich v. American Mfg. Co.*, 213 S.W. 799 (Mo. 1919); *Pointer v. Mountain Ry. Constr. Co.*, 269 Mo. 104, 189 S.W. 805 (1916); *Applegate v. Quincy O. & K. C. R.R.*, 135 Mo. 440, 158 S.W. 376 (1913); *Cooper v. Century Realty Co.*, 224 Mo. 709, 123 S.W. 848 (1909); *Gardner v. Metropolitan St. Ry.*, 223 Mo. 289, 122 S.W. 1068 (1909); *Evans v. Wabash R.R.*, 222 Mo. 431, 121 S.W. 36 (1909); *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S.W. 52 (1908); *Kirkpatrick v. Metropolitan St. Ry.*, 211 Mo. 68, 109 S.W. 682 (1908); *Roscoe v. Metropolitan St. Ry.*, 202 Mo. 276, 101 S.W. 32 (1907); *Orcutt v. Century Bldg. Co.*, 210 Mo. 424, 99 S.W. 1062 (1906); *McGrath v. St. Louis Transit Co.*, 197 Mo. 105, 94 S.W. 872 (1906); *Mallory v. St. Louis & S. Ry.*, 173 Mo. 75, 73 S.W. 159 (1903); *Feary v. Metropolitan St. Ry.*, 162 Mo. 75, 62 S.W. 452 (1901); *Bartley v. Metropolitan St. Ry.*, 148 Mo. 124, 49 S.W. 840 (1899); *McManamee v. Missouri Pac. Ry.*, 135 Mo. 440, 37 S.W. 119 (1896). An exhaustive citation of Missouri cases may be found at 79 A.L.R. 48, 51 (1932).

11. *Ashton v. St. Louis Transit Co.*, 105 Mo. App. 226, 79 S.W. 999 (St. L. Ct. App. 1904); *Gallagher v. Edison Illuminating Co.*, 72 Mo. App. 576 (1897). Also see *Divilbiss, Res Ipsa Loquitur—Effect of Pleading Specific Negligence*, 13 Mo. L. Rev. 110, 112 (1948).

12. 211 Mo. 68, 109 S.W. 682 (1908).

13. 9 S.W.2d 813 (Spr. Mo. App. 1928).

14. *Sanders v. City of Carthage*, 330 Mo. 844, 51 S.W.2d 529 (1932).

15. *Wertzel v. St. Louis Pub. Serv. Co.*, 361 Mo. 448, 235 S.W.2d 312 (1950); *Vendetti v. St. Louis Pub. Serv. Co.*, 360 Mo. 42, 226 S.W.2d 312 (1950); *State ex rel. Spears v. McCullen*, 357 Mo. 686, 210 S.W.2d 68 (En Banc 1948); *Maxie v. Gulf M. & O. R.R.*, 356 Mo. 633, 202 S.W.2d 904 (1947); *Benner v. Terminal R.R. Ass'n*, 348 Mo. 928, 156 S.W.2d 657 (1941), *cert. denied*, 315 U.S. 813 (1942); *State ex rel. Anderson v. Hostetter*, 346 Mo. 249, 140 S.W.2d 21 (1940); *Powell v. St. Joseph Ry., Light, Heat & Power Co.*, 336 Mo. 1016, 81 S.W.2d 957 (1935); *Glasco Elec. Co. v. Union Electric Light & Power Co.*, 332 Mo. 1079, 61 S.W.2d 955 (1933). See Annot., 160 A.L.R. 1450 (1946).

An instruction authorizing a verdict on general negligence is erroneous where specific negligence is pleaded. *Schroeder v. Johnson*, 218 S.W.2d 982 (K.C. Mo. App. 1949).

so consistently. A federal court in *May Dept. Stores Co. v. Bell* commented: "It is virtually impossible to determine from the Missouri decisions what is to be regarded as an allegation of general negligence. This grows out of a lack of uniformity in the application of the rule rather than in the statement of it."¹⁶

The standard for determining a general allegation was stated in *Price v. Metropolitan Street Ry.*:¹⁷ If the allegation does not point to the particular act which was negligent, and if it does not designate the servant who was guilty of the negligence, and does not attempt to specify the defect in the apparatus or machinery which caused the injury, it is an allegation of general negligence. In some cases this has been followed overzealously and any hint of a specific allegation was enough to cause the court to hold that *res ipsa* has been abandoned,¹⁸ while in other cases the court has been more liberal and allowed allegations which approach being totally specific.¹⁹ The later decisions tend in this direction in construing general negligence.²⁰ Upon reversal and remand of a case, the court has not only permitted, but has even suggested the amendment of a petition alleging specific negligence, where the proof was insufficient to make out a submissible case, yet the situation fell within the doctrine.²¹ Also, where a plaintiff in a previous petition alleged specific negligence, he was not estopped from pleading negligence generally in an amended petition.²²

The Missouri cases also hold that where general negligence is pleaded in a *res ipsa loquitur* situation, proof of specific negligence will result in an abandonment of general negligence.²³ This was applied strictly in the earlier cases. There has been a liberalization in this area, so that now not *any* proof of specific negligence, but only proof of the actual, precise cause, will preclude the benefit of the doctrine.²⁴

The Missouri statutes authorize a party to set forth two or more statements of a claim alternately or hypothetically either in one count or in separate counts,²⁵

16. 61 F.2d 830, 836 (8th Cir. 1932).

17. 220 Mo. 435, 119 S.W. 932 (1909).

18. *E.g.*, *Pointer v. Mountain Ry. Constr. Co.*, *supra* note 10.

19. *E.g.*, *McCaffery v. St. Louis Pub. Serv. Co.*, 269 Mo. 104, 189 S.W. 805 (1916).

20. See *Hall v. St. Louis Pub. Serv. Co.*, 266 S.W.2d 597 (Mo. En Banc 1954); *McCaffery v. St. Louis Pub. Serv. Co.*, *supra* note 19.

21. *Maxie v. Gulf, M. & O. R.R.*, 356 Mo. 633, 202 S.W.2d 904 (1947). Also, *Divilbiss, Res Ipsa Loquitur—Effect of Pleading Specific Negligence*, 13 Mo. L. REV. 110, 113 (1948).

22. *Briscoe v. Metropolitan St. Ry.*, 222 Mo. 104, 120 S.W. 1162 (1909).

23. *E.g.*, *Belding v. St. Louis Pub. Serv. Co.*, 358 Mo. 491, 215 S.W.2d 506 (1948); *Palmer v. Brooks*, 350 Mo. 1055, 169 S.W.2d 906 (1943); *Sanders v. City of Carthage*, *supra* note 14; *Conduitt v. Trenton Gas & Elec. Co.*, 326 Mo. 133, 31 S.W.2d 21 (1930). Where general negligence is pleaded, but specific negligence is proved and an instruction is given on the specific negligence, submission of a further instruction on the question of general negligence is reversible error, *Berry v. Kansas City Pub. Serv. Co.*, 343 Mo. 474, 121 S.W.2d 825 (1938).

24. See *Hall v. St. Louis Pub. Serv. Co.*, *supra* note 20; *Williams v. St. Louis Pub. Serv. Co.*, 363 Mo. 625, 253 S.W.2d 97 (1953); *Mueller v. St. Louis Pub. Serv. Co.*, 358 Mo. 247, 214 S.W.2d 1 (1948).

25. § 509.110, RSMo 1959.

but in *Hoeller v. St. Louis Pub. Serv. Co.*, the St. Louis Court of Appeals held that this does not authorize a party to combine in one petition a charge of general negligence with one of specific negligence and then have the court ignore the charge of specific negligence by submitting the case to the jury on general negligence.²⁶

The court in the principal case said there were two successive acts of negligence. One act was the whirling of the bleed pipe and the other was the failure to provide a safe place to work. These are really two different negligence situations joined in the same petition where the pleading in the one fact situation was specific and the pleading in regard to the bleed pipe was general. The court held that the specific allegations in a petition like this will have no effect on the general allegation. Thus it would appear that this decision would overrule the *Hoeller* case and that now a party may combine a charge of general negligence and a charge of specific negligence in the same petition, where there are at least two different negligent acts.

The court in this case directly overruled *Stubblefield v. Federal Reserve Bank*,²⁷ because it was the only Missouri case which previously had dealt with this same situation, involving two negligent acts, and the court in *Stubblefield* had held that a specific allegation would bar the *res ipsa loquitur* doctrine.

The waiver theory seems to be based upon two different ideas. Some courts follow the waiver theory because the specific allegations in a complaint may mislead a defendant, in that if a plaintiff can still use the doctrine, the defendant will not be on notice and will be surprised.²⁸ Other courts hold to the theory that the *res ipsa* doctrine is a rule of necessity and is used where the plaintiff is ignorant of the manner in which the defendant was negligent; but if the plaintiff alleges specific negligence, then he shows that he knows how the defendant was negligent and the reason for the rule fails.²⁹ Any indication by the plaintiff that he knows some of the facts in the chain of causation leading back to the defendant is enough to bar his use of the doctrine.

One of the fallacies of the waiver theory is that it equates some knowledge of the circumstances with complete knowledge of how the negligent act occurred. A plaintiff may know some of the circumstances without knowing exactly what did cause the injury. Since the doctrine of *res ipsa loquitur* is only an inference, it seems that the allegations of whatever specific facts the plaintiff knows should strengthen the inference to be drawn rather than destroy it. As stated in one source: "The fundamental fallacy of this position [waiver theory] is that it considers the *res ipsa* doctrine as an alternative to direct proof, rather than as a type of circumstantial evidence to be considered by the jury in conjunction with whatever other evidence a plaintiff has to offer."³⁰

Missouri is one of a small minority of jurisdictions which still follows the waiver theory. This rule has received much criticism from writers and practicing

26. 199 S.W.2d 7, 10 (St. L. Mo. App. 1947).

27. 356 Mo. 1018, 204 S.W.2d 718 (1947).

28. See *Johnson v. Galveston H. & N. Ry.*, 66 S.W. 906 (Tex. Civ. App. 1902).

29. *E.g.*, *Roscoe v. Metropolitan St. Ry.*, *supra* note 10.

30. Comment, 27 *FORDHAM L. REV.* 411, 413 (1958).

lawyers, because it places too great an emphasis on the niceties of pleading. Since Missouri follows the notice theory of pleading, there would seem to be no need to follow the waiver rule as long as the defendant receives notice from the pleadings concerning what he must be prepared to defend against. The rule which limits the doctrine to specific allegations in the pleadings would give the defendant adequate notice. The rule that specific allegations when accompanied with a general negligence allegation do not bar the doctrine also gives the defendant notice that both general and specific negligence are in issue.

Possibly the instant decision is an indication of a broader rule in the future. This decision is a small breach in the waiver theory. But the statement by the court that this exception will be limited to the facts of this case would lead one to believe that, except for a situation like this where there are successive acts of negligence, the general rule will still apply where the general and specific allegations refer to the same act of negligence.

As a result of this decision a Missouri pleader must now determine whether there are two successive negligent acts or only one. If there are two such acts, then he may plead specific negligence in one count and general negligence in the other without losing the benefit of the doctrine. Previously the Missouri pleader had difficulty in framing his pleadings generally enough to satisfy the waiver rule, but this only makes it more confusing, in that now he has to determine if there are two successive acts or not. One danger under the present decision is that the pleader may think there are two different acts of negligence, pleading one generally (planning to rely on *res ipsa loquitur*) and pleading the other specifically; should the court then determine that there is really only one negligent act, the pleader would be limited to his specific allegations and lose the benefit of the *res ipsa loquitur* doctrine. It is suggested that a more liberal rule is needed instead of an exception to the old rule. Judge Dalton's dissent aptly states the contemplated result of this decision: "We believe that the writing of such an exception into the established law of this state will result in unlimited confusion and misunderstanding; and that it will cause the members of the bar and the courts of this state an unending amount of grief and difficulty."³¹

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31. *Marquardt v. Kansas City So. Ry.*, 358 S.W.2d 49, 59 (Mo. En Banc 1962).