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Recent Cases

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DISCOVERY—FAILURE TO DISCLOSE POLICE COURT TRANSCRIPT CONTAINING A PARTY'S STATEMENT

Combellick v. Rooks[1]

Plaintiff in an automobile negligence case hired a stenographer to record the testimony given by the defendant before the municipal court in defense of a traffic charge arising out of the accident. In answer to the defendant's interrogatory whether the plaintiff had obtained any statement from the defendant, the plaintiff answered no.[2] At trial the plaintiff was allowed to use the municipal court transcript to impeach the defendant on cross-examination. Judgment was for the plaintiff, and the defendant appealed.[3]

The Missouri Supreme Court reversed, holding that the plaintiff should have disclosed the contents of the transcript and that it was prejudicial error to allow the use of the transcript after the plaintiff's failure to disclose. The case is significant from two standpoints: first, that the transcript was discoverable; second, that "a trial court is without discretion to refuse to require compliance with the rules of discovery."[4]

The issue as to discoverability was whether the transcript was a "statement" within the terms of Missouri Supreme Court Rules 56.01 and 57.01(b). Rule 56.01, as pertinent, provides, "Interrogatories may require as a part of or with the answers copies of all statements concerning the action or its subject matter previously given by the interrogating party . . . ." Rule 57.01(b),[5] which protects

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1. 401 S.W.2d 460 (Mo. En Banc 1966).
2. *Id.* at 463. The interrogatories and answers were:
12. Please state whether you or anyone acting on your behalf has received, obtained or made any recital or statement in writing or reduced to writing or stenotype or otherwise from or by defendant relevant to the October 13, 1962 accident.
12. No.
13. If your answer to the foregoing interrogatory No. 12 is in the affirmative, please attach a copy or copies of all such statements, writings or transcript to your answers hereto.
13. See answer to #12.
3. Subsequently the case was transferred from the Kansas City Court of Appeals to the Missouri Supreme Court. *Id.* at 460.
4. *Id.* at 464.
5. Mo. R. Civ. P. 57.01(b), as pertinent, provides:
The production or inspection of any writing obtained or prepared by the adverse party or coparty, his attorney, surety, indemnitor, or agent, in anticipation of litigation or in preparation for trial (except a statement given by the interrogating party) . . . shall not be required.

an attorney's work product,[6] expressly makes an exception for a statement given by the interrogating party.[7] The plaintiff contended that a "statement" within these rules referred to the common situation of a statement taken by one party's attorney from the opposing party, and would not include the transcript of a police court proceeding.[8] The court refused to limit the rules to the more common situation.[9] Once the transcript was held to be a statement given by the interrogating party, it clearly was discoverable. If the transcript has not contained the testimony of the interrogating party so as to come within Rules 56.01 and 57.01(b), it would constitute work product and not be discoverable.[10]

Treating the transcript as a statement by a party would not necessarily make it discoverable in all jurisdictions, since not all jurisdictions have statutes or court rules making a party's own statement discoverable.[11] Under the Federal Rules of Civil Procedure a rule 34 motion to inspect and copy is the appropriate motion for a party to obtain a copy of his own statement.[12] This rule requires a showing of good cause, and what constitutes good cause varies.[13]

The principal case does not resolve all possible problems involving the discovery of a police court transcript. One possible problem is that the attorney hiring the recorder may object to his adversary being able to use the transcript without incurring any of its costs.[14] If the attorneys cannot reach an informal

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6. State *ex rel.* Pete Rhodes Suply Co. v. Crain, 373 S.W.2d 38 (Mo. En Banc 1963).

7. State *ex rel.* Hudson v. Ginn, 374 S.W.2d 34 (Mo. En Banc 1964).

8. Brief for Respondent on Transfer, pp. 4-9, Combellick v. Rooks, *supra* note 1.

9. See also Masone v. Raul, 48 Misc.2d 939, 266 N.Y.S.2d 317 (1965), in which N.Y.C. PLR § 3101(e), stating that "a party may obtain a copy of his own statement," was interpreted beyond the common situation to include within the plaintiff's statement the statements of a witness and the defendant because the plaintiff incorporated their statements into his with a phrase that he had read and agreed with their statements.

10. McGee v. Cohen, 57 So.2d 658 (Fla. 1952); Steinhardt v. Greenbaum, 168 So.2d 200 (Fla. 1964); Guardianship of Frank, 137 N.W.2d 218 (N.D. 1965).

11. Discovery is allowed by Ga. Code Ann. § 81A-134(b) (Supp. 1966); N.Y.C. P.L.R. § 3101(e); N.D. R. Civ. P. 34(b); Wyo. R. Civ. P. 34(b); Discovery of an injured party's statement is allowed by Fla. Stat. § 92.33 (1959), Minn. Stat. § 602.01 (1957).

12. There is a conflict of authority whether or not a statement can be obtained with interrogatories under Fed. R. Civ. P. 33. 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 770 (1961).

13. Production of the statement was required in N.Y. Central R.R. Co. v. Carr, 251 F.2d 433 (4th Cir. 1957); Steelman v. United States Fid. & Guar. Co., 35 F.R.D. 120 (W.D. Mo. 1964); Butler v. United States, 226 F. Supp. 341 (W.D. Mo. 1964); Belback v. Wilson Freight Forwarding Co., 40 F.R.D. 16 (W.D. Pa. 1966); Parla v. Matson Nav. Co., 28 F.R.D. 348 (S.D. N.Y. 1961); Pasterak v. Lehigh Valley R.R. Co., 28 F.R.D. 383 (E.D. Pa. 1961). Production was denied in Lester v. Isbrandtsen Co., 10 F.R.D. 338 (S.D. Tex. 1950); Helverson v. J. J. Newberry Co., 16 F.R.D. 330 (W.D. Mo. 1954); Safeway Stores Inc. v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949); Shupe v. Pennsylvania R.R. Co., 19 F.R.D. 144 (W.D. Pa. 1956).

14. In Monarch Ins. Co. of Ohio v. Spach, 281 F.2d 401, n. 30 (5th Cir. 1960), the court indicated it felt the real quarrel concerned paying the cost of the copy of a statement.

agreement, it is doubtful that the trial court can grant much relief. The interrogating party may be required to pay for the preparation of copies.[15] A motion could be made under Missouri Rule 57.01(c) for a protective order;[16] but the committee note and comment to Rule 57.01(c) indicate that an unreasonable expense, not just some expense, constitutes cause for Rule 57.01(c). The conclusion seems to be that the attorney hiring the recorder may be reimbursed for any copies of the transcript, but will probably bear all of the initial cost.

Another problem concerns whether all of the transcript is discoverable, or only that portion containing the defendant's testimony. It seems logical that only the portion containing the party's testimony is a statement given by the interrogating party, and the rest of the transcript is a writing prepared in anticipation of litigation. Support can be found for this position in the opinion: "We hold that the portion of the transcript of the police court proceeding containing defendant's testimony is a 'statement' within the rule."[17] But since other language in the opinion does not make any distinction between all and a portion of the transcript, the question is not free from doubt.

Combellick is also significant from the standpoint of how a failure to disclose information in interrogatories is to be handled when discovered at trial. Prior Missouri decisions involving this question gave discretion to the trial court. In *Fitzpatrick v. St. Louis-San Francisco Ry. Co.*[18] and *Critcher v. Rudy Fick, Inc.*[19] evidence was admitted over the objection that it was inconsistent with answers to interrogatories. On appeal, the actions of the trial courts were affirmed because they had discretion in the matter, and the objecting party was not prejudiced. In *Central & Southern Truck Lines, Inc. v. Westfall GMC Truck, Inc.*[20] and *Aulgar v. Zylick*,[21] the testimony of witnesses was refused on the ground that the witness' names were not disclosed in interrogatories. On appeal, the actions of the trial courts were affirmed because they possessed broad discretion, which was not abused. The court in *Combellick* considered the law stated in these cases inapplicable, and held "that a trial court is without discretion to refuse to require compliance with the rules of discovery."[22] There does not seem to be any valid distinction between failure to disclose the names of witnesses and failure to disclose the existence of a statement by the other party. Perhaps these cases can be reconciled by reading *Combellick* as meaning that a trial court must impose some

15. The committee note and comment to Rule 56.01(a) quotes Barrows v. Koninklijke Luchtvaart Maatschappij, 11 F.R.D. 400 (S.D. N.Y. 1951), "If copies are prepared, the interrogating party may be required to bear the cost of their preparation."

16. Mo. R. Civ. P. 57.01(c) provides in part: "[U]pon notice and good cause shown, . . . the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or undue expense. . . ."

17. *Supra* note 1.

18. 300 S.W.2d 490 (Mo. 1957).

19. 315 S.W.2d 421 (Mo. 1958).

20. 317 S.W.2d 841 (K.C. Mo. App. 1958).

21. 390 S.W.2d 553 (K.C. Mo. App. 1965).

22. *Supra* note 1, at 464.

sanction for failure to comply with the rules of discovery and by reading the earlier cases as meaning that the trial court has discretion to choose which sanction to apply.

The problem of objection to evidence on the ground that it was not disclosed in interrogatories has arisen in other jurisdictions. When statements have not been disclosed as required, trial courts have refused to allow the use of the statements.[23] When a witness' name has not been disclosed as required, exclusion of the witness' testimony has been considered proper.[24] One theme running through the cases is that the solution to the problem is within the discretion of the trial court.[25]

By holding that a police court transcript containing the testimony of a party is a "statement" within the terms of Missouri Rules 56.01 and 57.01(b), *Combellick v. Rooks* is commendable for interpreting the rules of discovery with the same spirit with which they were designed, i.e., to eliminate surprise and concealment at trial. However, by holding "a trial court is without discretion to refuse to require compliance with the rules of discovery,"[26] the case confuses what had appeared to be a clear area of law set out by *Central & Southern Truck Lines v. Westfall GMC Truck*[27] and *Aulgar v. Zylich*.[28]

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23. Bernat v. Pennsylvania R.R. Co., 14 F.R.D. 465 (E.D. Pa. 1953); Frankel v. Stake, 33 F.R.D. 1 (E.D. Pa. 1963).

24. D'Agostini v. Schaffer, 45 N.J. Super. 395, 133 A.2d 45 (1957); Gebhard v. Niedzwiecki, 264 Minn. 471, 112 N.W.2d 110 (1963); Evtush v. Hudson Bus Transp. Co., 7 N.J. 167, 81 A.2d 6 (1951); Abbatemarco v. Colton, 31 N.J. Super. 181, 106 A.2d 12 (1954); Newsum v. Pennsylvania R.R. Co., 97 F. Supp. 500 (S.D. N.Y. 1951); Taggert v. Vermont Transp. Co., 32 F.R.D. 587 (E.D. Pa. 1963), *aff'd*, 325 F.2d 1022 (3rd Cir. 1964). But see Young v. Saroukas, —— Del. ——, 189 A.2d 437 (1963); Nathan v. Duncan, 113 Ga. App. 630, 149 S.E.2d 383 (1966).

25. Steward v. Meyers, 353 F.2d 691 (7th Cir. 1965); Clark v. Pennsylvania R.R. Co., 328 F.2d 591 (2nd Cir. 1964); Wray M. Scott Co. v. Daigle, 309 F.2d 105 (8th Cir. 1962); Wright v. Royse, 43 Ill. App.2d 267, 193 N.E.2d 340 (1963); Sanchez v. Waldrup, 271 Minn. 419, 136 N.W.2d 61 (1965); Branch v. Emery Transp. Co., 53 N.J. Super. 367, 147 A.2d 556 (1958); Sather v. Lindahl, 43 Wash.2d 463, 261 P.2d 682 (1953).

26. *Supra* note 1, at 464.

27. *Supra* note 20.

28. *Supra* note 21.

SECTION 11—UNIFORM LIMITED PARTNERSHIP ACT—A RENUNCIATION SUBSEQUENT TO A SIX MONTH DELAY IS NOT TIMELY

Vidricksen v. Grover[1]

In 1952 Dr. Vidricksen, appellant, and a Mr. Thom agreed to form an association for the operation of a car agency. Vidricksen contributed twenty-five thousand dollars with the understanding that he was to be a limited partner while Thom would become a general partner. The articles of partnership were drawn but a certificate of limited partnership was never filed as is required in order to form a limited partnership under California law.[2]

Financial difficulties were encountered by the concern, and in this connection, in March 1961, Vidricksen consulted two different attorneys, both of whom were unable to represent him due to a conflict of interest. From these two attorneys he learned that whether he had attained the status of a limited partner under California law was questionable. In August, 1961, Vidricksen filed suit for an accounting from his partner Thom.[3] On September 11, 1961, bankruptcy proceedings were begun against Thom[4] and eight days later Vidricksen, in an attempt to comply with section 11 of the UNIFORM LIMITED PARTNERSHIP ACT, filed a written renunciation in the Bankruptcy court renouncing all his interest in the profits of the automobile agency.

The referee in bankruptcy held the investor responsible for the partnership obligations as a general partner.[5] On review this finding was sustained by the United States District Court for the Northern District of California and Vidricksen appealed to the United States Court of Appeals for the Ninth Circuit. The court affirmed, holding the investor had neither perfected a limited partnership nor renounced profits promptly as is required to avoid liability as a general partner under the provisions of section 11.[6]

The limited partnership is a creature of statute, it's purpose is to allow investors to share in the profits of a partnership while incurring only limited liabil-

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1. 363 F.2d 372 (9th Cir. 1966).

2. § 15502, CAL. CORP. CODE. This section is identical to § 2 of the UNIFORM LIMITED PARTNERSHIP ACT, 8 U.L.A. The UNIFORM ACT was adopted in California in 1949, §§ 15501 to 15531, CAL. CORP. CODE. Missouri adopted the UNIFORM ACT in 1947, §§ 359.010 to 359.290, RSMo (1959). In addition to California and Missouri, forty other states and the District of Columbia have adopted the ACT with only slight modification. In this note the UNIFORM ACT sections will be referred to in the text with the corresponding California and Missouri citations in the footnotes.

3. Although in the complaint for an accounting Dr. Vidricksen apparently admitted he had become a general partner with Thom, the court expressly disavowed reliance on this admission in finding the appellant liable as a general partner.

4. The court's opinion does not make clear whether Thom, as an individual, was the bankrupt, or whether the firm was a bankrupt or both.

5. The reported decision is obscure with regard to the bankruptcy procedure followed in *Vidricksen*. It is not clear what the nature of the proceeding before the referee was or how the issue of Vidricksen's potential liability as a general partner was raised.

6. § 359.110 RSMo (1959); § 15511 CAL. CORP. CODE.

ity for the partnership obligations.[7] The rigidity of the early limited partnership acts and the strict manner in which the courts tended to construe them greatly limited the development and use of the limited partnership as a method of business organization.[8] Even a slight deviation from one of the statutory requirements would result in the liability of the contributor as a general partner, irrespective of his good faith or intentions to form a limited partnership.[9] In an effort to encourage the use of the limited partnership and to make it a more practical method of business organization the UNIFORM LIMITED PARTNERSHIP ACT was drafted.[10] Included in the ACT is section 11, a remedial provision which affords relief from the liability of a general partner to the contributor who believes he is a limited partner, but in fact has not become a limited partner because of failure to comply with the statutory procedures. Section 11 provides:

> A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided, that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.[11]

The *Vidricksen* case involves a construction of section 11 in two respects. First, when has a contributor, who in good faith believes he is a limited partner "ascertained" his mistake? Secondly, after he has ascertained his mistake what is required for a renunciation to be prompt in the statutory sense?

In *Vidricksen* the court held the investor had ascertained his mistake when he learned informally from non-creditors in March 1961, "that something was wrong with the organizational setup."[12] This situation is unique in that generally an investor is apprised of his failure to comply with the UNIFORM LIMITED PARTNERSHIP ACT and therefore, of his potential liability as a general partner, by a creditor either in an action seeking to hold him liable as a general partner or just prior to such an action.[13]

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7. Hoefer v. Hall, 75 N.M. 751, 411 P.2d 230, 232 (1966).

8. In discussing the limited partnership acts and judicial construction of the laws prior to the UNIFORM ACT the Commissioners comment:

> The practical result of the spirit shown in the language and in the interpretation of existing statutes . . . has to a very great extent deprived the existing statutory provisions for limited partnerships of any practical usefulness.

Commissioner's Note to § 1 of the UNIFORM ACT, 8 U.L.A. 3.

9. Giles v. Vette, 263 U.S. 553, 562 (1924); Pittman, *Missouri's "Uniform Limited Partnership Act,"* 14 MO. L. REV. 133, 134 (1949).

10. *Ibid.*

11. § 359.110 RSMo (1959) and § 15511 CAL. CORP. CODE are identical to § 11 of the UNIFORM ACT.

12. 363 F.2d at 373.

13. Giles v. Vette, *supra* note 6, at 557; Rathke v. Griffith, 36 Wash.2d 394, 218 P.2d 757 (1950).

In past cases involving section 11 the renunciation of profits has followed closely the creditors allegation or complaint.[14] Apparently the creditors have treated the investor as having first ascertained his mistake when the petition was filed or the allegation made by the creditor and therefore, the timeliness of the renunciation has not been argued.

The court in *Vidricksen* recognizes the possibility that an investor may have ascertained his mistake at an earlier point in time, possibly before creditors have made any attempt to hold the contributor liable as a general partner.[15] The court found Dr. Vidricksen was first made aware of his mistake when he learned informally from non-creditors that there was a problem with respect to whether he had become a limited partner and that it was from this point that the timeliness of the subsequent renunciation was to be measured.[16] Under this approach it is not necessary that an investor know precisely where the deficiency in organization is or even that he know for certain that there is a defect. The investor will have ascertained his mistake within the context of section 11 when he has knowledge that something is probably wrong with the organizational setup.

This interpretation of section 11 requires the investor who learns of a possible or probable defect in his status as a limited partner to promptly renounce his interest in the profits or bear the risk that at some later date it will appear that a limited partnership was not perfected, at which time the outlet provided by section 11 may be foreclosed.

Once it had been determined that Vidricksen had an obligation to renounce when he learned of the probable defect in the organizational status, the court readily found that a renunciation six months later was not timely. Although the UNIFORM ACT does not expressly provide a time limit within which a renunciation must occur,[17] it does require that it be made promptly after the investor ascertains his mistake. Perhaps because six months would rarely be considered prompt in any context[18] and also possibly because there were no reported cases construing what is required for a prompt renunciation,[19] the court in *Vidricksen* failed to discuss

14. *Ibid.*; J. C. Wattenbarger & Sons v. Sanders, 216 Cal.2d 495, 30 Cal. Rptr. 910 (1963).

15. The court states: "We do not think Dr. Vidricksen needed a bonded opinion to start the time running. Knowledge that he was probably in trouble was enough." 363 F.2d at 373.

16. *Ibid.*

17. In addition to omitting an express time limit within which a renunciation of profits must occur the UNIFORM ACT does not provide a time limit within which a certificate of limited partnership must be filed and recorded. In Stowe v. Merrilees, 6 Cal.2d 217, 44 P.2d 368 (1935), the certificate was not filed until forty nine days after the articles of partnership were executed. The court held that the certificate must be recorded within a reasonable time and that in the circumstances of this case forty nine days was a reasonable time.

18. "Promptly" is defined by WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961), as meaning to respond instantly, performing readily or immediately without delay or hesitation.

19. The court stated that *Vidricksen* was a case of first impression in California and research has failed to uncover cases in other jurisdictions where a court has directly considered what is required for a renunciation to be timely.

the criteria to be used to determine if a renunciation is timely. However, in light of the historical background and practical motive which precipitated the development of the Act in general and section 11 in particular, it is possible to identify several factors as proper considerations for measuring the timeliness of a renunciation.[20]

If the phrase "promptly renounce" were to be given it's literal meaning any delay in renunciation would deprive the partner of the outlet provided by section 11.[21] However, it is more likely that the remedial nature of the section would permit its application even though the renunciation was not immediately after the contributor ascertained his mistake. The extent to which a renunciation can be delayed and still be considered timely should primarily depend on the effect the delay has on creditors and other persons associated with the partnership.[22] By requiring the renunciation of profits to be made promptly rather than providing for an unlimited right to renounce indicates that the drafters of the UNIFORM ACT intended to avoid additional loss or disadvantage to creditors after the supposed limited partner ascertained his mistake. Therefore, if creditors or other persons associated with the partnership sustain substantial loss or other disadvantage because the renunciation was delayed, the subsequent renunciation would not appear timely. In situations where the delay has not resulted in substantial loss or disadvantage to creditors or other persons associated with the partnership the good faith of the supposed limited partner with regard to the reasons for the delay would be a proper consideration in determining if the renunciation was timely. In addition to the above factors it should be remembered when considering the timeliness of a renunciation that the desire to make the limited partnership a practical method of business organization precipitated the development of section 11.

There is nothing in the *Vidricksen* opinion to indicate that any persons were disadvantaged or sustained loss because the renunciation was not made six months earlier, nor is there any suggestion that Vidricksen was acting in bad faith in delaying the renunciation. Nevertheless, the conclusion reached by the court in the case is entirely consistent with the provisions of section 11. Although it places a significant burden on Dr. Vidricksen, a contrary result would render meaningless the requirement that a renunciation must be made promptly after the investor ascertains his mistake in order to be effective.

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20. See note 8 *supra*; Pittman, *supra* note 9, at 134.
21. See note 18 *supra*.
22. By way of dictum in Giles v. Vette, *supra* note 6, at 563, the United States Supreme Court has indicated that the extent of loss or disadvantage to creditors or other persons associated with the partnership should be a consideration in determining if the renunciation is timely. In holding section 11 applicable the court carefully noted that "No person suffered any loss or disadvantage because it (renunciation) was not made earlier."

JUDGMENT BY CONFESSION RELICTA VERIFICATIONE—RIGHT OF APPEAL BY PLAINTIFF

Fritzsche v. East Texas Motor Freight Lines[1]

Plaintiff filed a petition alleging that defendant's negligence caused a collision between plaintiff's tractor and defendant's truck, and praying for $10,000 damages. Defendant answered denying negligence, but a month later *ex parte,* and without notice, confessed judgment. A $10,000 judgment was entered for plaintiff who, upon learning of it, filed a motion to set it aside, alleging that at the time the petition was filed his counsel was not fully advised of the extent of his damages. Medical expenses had already exceeded $12,000 and were continuing; his personal property had been damaged to the extent of at least $5,000; and plaintiff's total damages would probably exceed $30,000. The motion was denied. The appellate court affirmed, saying that at common law the proceedings could be *ex parte* and without notice, and the court had no choice but to enter judgment. "In such a case, plaintiff could suffer no harm because he secures all the relief for which he is asking."[2] The motion to open judgment was addressed to the discretion of the court, and there was no abuse of discretion.

"*Ex parte* proceedings are a form of procedure which have never been favored by the law."[3] They should only be used when there is some interest served which outweighs the disadvantage of possible unfairness to an affected party who has no opportunity to defend himself. An example of where this unusual procedure is deemed justified is the temporary restraining order. One may apply for it *ex parte* and without notice to the other side.[4] Yet safeguards are provided. The judge can refuse the order until both sides have been heard if he feels that this is necessary.[5] Whether or not notice is required, a party will not be enjoined unless a bond is posted of sufficient value to cover all damages that may be caused by the order.[6] Unlike the temporary restraining order, the *ex parte* proceeding permitted in the main case serves no useful purpose. In addition, there are no safeguards to protect the parties from such things as innocent mistakes.

Hoppe v. St. Louis Pub. Serv. Co.[7] held that even though the trial court had complete discretion to vacate a judgment within thirty days as being against the weight of the evidence,[8] it was an abuse of discretion and a violation of due process to vacate the judgment and order a new trial without notice to the parties. The court said, "In our system of jurisprudence reasonable notice to a litigant (when there exists even the possibility of action adverse to his interests) is deemed to be

1. 405 S.W.2d 541 (St. L. Mo. App. 1966).
2. *Id.* at 545.
3. Note, 40 Ky. L.J. 98 (1951-52).
4. Mo. R. Civ. P. 92.02.
5. Mo. R. Civ. P. 92.19.
6. Mo. R. Civ. P. 92.09.
7. 235 S.W.2d 347 (Mo. 1950).
8. Mo. R. Civ. P. 75.01.

of the essence of fairness and justice . . . . The requirement of notice can result in no hardship."[9]

The appellate court distinguished the *Hoppe* case, saying that there the judge arbitrarily took away a judgment from defendant, and here the entry of judgment "was not adverse to any right then being asserted by plaintiff;"[10] but in so holding, the court greatly favors form over substance. In reality, the cases cannot be distinguished. The entry of judgment may even have taken more from plaintiff because he was permanently given grossly inadequate damages. In *Hoppe,* defendant was only deprived of the right to argue that plaintiff should not be given a new trial, whether or not to grant it was still within the discretion of the trial court. Even if the ruling was against defendant, he would be given a chance to prove his claim again.

Under this decision, very harsh results could follow. Defendant would never confess judgment unless it were greatly to his advantage. He would not confess judgment to a petition calling for reasonable damages because a jury verdict would be no larger, and there is always a chance that defendant would win. If defendant knew that he could not win, he would negotiate an out of court settlement with plaintiff for an amount less than the sum demanded in the petition.

Another possible result under this decision is shown if plaintiff sues for a broken leg and a damaged car and defendant demands a physical examination. If his doctor discovers brain damage, defendant will confess judgment before plaintiff sees the report. Here the opening of judgment would be discretionary since there is no equitable defense, such as mutual mistake or fraud.

The harsh position taken by the court in this case is unjustified because there is absolutely no public purpose served by permitting this *ex parte* proceeding. It could be argued that a petition might initially ask for small damages to prevent defendant from removing the case to a federal court. Later, when the trial was so close as to make it inconvenient for defendant to remove the case, plaintiff might amend his petition to request more damages. If this is a problem, the judgment of the court is a very unsatisfactory solution because it punishes the innocent plaintiff as well as the guilty one. The proper solution is for the court to refuse to allow plaintiff to amend his petition if it appears that he is trying to gain an unfair advantage.

The appellate court should have concluded that it was an abuse of discretion to refuse to open the judgment. In *Madson v. Petrie Tractor & Equip. Co.*[11] it was said that: "Since courts universally favor trial on the merits, slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order." By analogy the same principle should apply to the principal case.

A properly decided case was *Flanigan v. Continental Ins. Co.*[12] There plaintiff

9. Hoppe v. St. Louis Pub. Serv. Co., *supra* note 7, at 350.
10. Fritzsche v. East Texas Motor Freight Lines, *supra* note 1, at 545.
11. 106 Mont. 382, 388, 77 P.2d 1038, 1040 (1938).
12. 22 Neb. 235, 34 N.W. 367 (1887).

sued on a note, and defendant confessed judgment *ex parte*. Plaintiff moved to set aside the judgment because entered without his consent. The court said that where defendant appears in court without process and confesses judgment, plaintiff's consent is necessary. But here since plaintiff brought the action and de-defendant confessed, plaintiff's assent will be presumed. However, the court said that if plaintiff could affirmatively show that a mistake had been made the presumption would be rebutted. This case offers a good solution to the problem. Defendant can confess judgment if it is in his interest. But if plaintiff shows that he is the victim of an innocent mistake he can have the judgment set aside and his petition amended.

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CHOICE OF LAWS—NEW MISSOURI APPROACH?

Noe v. United States Fid. & Guar. Co.[1]

The plaintiff, while in Louisiana, was injured in an automobile accident resulting from the alleged negligence of a citizen of that state who was insured by the defendant.[2] Louisiana had a direct action statute[3] permitting an injured party to bring an action directly against the insurer when the injury or accident occurred within Louisiana. The defendant insurance company maintained an office in Greene County, Missouri,[4] where plaintiff brought suit. The case was dismissed for failure to state a claim upon which relief may be granted, and the plaintiff appealed.[5]

Missouri does not have a direct action statute comparable to Louisiana's.[6] Since plaintiff's action was based solely on the direct action statute, the conflict of laws problem arose as to whether that statute should be applied in Missouri. The plaintiff contended that the statute was substantive in nature and should be applied by the Missouri courts as the *lex loci*. The defendant argued that the Louisiana statute was procedural and should not be given extraterritorial effect.[7] The

1. 406 S.W.2d 666 (Mo. 1966).
2. *Id.* at 667.
3. LA. REV STAT. ANN. tit. 22, § 655 (Supp. 1966). The material part of the statute provides that an "injured person . . . shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone . . . in the parish in which the accident . . . occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue . . . . This right of direct action shall exist . . . provided the accident . . . occurred within the state of Louisiana."
4. Brief for Appellant, p. 3, Noe v. United States Fid. & Guar. Co., *supra* note 1.
5. Noe v. United States Fid. & Guar. Co., *supra* note 1, at 667.
6. *Id.* at 668. Missouri does permit action against an insurer by a judgment creditor of the insured if the judgment has been unsatisfied for 30 days. § 379.200, RSMo 1959.

court held that the Louisiana statute was procedural in nature, created no substantive rights, and was not enforceable in Missouri courts.[8] In labeling the statute procedural, the supreme court followed the weight of authority of the Louisiana courts[9] and the courts of other jurisdictions.[10]

A footnote in the principal case[11] states that the court was not called upon to examine new approaches made in other jurisdictions to the choice of law problem, because the case had been briefed according to the "long accepted distinction between substantive and procedural law as establishing the basis for the proper choice of law."[12] The *Noe* footnote also referred to another 1966 decision involving a choice of law problem, *Toomes v. Continental Oil Co.*[13] A footnote in *Toomes* contained a statement similar to that later made in the *Noe* footnote.[14] This raises the question as to whether the Missouri Supreme Court would abandon the traditional substantive-procedural approach to choice of law problems in tort litigation if a new approach was urged upon them.[15] These two cases were decided by different divisions of the court.[16]

The *Toomes* footnote[17] cites several Missouri tort cases[18] in which the substantive-procedural distinction was applied, with the substantive law being governed by the *lex loci* and the procedural law by the *lex fori.* None of these cases

7. *Id.* at 668.
8. *Id.* at 671.
9. Home Ins. Co. v. Highway Ins. Underwriters, 222 La. 540, 62 So.2d 828 (1952); Burke v. Massachusetts Bonding & Ins. Co., 209 La. 495, 24 So.2d 875 (1946); Finn v. Employers' Liab. Assur. Corp., 141 So.2d 852 (La. 1962); Churchman v. Ingram, 56 So.2d 297 (La. 1951); Robbins v. Short, 165 So. 512 (La. 1936); Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., Inc., 18 La. App. 725, 138 So. 183 (1931). The Court in Noe, *supra* note 1, at 669-70, distinguished West v. Monroe Bakery, 217 La. 189, 46 So.2d 122 (1950).
10. Bouis v. Aetna Cas. & Sur. Co., 91 F. Supp. 954 (W.D. La. 1950); Goodin v. Gulf Coast Oil Co., 241 Miss. 862, 133 So.2d 623 (1961); Cook v. State Farm Mut. Ins. Co., 241 Miss. 371, 133 So.2d 363 (1961); McArthur v. Maryland Cas. Co., 184 Miss. 663, 186 So. 305 (1939); Penny v. Powell, 162 Tex. 497, 347 S.W.2d 601 (1961). *Contra,* Lumberman's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954) (with which the Court in Noe, *supra* note 1, at 670-71, specifically disagreed); Collins v. American Auto. Ins. Co. of St. Louis, 230 F.2d 416 (2d Cir. 1957) (which the Court in Noe, *supra* note 1, at 671, considered not to be persuasive authority); Lewis v. Manufacturers' Cas. Ins. Co., 107 F. Supp. 465 (W.D. La. 1952); Hidalgo v. Fidelity & Cas. Co. of New York, 104 F. Supp. 230 (W.D. La. 1952).
11. Noe v. United States Fid. & Guar. Co., *supra* note 1, at 668 n.1.
12. *Ibid.*
13. 402 S.W.2d 321 (Mo. 1966).
14. *Id.* at 321 n.1.
15. A question might also be raised as to whether Missouri courts would be called upon to re-examine their choice of laws approach on transactions covered by the Uniform Commercial Code, Section 400.1-105(1), RSMo 1965 Supp. provides that parties may choose the state law to apply to their transactions if it has a reasonable relation to more than one state; in the absence of such agreement the Uniform Commercial code as adopted "applies to transactions bearing an appropriate relation to this state."
16. Noe was decided by Division 2; Toomes by Division 1.
17. 402 S.W.2d 321, *supra* note 13, at 321 n.1.
18. Russell v. Kotsch, 336 S.W.2d 405 (Mo. 1960); Robinson v. Gains, 331 S.W.2d 653 (Mo. 1960); Hall Motor Freight v. Montgomery, 357 Mo. 1188, 212 S.W.2d 748 (1948); Scott v. Jones, 334 S.W.2d 742 (K.C. Mo. App. 1960).

discussed the wisdom of the continued application of the traditional approach to conflict of laws problem. The *Toomes* footnote[19] cites decisions of other courts which have examined the traditional approach and found it lacking.[20]

In *Babcock v. Jackson*,[21] New York rejected the traditional substantive-procedural distinction as being the proper guide for determining choice of laws problems. There, the plaintiff was seriously injured when the car in which she was a passenger, and which was being driven by the defendant, went out of control and ran into a stone wall in Ontario, Canada.[22] The defendant maintained that the *lex loci* governed, and that the Ontario guest statute barred the plantiff's recovery.[23] Rejecting this approach and applying New York law allowing recovery, the court criticized the traditional "vested rights" theory as ignoring the interest which a state, other than that of the situs of the tort, might have in the resolution of a particular issue.[24] The The court noted that Ontario's only relationship with the tort was the fortuitous happening of the accident within its jurisdiction. The plaintiff and the defendant, both residents of New York, were riding in an automobile which was licensed, garaged, and insured in New York, and were on a week-end trip which began in that state and was to terminate there.[25]

The New York court cited[26] with approval the approach of the *Restatement (Second), Conflict of Laws*,[27] that "the local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort." The relative importance of the relationship was determined by evaluating the contacts in the light of "the issues, the character of the tort and the relevant purposes of the tort rules involved."[28] Using this approach,[29] the court found that the purpose of Ontario's guest statute was to prevent the fraudulent assertion of claims against insurance companies by collusion, between driver and passengers, and that New York's policy was to insure that an injured party was compensated for injuries caused by his tort feasor, and therefore

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19. 402 S.W.2d 321, *supra* note 13, at 321 n.1.

20. Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Gianni v. Fort Wayne Air Serv., Inc., 342 F.2d 621 (7th Cir. 1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Kilberg v. Northeast Air Lines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis.2d 617, 133 N.W.2d 408 (1965).

21. *Supra* note 20.

22. *Id.* at 476, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.

23. *Id.* at 477, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.

24. *Id.* at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746.

25. *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

26. *Id.* at 482-83, 191 N.E.2d at 283-84, 240 N.Y.S.2d at 749.

27. Section 379(1) (Tent. Draft No. 8, 1963).

28. *Supra* note 20, at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. This is the approach set forth by RESTATEMENT (SECOND), CONFLICT OF LAWS, § 379(2)-(3) (Tent. Draft No. 8, 1963).

29. The New York Court labeled this approach the "center of gravity" or "grouping of contacts," and noted that it had adopted this approach with respect to contract rules in Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

Ontario had "no conceivable interest in denying a remedy" where the defendants and their insurer are not residents of Ontario, but of New York.[30]

In adopting this "grouping of contacts approach," the New York Court felt that:

> (j)ustice, fairness and "the best practical result" . . . may be achieved by giving controlling effect to the law of the jurisdiction, which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation.[31]

Wilcox v. Wilcox,[32] also cited by the Missouri Supreme Court in the *Toomes* footnote, arose from an automobile accident which occurred in Nebraska. The plaintiff was injured while riding as a guest in an automobile operated by her husband, the defendant.[33] The plaintiff, the defendant, and the insurer of the automobile were domiciled in Wisconsin, and the automobile was insured under a policy written and delivered in Wisconsin.[34] The accident occurred in Nebraska while the parties were returning from a vacation.[35]

The Nebraska guest statute allowed a guest to recover from a tort only if gross negligence or intoxication was proved.[36] Wisconsin rejected the traditional rule that the *lex loci* applied, terming it a "petrified approach" which ignored "fundamental policies of the state most intimately concerned."[37] The Wisconsin court stated that the *lex loci* rule had not produced the certainty of results and foreseeable legal consequences that supposedly were the aim of courts because hard cases had prompted courts to deviate from the rule.[38]

The Wisconsin court[39] applied a reasoning similar to the "grouping of contacts" approach of the New York court, stressing, however, that the concern with the contacts must not be merely quantitative, but must be viewed "qualitatively in light of policy considerations."[40] The Wisconsin approach starts with the premise that the forum state will not apply a rule of law which is repugnant to its own policies, and that there should be a presumption in favor of the law of the forum unless it is clear that the contacts of the non-forum jurisdiction are of greater

30. *Supra note* 20, at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. The New York Court pointed out that Ontario's interest would be different if the issue in question was the proper standard of care which defendant should have been exercising at the time of the accident. *Ibid.*

31. *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

32. *Supra* note 20.

33. *Id.* at 619, 133 N.W.2d at 409.

34. *Ibid.*

35. *Ibid.*

36. *Ibid.*

37. *Id.* at 630, 133 N.W.2d at 415.

38. *Id.* at 622-23, 133 N.W.2d at 412. Many courts have avoided the effect of the substantive-procedure approach in a "hard" case by labeling the foreign law in issue procedural and applying forum law, see Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953).

39. The decision by Heffernan, J., contains a fine short survey of recent decisions and approaches taken by various writers in the choice of laws area, *supra* note 20, at 625-31, 133 N.W.2d at 412-15.

40. *Id.* at 634, 133 N.W.2d at 417.

significance than those of the forum jurisdiction.[41] Applying this reasoning to *Wilcox*, the Wisconsin court determined that the policy of Nebraska was to protect a Nebraska host from an ungrateful guest, and to protect Nebraska insurance companies, and that the policy of Wisconsin was to compensate guests injured as a result of ordinary negligence of theri host.[42] The Nebraska policy would not be affected when all those concerned were residents of Wisconsin. The most significant contacts in this situation were found to be the fact that all those concerned, host, guest, and insurance company, were residents of Wisconsin, and the relationship arose in Wisconsin.[43]

The cases[44] cited in the *Toomes* footnote by the Missouri Supreme Court as refusing to abandon the traditional substantive-procedural test contained no discussion of newer approaches. The cases examined the holdings of several jurisdictions that apply the traditional *lex loci* approach, and then the respective courts continued with their applications, fearful of a "voyage into such an uncharted area."[45]

Even using the approach to choice of laws problems as adopted by New York and Wisconsin, it is extremely doubtful that the Missouri court would have reached a different result in the *Noe* case. Missouri's strong public policy against disclosing the presence of an insurance company in a jury trial would probably prevent a direct action suit in Missouri courts regardless of the "contacts" of the other jursidiction. The New York court refused to apply the Louisiana direct action statute involved in the *Noe* case upon these grounds.[46]

The footnotes in *Noe* and *Toomes* suggest that in an appropriate case the Missouri Supreme Court would be willing to explore the advisability of adopting a new approach to the choice of law problem. The goal of a choice of law rule should be the application of the most appropriate law to the particular issue. The virtue of the traditional approach is ease of application, predictibility, and uniformity of results. Its automatic application leads to unjust results at times, particularly when the place of the tort is fortuitous. In a hard case, an unjust result would encourage the court to develop exceptions to the rule, or to label a matter either substantive or procedural to achieve a desired, just result.[47] In a highly mobile society, the fortuitousness of the place of the injury, and the number of hard cases from the forum court's viewpoint, will greatly increase. Predictibility would seem to be of limited value in a tort situation. Its value would be limited to an attorney advising his client on the possible outcome of litigation; seldom would it influence an act or before the tort occurred. Writers and scholars in the conflict's area have been very vocal in their recommendation for sweeping revisions, but have

41. *Ibid.*
42. *Ibid.*
43. *Ibid.*
44. Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Oshiek v. Oshiek, 224 S.C. 249, 136 S.E.2d 303 (1964); Friday v. Smoot, 211 A.2d 594 (Del. 1965).
45. Shaw v. Lee, *supra* note 44, at 616, 129 S.E.2d at 293.
46. Morton v. Maryland Cas. Co., 4 N.Y.2d 488, 493, 176 N.Y.S.2d 329, 330 (1958), *affirming* 1 App. Div.2d 116, 148 N.Y.S.2d 524 (1956).
47. See, *e.g.*, Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953).

been unable to agree on the exact form that a new approach should take.[48] The possible form of a new approach in Missouri's choice of law rule is too broad a topic for this note. It must be limited to the possibility of Missouri adopting a new approach if an appropriate case presents itself.

HUGH MCPHEETERS, JR.

"DEAD MAN'S STATUTE"—WAIVER OF INCOMPETENCY

Prentzler v. Schneider[1]

This was an action for the wrongful death of plaintiff's husband as a result of a collision of two motor vehicles. Plaintiff's husband was driving his pickup truck with plaintiff as a passenger when it collided with a truck driven by one Schneider. Both drivers were killed instantly. Plaintiff was the only surviving witness to the collision.

Plaintiff and Schneider's widow filed separate wrongful death actions. The suit brought by Schneider's widow was tried first, and resulted in a $25,000 judgment in her favor. Thereafter, defendant, Schneider's administratrix, moved for a summary judgment in the instant case. Defendant argued that her victory in the first suit barred plaintiff in this suit under the doctrine of estoppel by judgment. In support of the motion, defendant attached the transcript of the earlier trial which included testimony given by plaintiff. The motion for summary judgment was properly overruled,[2] and the instant case proceeded to trial.

Judgment was for plaintiff for $15,000, and defendant appealed to the Kansas City Court of Appeals. That court reversed and remanded for error in permitting plaintiff to testify to the facts of the collision, because she was incompetent as a witness by reason of the Dead Man's Statute. On application of both plaintiff-respondent and defendant-appellant the case was transfered to the Missouri Supreme Court. There, in the noted opinion,[3] it was held that defendant had waived plaintiff's incompetency by introducing the transcript containing plaintiff's testimony. The court stated:

> By the introduction in this case of plaintiff's testimony in the first case tried, pertaining to the facts of the collision, defendant waived plaintiff's incompetency as a witness. It is of no consequence that this testimony was

48. See *e.g.*, CAVERS, THE CHOICE-OF-LAW PROCESS (1963); CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1965); CHEATHAM AND REESE, *Choice of The Applicable Law*, 52 COLUM. L. REV. 959 (1952); COOK, *The Logical and Legal Basis of the Conflict of Laws*, 33 YALE L. J. 457 (1924); TRAYNOR, *Is This Conflict Really Necessary*, 37 TEX. L. REV. 657 (1959).

1. 411 S.W.2d 135 (Mo. En Banc 1966).

2. The widow and the administrator are different persons and not in privity with each other. The determination of a fact issue in an action by one is not res judicata (collateral estoppel) in another action growing out of the same accident. *Id.* at 139. See also Plaza Express Co. v. Galloway, 365 Mo. 166, 280 S.W.2d 17 (1955).

3. *Supra* note 1.

> offered solely in support of her motion for summary judgment and was not considered by the jury. The use of the transcript of plaintiff's testimony against her on the motion for summary judgment amounts to the same as calling her as a defendant's witness on the motion. By so requiring her to testify for that purpose defendant made her competent as a general witness in the case.[4]

The judgment for plaintiff was accordingly affirmed.

The significance of this case is found in its expansion of the already wide doctrine of waiver under the Dead Man's Statute. The many varied situations now giving rise to a waiver of incompetency under the statute present a real hazard for the unwary. The instant case provides a perfect example of the ease with which the objection may be lost. Defendant simply asked for a summary judgment and, as the theory of the motion required it, attached the transcript of an earlier trial. Because that transcript included testimony given by plaintiff, defendant unwittingly lost her objection. In order to avoid such involuntary waivers under the Dead Man's Statute, the lawyer must be aware of the acts likely to constitute waiver.

The simplest act of waiver is to allow the surviving party to take the stand and testify without making a timely objection. Missouri courts have held the objection waived if not "raised at the first opportunity,"[5] or "made at the earliest possible moment."[6] These cases indicate that the objection must be made as soon as it appears the survivor is being asked to testify to matters about which he is incompetent under the statute. The rationale of this position, as pointed out in *Ashley v. Williams*,[7] is that a party should not be able to allow the witness to testify in the hope of drawing from him favorable testimony, then, when the experiment proves disastrous, raise his objection and have the testimony stricken from the record.

The objection may also be waived by questioning the survivor either on direct or cross-examination. If the protected party calls the survivor as a witness, clearly he has waived his objection.[8] Missouri courts reason that the protected party should not be able to call the witness and elicit beneficial testimony while excluding that which is unfavorable on the grounds of incompetency under the statute. Cross-examination, on the other hand, will not waive a proper and timely objection if it is limited to testimony introduced on direct examination.[9] If the cross-examination goes beyond the scope of the direct examination and opens new matters, early cases held that the objection was waived.[10] This placed the objector in a dilemma, for if he cross-examined on new matters, he waived his objection, yet if he stood on

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4. *Id.* at 142.
5. People's Bank of Queen City v. Aetna Cas. & Sur. Co., 225 Mo. App. 113, 40 S.W.2d 535 (K.C. Ct. App. 1931).
6. *In re* Reichelt's Estate, 179 S.W.2d 119 (St. L. Mo. App. 1944).
7. Ashley v. Williams, 365 Mo. 286, 281 S.W.2d 875 (1955).
8. *In re* Trautmann's Estate, 300 Mo. 314, 254 S.W. 286 (1923); F. Hattersley Brokerage & Commission Co. v. Hume, 193 Mo. App. 120, 182 S.W. 93 (St. L. Ct. App. 1916).
9. Johnston v. Johnston, 173 Mo. 91, 73 S.W. 202 (1903).
10. Reitz v. O'Neil, 2 S.W.2d 178 (St. L. Mo. App. 1928); Pierce Loan Co. v. Killian, 153 Mo. App. 106, 132 S.W. 280 (St. L. Ct. App. 1910).

his objection, and the witness was eventually declared competent, he had sacrificed valuable evidence. More recent cases have established the rule that the waiver extends only to the new matters covered.[11] The most recent case in point, *Hegger v. Kausler*,[12] stated the rule as follows: "It is only where the party insisting upon the incompetency nevertheless cross-examines the witness on new matter not touched upon or brought out on the examination in chief that the incompetency is waived and then only as to such new matter."[13] It now appears well settled that cross-examination will make the witness competent as to all new matters covered, but will not affect an objection under the statute to testimony given on direct.

If the protected party takes the survivor's deposition, he has waived the objection.[14] The deposition need not even be filed in the case in order to constitute a waiver. *Edwards v. Durham*[15] held, "the incompetency of a witness under the statute may be and is waived by the adverse party taking his deposition in the case, whether the same be filed in court or not."[16]

Likewise, serving interrogatories on the survivor will waive his incompetency under the statute.[17] The earlier rule was that filing interrogatories did not act as a waiver.[18] These cases treated interrogatories, like pleadings, as being only a procedural step taken by plaintiff. Later cases have made it clear, however, that serving interrogatories is sufficient to waive incompetency. *Lehr v. Moll*[19] held that the effect of serving interrogatories is now the same as taking depositions:

> We have held that when a party had taken his adversary's deposition in the same action, it amounted to a waiver of any incompetency of his adversary, notwithstanding he would have otherwise been incompetent. We therefore hold that by serving the interrogatories upon respondent, appellants waived her incompetency as a witness.[20]

Introducing the transcript of an earlier trial or hearing containing the survivor's testimony will also waive incompetency under the statute. In *Lampe v. Franklin Am. Trust Co.*,[21] the transcript was introduced in the actual trial. In the instant case, the transcript was attached to a motion for summary judgment. In both cases it was held that the incompetency of the survivor was thereby waived.

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11. Hegger v. Kausler, 303 S.W.2d 81 (Mo. 1957); Simmon v. Marion, 227 S.W.2d 127 (K.C. Mo. App. 1950); Bussen v. Del Commune, 239 Mo. App. 859, 199 S.W.2d 13 (St. L. Ct. App. 1947).
12. *Supra* note 11.
13. *Id.* at 88.
14. Edwards v. Durham, 346 S.W.2d 90 (Mo. 1961); Ashley v. Williams, 365 Mo. 286, 281 S.W.2d 875 (1955); Baker v. Baker, 363 Mo. 318, 251 S.W.2d 31 (1952).
15. *Supra* note 14.
16. *Id.* at 97.
17. Watkins v. Watkins, 397 S.W.2d 603 (Mo. 1965); Ashley v. Williams, 365 Mo. 286, 281 S.W.2d 875 (1955); Lehr v. Moll, 247 S.W.2d 686 (Mo. 1952).
18. Carmody v. Carmody, 266 Mo. 566, 181 S.W. 1148 (1916); Tygard v. Falor, 113 Mo. 234, 63 S.W. 672 (1901).
19. *Supra* note 17.
20. *Id.* at 690.
21. 339 Mo. 361, 96 S.W.2d 710 (1936).

The effect of a waiver may be greater than the lawyer might anticipate. It has been held that waiving the incompetency of one witness waives the incompetency of all witnesses under the Dead Man's Statute.[22] The waiver also extends to another trial of the same cause, a trial de novo, and to subsequent proceedings generally.[23] The waiver has been held to extend to a subsequent suit involving substantially the same parties and same issues; but it does not extend to a different suit between the same parties.[24] It is apparent that much thought should be given to making a voluntary waiver and much care taken to avoid an involuntary one.

Few statutes have been criticized as severely as the Dead Man's Statute.[25] A study of the cases convinces one that judicial dissatisfaction with the statute has encouraged the courts to expand the doctrine of waiver. The alternative to this expansion is amendment or abolition of the Dead Man's Statute. The latter approach would seem preferable. Unnecessary problems and conflicts arise when the courts are forced to stretch the waiver doctrine. In the instant case, for example, the expanding waiver doctrine ran counter to the policies underlying the summary judgment procedure. As pointed out by the dissent, "the effect of the majority is to say to a party under circumstances such as that which confronted defendant that the summary judgment procedure is utilized at his peril."[26] Although it is doubtful that use of the summary judgment will be significantly discouraged by this case, the point remains the same. Increasing the number of acts which will waive incompetency is a backhanded way of dealing with the harshness of the Dead Man's Statute. Legislative action would seem to be called for to avoid the necessity of basing decisions on technicalities in order to achieve justice.

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22. Baker v. Baker, 363 Mo. 318, 251 S.W.2d 31 (1952); Fowler v. Sone, 226 S.W. 995 (K.C. Mo. App. 1920).

23. Moore v. Adam's Estate, 303 S.W.2d 936 (Mo. 1957); *In re* McMennamy's Guardianship, 307 Mo. 98, 270 S.W. 662 (1925); *In re* Imboden's Estate, 111 Mo. App. 220, 86 S.W. 263 (1905); Tierney v. Hannon's Ex'r, 81 Mo. App. 488 (St. L. Ct. App. 1899).

24. Edwards v. Durham, 346 S.W.2d 90 (Mo. 1961); Causer v. Wilmoth, 142 S.W.2d 777 (St. L. Mo. App. 1940). One Missouri case held that a waiver in the first trial was not a waiver in the second trial even though both were on the same issues. Meffert v. Lawson, 315 Mo. 1091, 287 S.W. 610 (1926). The case can perhaps be distinguished on the basis that there was no affirmative waiver only a failure in the first trial to object to the testimony.

25. "As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." 2 WIGMORE, EVIDENCE § 578, p. 697 (3d ed. 1940). Writers feel honest claims are frequently precluded by operation of the statute. Moreover the under-lying policy of the statute seems untenable, for, as Wigmore argues, there is no more justification "to save dead men's estates from false claims than to save living men's estates from loss by lack of proof."

26. *Supra* note 1, at 143.

CAUSATION AND COMMON KNOWLEDGE IN MEDICAL MALPRACTICE CASES

Schulz v. Feigal[1]

Plaintiff, due to the negligence of defendant's employee, was mistakenly given an injection of adrenalin while being treated for a vitamin deficiency. The defendant doctor recognized plaintiff's reaction as an adrenalin overdose and administered a tranquilizer to counteract the effects. Left alone to recover, plaintiff became nauseated and left the room unobserved to go across the hall to the washroom. While in the hall she fainted and fell, sustaining injuries to her hip. The trial court refused to submit to the jury the issue of whether plaintiff's injury was the proximate result of the admitted negligent act, holding that plaintiff's fall was the result of an independent or intervening cause for which the defendant was not causally responsible. On appeal, the Minnesota court reversed, asserting that the jury could find that plaintiff's actions were not a superseding cause of her injuries, but were a normal response to the original wrongful act. The court, holding that the causal connection between the two injections and the fall need not be established by expert testimony, said: "It is within the common knowledge of jurors from wide information of the social and health problems created by the general use of tranquilizers that their use produces an unnatural impact on the mental, physical, and emotional structure and may cause disorientation."[2] Based on the laymen's common knowledge the court concluded that the jury could find, without supporting expert testimony, that plaintiff's collapse was a natural and proximate result of the original negligent act.

As a general rule, the jurors utilize their common knowledge to draw reasonable inferences from the evidence of a causal relationship between the negligent act and the injuries.[3] In appropriate cases, however, expert opinion evidence may be required.[4] Such cases involve situations not within the common knowledge of the jury. Due to the technical nature of the subject matter involved, and the complicating factor that a patient often has some injury or disease before he is treated by a doctor, the courts have held that expert medical testimony is essential in most malpractice actions to support conclusions of negligence and causation.[5] So widespread is this authority that the courts infer an "exception" to this requirement when the results of a negligent act are so obvious that laymen drawing upon their common knowledge can form reasonable inferences of causation.[6] This "exception" however, is the general rule with regard to proof of negligence and causation in the ordinary negligence case.

1. 273 Minn. 470, 142 N.W.2d 84 (1966).
2. *Id.* at —, 142 N.W.2d at 91.
3. Prosser, Law of Torts 167 (3ed. 1964).
4. *Ibid.*
5. Immekus v. Quigg, 406 S.W.2d 298 (Spr. Mo. App. 1966); Williams v. Chamberlain, 316 S.W.2d 505 (Mo. 1958); See Annot., 13 A.L.R. 2d 11 (1950).
6. It should be noted that this "exception" can also work as a disadvantage to a plaintiff in a malpractice action when it is common knowledge that the alleged injury could result from many causes. See Jarboe v. Harting, 397 S.W.2d 775 (Ky. Ct. App. 1965).

Despite the fact that most jurisdictions recognize that there are malpractice cases involving causal inferences within the common knowledge of the laymen, few have found factual situations where such unsupported common knowledge is relied upon. This reluctance may be attributable to the general requirement that the evidence must be sufficient to take the inference of causation beyond a mere possibility (or even probability equal to other possible causes) to a reasonable probability before the issue will be submitted to the jury.[7] This is to prevent speculation or guessing by the jury.[8] Therefore, even if such an inference of causation based on common knowledge and other non-expert testimony is reasonable, it must also be more probable than not that this was the cause of the injury. Such a probability may not be inferable utilizing the laymen's common knowledge as a basis, especially when other possible causes are present.

Minnesota follows the aforementioned requirements of proof in malpractice actions.[9] Accordingly, the court in *Schulz* holds that it is reasonably probable that tranquilizers cause physical disorientation resulting in fainting, and such a degree of probability is inferable by laymen drawing upon their common knowledge without supporting expert testimony. Even in light of an increasing knowledge of medical science by the laymen, such a holding *prima facie,* seems to vest in him knowledge of a technical nature more worthy of a label than "common." However, other evidence in *Schulz* raises the question of how much reliance the court placed on common knowledge as a basis for the inference of causation. It should be noted that the defendant doctor testified that "occasionally it [the tranquilizer] could be a good knockout agent."[10] This expert testimony,[11] plus the evidence that plaintiff had a prior history of fainting, might explain the court's willingness to rely on the jury's common knowledge. In this respect, a parallel can be drawn with many of the cases holding that the laymen's common knowledge is a sufficient basis for inferring the causal relationship.

These cases, though not proporting to require it, contain some expert testimony of a causal relationship as in *Schulz.* In *Walker Hospital v. Pully,*[12] the Indiana court held common knowledge a basis for the inference that leaving gauze in a wound would cause infection, but the court noted that there was medical testimony to substantiate a causal relationship. The South Dakota Supreme Court in *Myrlie v. Hill*[13] held there was sufficient evidence without expert testimony for the jury to find a causal relationship between an immediate burning pain after the defendant doctor administered eyedrops that smelled like iodine and an ulcer that formed

7. See Annot., 13 A.L.R. 2d 11 (1950).
8. *Ibid.*
9. Yates v. Gamble, 198 Minn. 7, 268 N.W. 670 (1936); Williamson v. Andrews, 198 Minn. 349, 270 N.W. 6 (1936).
10. *Supra* note 1 at — , 142 N.W.2d at 90.
11. Expert testimony may be supplied by admissions of the defendant doctor; *e.g.* Sheffield v. Runner, 163 Cal. App. 2d 48, 328 P.2d 828 (1958).
12. 74 Ind. App. 659, 127 N.E. 559 (1920), *rehearing denied* 128 N.E. 933 (1920). See also Russell v. Newman, 116 Kan. 268, 226 Pac. 752 (1924).
13. 58 S.D. 330, 236 N.W. 287 (1931).

the following day. Again, there was expert testimony pointing to iodine as a possible cause of the ulcer.

Loss of blood is another area in which expert testimony has not been required. In *Skeels v. Davidson*,[14] there was testimony by the deceased plaintiff's mother that the plaintiff had bled continually following an operation to remove his tonsils until the defendant finally stopped it by a subsequent operation. Shortly thereafter, plaintiff died. There was no expert testimony as to the cause of death, other than testimony of the defendant doctor that the child drowned in its own vomitis. The court in reference to the cause of death said: "[E]very layman knows that it [death] can be caused by excessive loss of blood."[15] But the court continued, saying that even if the jury had accepted the doctor's opinion as to the cause of death, it was still warranted in finding the defendant liable since the jury had been instructed that they might find that the defendant's neglect of the son subsequent to the operation resulted in death. This clearly weakened the strength of common knowledge as a basis for drawing the inference of causation. This same pattern was established in a recent Oklahoma decision,[16] where the court held that when the plaintiff's testimony established that she had been burned instantaneously with treatment, no expert testimony was required as to causation. Again, there was expert testimony that the injury could have been caused by the treatment.

In malpractice actions for infection resulting from the use of an allegedly unsterile instrument, a California court has allowed the laymen's common knowledge to draw the inference of causation when no expert testimony was present.[17] In doing so, the court stated that the danger of infection from unsterile instruments is a matter of common knowledge, and a jury is authorized to draw this reasonable inference. In a similar factual situation, other courts have required supporting expert testimony, expressly rejecting the common knowledge of the laymen.[18]

Decisions proporting to allow a causal inference based on common knowledge when medical testimony is present, indicate that the courts may be more willing to do so when there is some medical testimony relating the negligence to the injury, even if establishing only a mere possibility.

Missouri courts have also recognized the necessity for expert testimony in malpractice actions.[19] Like most jurisdictions, Missouri is reluctant to allow common

14. 18 Wash.2d 358, 139 P.2d 301 (1943).
15. *Id.* at 365, 139 P.2d at 304.
16. Orthopedic Clinic v. Hanson, 415 P.2d 991 (Okla. 1966).
17. Soest v. Balsinger, 60 Cal. App.2d 441, 141 P.2d 13 (1943). However, it should be noted that in doing so, the court cited Mastro v. Kennedy, 57 Cal. App.2d 499, 134 P.2d 865 (1943), a case involving similar facts. But there, the plaintiff testified that the defendant doctor told his nurse that unsterile instruments had caused the injury.
18. See Moline v. Christie, 180 Ill. App. 334 (1913); Bush v. Cress, 181 Minn. 590, 233 N.W. 317 (1930). There is also a strong indication that California will not allow the juror's common knowledge to support causation conclusions without expert testimony where a foreign object is negligently left in the body and alleged as the cause of the infection. See Wires v. Litle, 27 Cal. App. 2d 240, 82 P.2d 388 (1938).
19. Williams v. Chamberlain, *supra* note 5; Kappel v. Slickman, 401 S.W.2d 451 (Mo. 1966).

knowledge as a basis for causal inferences. Missouri has allowed common knowledge as a basis when expert testimony was in fact present.[20] However, in factual situations similar to those above, Missouri has permitted the juror to draw inferences of causation utilizing his common knowledge. In *Sontag v. Ude*,[21] a five-inch rubber tube was left in the body cavity of a ten month old child. The evidence showed that his health began to fail from that time until his death three weeks later. No expert testimony, even of a circumstantial nature, was offered by the plaintiff. The court said: "Whether these acts were the proximate cause of death was within the competency and intelligence of the jury to determine. No professional—no opinion—evidence was necessary, so far as the plaintiff's case was concerned."[22] In *Null v. Stewart*,[23] the supreme court, quoting the above from *Sontag*, upheld a judgment for a plaintiff alleging infection as a result of gauze left in her abdominal cavity. No expert testimony establishing causation was produced by the plaintiff, while the defendant doctor had testified that the gauze wouldn't cause the infection.

The Missouri courts in foreign substance cases have tended to label them as *prima facie* negligence where the plaintiff need only show that the foreign substance was left inside the patient's body.[24] The burden of coming forward with evidence shifts to the defendant, but a finding of negligence by the jury still remains the ultimate test.[25] These are not *res ipsa loquitur* cases. They usually involve known, alleged and proven ommissions. Such cases go to the jury supported by circumstantial evidence and usually medical testimony of causation. Sometimes, as in *Sontag*, causation is established by the ability of the juror, drawing upon his common knowledge, to form reasonable inferences from the evidence of the necessary causal relationship between the injury and the negligent act.

In cases involving the administration of eye drops, Missouri has also demonstrated an apparent willingness to allow causal inferences when no expert testimony is present. In *Coffey v. Tiffany*[26] the court of appeals held that no expert testimony was required to make a case for the jury when plaintiff testified that she lost her previously good sight immediately after administration of eyedrops by the defendant. However, the supreme court quashed for improper admission of evidence and by way of dictum cast doubt on the lower court's holding concerning common knowledge by stating that there was much substance in the defendant's contention that the facts shown failed to prove any causal connection between the injury and the defendant's act.[27]

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20. *Ibid.*
21. 191 Mo. App. 617, 177 S.W. 659 (St. L. Ct. App. 1915).
22. *Id.* at 625, 177 S.W. at 661.
23. 78 S.W.2d 75 (Mo. 1934).
24. Null v. Stewart, *supra* note 23; Sontag v. Ude, *supra* note 21; Tate v. Tyzzer, 208 Mo. App. 290, 234 S.W. 1038 (St. L. Ct. App. 1921); Ingram v. Poston, 260 S.W. 773 (St. L. Mo. App. 1924).
25. Williams v. Chamberlain, *supra* note 5; Hilton v. Mudd, 174 S.W.2d 31 (St. L. Mo. App. 1943).
26. 192 Mo. App. 455, 182 S.W. 495 (K.C. Ct. App. 1914).
27. State *ex rel* Tiffany v. Ellison, 266 Mo. 604, 182 S.W. 996 (1916).

The above demonstrates that a factual situation upon which "but for" causation may be sufficiently established without supporting expert testimony in one jurisdiction is not allowed on almost identical facts in another. Such conflicting decisions are based on differing court views of the ability of the juror's common knowledge to provide a sufficient basis for a reasonable inference. Furthermore, medical testimony can usually be found in decisions that have, notwithstanding such testimony, allowed the juror's to draw inferences of causation utilizing their common knowledge. Such decisions should be relied upon as a basis for the nonproduction of medical testimony of causation with caution. It would be more desirable to produce some expert testimony even if the facts at hand are nearly identical to the prior case. Although no weight is ostensibly given to this medical testimony in these cases, its presence cannot be overlooked as a factor in the court's decision to allow inferences of causation to be drawn by the juror utilizing his common knowledge.

JOHN R. MUSGRAVE

PARTICIPATION FOR THE LISTENING PUBLIC IN FCC LICENSE RENEWAL PROCEEDINGS

Office of Communications of the Church of Christ v. FCC[1]

In 1963, the Federal Communications Commission ordered various Mississippi radio and television stations, including WLBT in Jackson, to submit factual reports on programs dealing with racial issues. The orders were in response to informal complaints to the FCC which alleged that the Mississippi stations had denied certain community groups a reasonable opportunity to answer critics whose views had been televised by the stations. While the Commission was considering WLBT's respone to its order, WLBT filed an application for license renewal.[2] The national Office of Communications of the United Church of Christ, individual residents of Mississippi, and the local United Church of Christ at Tougaloo, all of whom had filed or concurred in the original complaint against the Mississippi stations, petitioned as parties in interest to contest the renewal of WLBT's license.[3] Petitioners claimed standing to intervene as individuals and organizations which had been aggrieved by WLBT's denial of opportunity to answer critics. Petitioners also claimed standing as representatives of the listening audience, which, they urged, has a right to balanced programing on significant public questions. Petitioners contended that the station had violated the "Fairness Doctrine." The "Fairness

1. 359 F.2d 994 (D.C. Cir. 1966).

2. In 1958, when WLBT had sought renewal, the Commission deferred action due to similar complaints, but granted the license when the instances of improper behavior were found to be isolated.

3. Communications Act of 1934 § 309(d)(1), 74 Stat. 890 (1960), 47 U.S.C. § 309 (d)(1) (1964). "Any party in interest may file with the Commission a petition to deny any application [for license renewal] . . . ."

Doctrine" comprehends the general right of the public to be informed of and have presented to it different attitudes and viewpoints held by various groups in the community on vital and controversial issues. Although its particularized requirements are difficult to define, the "Fairness Doctrine" at least means that the right of the public to hear different views is paramount to any right on the part of a broadcast licensee to broadcast his own sentiments.[4]

The Commission denied the petition, asserting that the general public has no standing unless an injury of a substantial and direct nature is shown,[5] and conducted no evidentiary hearing to resolve the factual questions concerning the public interest issue as required by statute.[6] A one year conditional license was granted to WLBT. On appeal, the court reversed the decision and remanded to the Commission, instructing it to give some or all of the appellants standing to challenge the renewal order and directed that an evidentiary hearing be conducted. Public intervention was to be allowed.[7]

This decision recognizes, for the first time, that listeners' sentiments have relevance to a license renewal proceeding under the Federal Communications Act.[8] Previously, standing before the Commission had been limited by the courts to those allegedly aggrieved by electrical interference[9] or by a substantial economic injury having a direct affect upon the public convenience, interest or necessity.[10] Heretofore, standing had never been accorded on any other ground, although the Commission had hinted at others.[11] This was true despite the fact that the Commission

4. This doctrine received Congressional approval in the 1959 amendment of section 315. Communications Act of 1934 § 315(a), 73 Stat. 557 (1959), 47 U.S.C. § 315(a) (1964).

5. See Verslius Radio & Television, Inc., 3 AD.L. 365 (2d ser.) (Decisions) (FCC 1954); Ohio Valley Broadcasting Corp., 4 AD.L. 259 (2d ser.) (Decisions) (FCC 1955). For cases where alleged economic injury was not sufficient see, Niagara Frontier Amusement Corp., 4 AD.L. 27 (2d ser.) (Decisions) (FCC 1955); Mid-South Broadcasting Co., 3 AD.L. 441 (2d ser.) (Decisions) (FCC 1954); Kansas State College of Agriculture & Applied Science, 2 AD.L. 738 (2d ser.) (Decisions) (FCC 1953). For cases denying standing to consumers see, The Good Music Station, 6 AD.L. 930 (2d ser.) (Decisions) (FCC 1957); WJR, The Goodwill Station, Inc., 4 AD.L. 753 (2d ser.) (Decisions) (FCC 1955); Capitol Broadcasting Co., 2 AD.L. 704 (2d ser.) (Decisions) (FCC 1953).

6. Communications Act of 1935 § 309(e), 78 Stat. 193 (1964), 47 U.S.C. § 309(e) (1964). "If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented . . . [the Commission] shall formally designate the application for hearing . . . ."

7. This note does not cover the problems involved with public evidentiary hearings, but only those of standing.

8. See statute cited note 3 *supra.*

9. NBC v. FCC(KOA), 132 F.2d 545 (D.C. Cir. 1942), *aff'd,* 319 U.S. 239 (1934).

10. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied,* 358 U.S. 946 (1959); Democrat Printing Co. v. FCC, 202 F.2d 298 (D.C. Cir. 1952). For a decision denying standing on the ground that economic injury would not affect the public interest, necessity or convenience, see WOKO, Inc. v. FCC, 109 F.2d 665 (D.C. Cir. 1939). See also 48 Stat. 1083 (1934), 47 U.S.C. § 307 (1964), which requires a finding of the public convenience, interest or necessity for granting of a station license or renewal thereof.

11. Capitol Broadcasting Co., *supra* note 5.

is entrusted with the statutory duty of safeguarding the public interest.[12] In *Church of Christ,* the court of appeals noted that the "public interest" is inadequately protected by rules which limit participation in the licensing function to those persons who are economically or technologically aggrieved. Accordingly it approved accreditation of representatives of the listening public to act as "Private Attorneys General"[13] in such proceedings, without, however, indicating how such representatives could be "certified." The court emphasized the impossibility of the Commission's monitoring all broadcasts and asserted that "public response is the most reliable test of ideas and performance in broadcasting as in most areas of life."[14] The court also justified giving standing to listener groups in terms of a more traditional criterion, economic aggrievement. It did so by recognizing an economic injury to the listening public based upon the public's aggregate investment in receiving equipment.[15] The court noted that previous decisions had never indicated that electrical interference and economic injury were the *exclusive* credentials entitling an objector to contest the issuance or renewal of a broadcsating license.[16]

Extending standing to listeners' groups hopefully will afford publicity to programming practices and program content to an extent not heretofore possible in license renewal proceedings. Alleged abuses of the public trust which a licensee assumes under the statute,[17] will be more readily proved or disproved, and more objective assurance obtained that the public interest standard has been met by the licensee who seeks renewal—or by an applicant desiring initial issuance of a permit—which assurance seems required by the Federal Communications Act.[18]

Consumers alleging both economic and non-economic aggrievement have been accorded standing, both to participate in proceedings as a party in interest and to seek judicial review of final orders as a person affected or aggrieved, by other agencies. Both the Federal Power Act[19] and the Natural Gas Act[20] provide for intervention in Federal Power Commission proceedings by representatives of interested consumers. The acts also provide judicial review for any party permitted to participate in the Commission's proceeding who is aggrieved or affected by the

12. Communications Act of 1934 § 309(a), 48 Stat. 1088 (1934), 47 U.S.C. § 309(a) (1964); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1941).
13. This theory was espoused in Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694 (2d Cir. 1943), *vacated as moot,* 300 U.S. 707 (1943). It holds that Congress may by statute empower any person to institute a proceeding involving a justiciable controversy as a representative of the public to vindicate its interest. See also Reade v. Ewing, 265 F.2d 630 (2d Cir. 1953).
14. Office of Communication of the Church of Christ v. FCC, *supra* note 1, at 1003.
15. *Id.* at 1002.
16. *Id.* at 1001.
17. *Id.* at 1003.
18. See statute cited note 10 *supra.*
19. Federal Power Act § 308(a), 49 Stat. 858 (1935), 16 U.S.C. § 825(g)(a) (1964).
20. Natural Gas Act § 15(a), 52 Stat. 829 (1938), 15 U.S.C. § 717(n)(a) (1964).

final order of that proceeding.[21] But, due to the wide discretion permitted the Commission to deny intervention even to those alleging standing as representatives of interested consumers, consumer sentiments have encountered difficulty in being expressed, and therefore utilized, in FPC determinations. Furthermore, since a party may seek judicial review only when he has been permitted to participate in the Commission proceedings,[22] a denial of intervention will foreclose to the consumer this alternate means of obtaining FPC recognition of his interests. This problem is demonstrated by the Commission's holding that household consumers of natural gas are not entitled to intervene in a rate making hearing since their interests are not directly affected by the proceeding as required by section 1.8(b) of the Commission's Rules of Practice and Procedure.[23] However, economic injury to consumers who have participated in an agency proceeding has been sufficient for standing to seek judicial review.[24] More recently, in *Scenic Hudson Preservation Conference v. FPC*,[25] a conservation group, not a consumer in the traditional sense but more like the concept of the listener as a consumer, was granted standing to seek judicial review on a non-economic basis. Appellant had, however, been a party to the agency proceeding. Previous rulings had held that to seek judicial review, there must be a finding of economic injury, but in *Scenic Hudson,* this barrier was abrogated.

Consumer standing to seek judicial review has been recognized under the Federal Food, Drug and Cosmetic Act[26] to a greater degree than under the Federal Communications Act. *Reade v. Ewing*[27] upheld the petitioner's allegation that his status as a consumer of oleomargarine was adversely affected by a commission order. Under the Federal Aviation Act of 1958, requiring a "substantial interest" to intervene[28] and seek judicial review,[29] Houston, Texas was permitted to participate

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21. Federal Power Act § 313(a), 49 Stat. 860 (1935), 16 U.S.C. § 825 (l) (b) (1964); Natural Gas Act § 19(b), 52 Stat. 831 (1938), 15 U.S.C. § 717 (r)(b) (1964).

22. Federal Power Commission's Rules of Practice and Procedure, 18 C.F.R. § 1.8(2) (1959). See also Austral Oil Co. Inc., 22 F.P.C. 858 (1960); Alston Coal Co. v. FPC, 137 F.2d 740 (10th Cir. 1943).

23. Panhandle Eastern Pipeline Co., 23 F.P.C. 354 (1960).

24. Memphis Light, Gas & Water Division v. FPC, 250 F.2d 402 (D.C. Cir. 1957), *rev'd sub. nom.* United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division, 358 U.S. 103 (1958) (without mentioning the standing problem); United States *ex rel.* Chapman v. FPC, 345 U.S. 153 (1953); Lynchburg Gas Co. v. FPC, 336 F.2d 942 (D.C. Cir. 1964); Public Service Comm'n of N.Y. v. FPC, 327 F.2d 893 (D.C. Cir. 1964). See also Wisconsin v. FPC, 292 F.2d 753 (D.C. Cir. 1961), where standing to seek judicial review was denied a consumer because he had not been a party to the FPC proceeding.

25. 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

26. Federal Food, Drug & Cosmetic Act § 701(f)(1), 52 Stat. 1055 (1938), 21 U.S.C. § 371 (f) (1) (1964). "In a case of actual controversy as to the validity of any order under subsection (e) of this section, any person who will be adversely affected by such order if placed in effect may . . . file a petition . . . for judicial review of such order."

27. 205 F.2d 630 (2d Cir. 1953).

28. 72 Stat. 767 (1958), 49 U.S.C. § 1378(b) (1964).

29. 72 Stat. 795 (1958), 49 U.S.C. § 1486(a) (1964).

on the ground that its air service was impaired.[30] This somewhat parallels the basis of the standing of the listener in *Church of Christ*, as a representative of the public interest.

Other agencies have recognized consumer interest, but have required some showing of economic injury. Shippers have been accorded the rights of intervention and judicial review in Interstate Commerce Commission proceedings,[31] but these rights are not coterminous under the Interstate Commerce Act. Being permitted to intervene in the agency proceeding does not automatically entitle one to seek judicial review of the final order.[32] To be granted standing to seek judicial review, a shipper must show himself directly affected by the ICC order.[33] Such a showing has required economic injury to the degree that shippers who claim injury due to increased competition have been denied standing,[34] while those whose rates were increased have been held directly affected.[35] Such a direct economic injury had not been required to intervene before the FCC. Even before *Church of Christ* competitive and non-competitive economic injury has been sufficient grounds for standing.[36] In accord with this requirement for direct economic injury, the right to review has not been conferred on the more peripheral consumer under the Interstate Commerce Act. In *Utah Citizens Rate Ass'n. v. U.S.*,[37] a citizen's committee sought review of an ICC order increasing rates, but standing was denied because there was no direct economic injury.

By conferring standing on responsible representatives of the listening public, the court of appeals may well have added to the Commission's work load in license renewal proceedings. Moreover, there is no guarantee that the present FCC staff is capable of absorbing these additional responsibilities.[38] In *Church of Christ*, how-

30. City of Houston v. CAB, 317 F.2d 158 (D.C. Cir. 1963).

31. Utah Citizens Rate Ass'n v. United States, 10 AD.L. (2d ser.) (Decisions) (D. Utah 1961).

32. Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249 (1930); Freeport Sulphur Co. v. United States, 199 F. Supp. 913 (S.D.N.Y. 1961).

33. L. Singer & Sons v. Union Pac. R.R. Co., 311 U.S. 295 (1940); Utah Citizens Rate Ass'n v. United States, *supra* note 31; Alexander Sprunt & Son, Inc., *supra* note 32. For other cases where alleged economic injury was held insufficient for consumer standing see, Freeport Sulphur Co. v. United States, *supra* note 32; Johnson v. Chesapeake & O. Ry Co., 188 F.2d 458 (4th Cir. 1951).

34. See L. Singer & Sons v. Union Pac. R.R. Co., *supra* note 33; Alexander Sprunt & Son, Inc. v. United States, *supra* note 32; Freeport Sulphur Co. v. United States, *supra* note 32.

35. See Utah Citizens Rate Ass'n v. United States, *supra* note 31.

36. For non-competitive standing, see NBC v. FCC(KOA), *supra* note 9; For competitive, see FCC v. Sanders Bros. Radio Station, *supra* note 10, and Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert denied*, 358 U.S. 946 (1959). The latter case represents the furthest extension of standing before the noted case. Here, standing was granted based on competitive economic injury to a manufacturer in an industry unrelated to broadcasting.

37. *Supra* note 35. *But see* Henderson v. United States, 339 U.S. 816 (1950), where a passenger was held sufficiently affected by the ICC's violation of a statute to seek judicial review.

38. The arguments of administrative incapacity and lack of finality are those primarily made for not expanding the basis of standing. See the dissent in Philco Corp. v. FCC, *supra* note 36, at 659.

ever, this problem was not considered insurmountable as the court noted that the Commission still retained the power to determine the criteria for certifying the responsible representatives of the public interest. The Commission thereby retains some power to limit the number of potential objectors to a given license renewal. The court vigorously asserted that such accreditation criteria may be established by the Commission's discretionary and rulemaking powers, but said nothing about the criteria themselves. The Commission seems thereby to retain plenary power to generate standing requirements of sufficient strictness to stem any flood of consumer interest representatives challenging license renewals. But it is important to note that a limitation may exist on the Commission's power to restrict audience participation, if the court's reference in *Church of Christ* to this power to read to imply that the FCC may also deny standing to petitioners, even though qualifying as representatives of the public interest, for failure to comply with heretofore existing rules not related to accreditation criteria, but rather to interveners generally.[39]

While the court of appeals purported to recognize complete discretion in the Commission to formulate criteria and procedures for certification of audience representatives, it nevertheless required the Commission to grant standing to *at least one* of the petitioners since the Commission had admitted that all were responsible representatives of the public interest. Accordingly, the Commission was prevented from denying participation to this petitioner for failure to comply with rules not related to accreditation criteria. The court thereby suggested, and perhaps established, a vaguely formulated limitation on Commission power.

Precedent for this type of procedural "limit" exists. In *American Communication Ass'n. v. U.S.*[40] an express limitation was placed on the Commission's power to limit the number of interveners. Petitioners had been denied intervention in a FCC rate hearing for failure to comply with certain rules. The FCC conceded that petitioners were sufficiently aggrieved to seek judicial review of their final order, which under the Federal Communications Act would also qualify them for standing before the Commission as a party in interest.[41] Nevertheless, the FCC denied intervention on the ground that compliance with the rules was necessary to keep the hearing within a reasonable scope. The court of appeals reversed, holding that petitioners qualified to intervene or seek judicial review could not be denied partici-

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39. An example of this is the Commission rule setting forth the following:
> Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene . . . . The petition must set forth the interest of the petitioner in the proceedings, [and] must show how such petitioner's participation will assist the Commission in the determination of the issues in question . . . . The presiding officer in his discretion, may grant or deny such petition or may permit intervention by such persons limited to particular issues or to a particular stage of the proceedings.

Federal Communication Commission's Rules of Practice and Procedure, 47 C.F.R. § 1.223(b) (1964).

40. 298 F.2d 648 (2d Cir. 1962).

41. See Philco Corp. v. FCC, *supra* note 36; Metropolitan Television Co. v. FCC, 221 F.2d 879 (D.C. Cir. 1955).

pation for non-compliance with Commission rules or on other discretionary grounds.

Despite the court's holding in *Church of Christ* that at least one of the petitioners therein involved *must* be granted standing, and the overruling of the Commission's rule limiting intervention in the *American Communication Ass'n.* case, the retained power of the FCC to establish the procedures and criteria for certifying audience representatives, if effectively employed, may still prove sufficient to limit those qualifying to a manageable and reasonable number.

JOHN R. MUSGRAVE

EQUITY—REQUIREMENTS FOR LACHES

Lake Development Enterprises, Inc. v. Kojetinsky[1]

Plaintiff was the owner of a lake front subdivision, and all lots sold by plaintiff were subject to certain restrictive covenants.[2] Defendant purchased four lots from plaintiff, and on the "parkway"[3] adjacent to one of the lots erected a one story wooden building connected to his boat dock. Plaintiff sought a mandatory injunction for removal of this building, alleging a breach of covenant by defendant.[4]

Defendant conceded that he did not receive written permission to erect the building, but he contended that since the plaintiff knew of the construction and made no effort to stop it, the defense of laches should bar relief. In support of this contention, defendant elicited testimony from the president of plaintiff corporation that its manager, as part of his regular duties, made a daily inspection of the lake property.[5] There was also evidence that plaintiff had never enforced some of the covenants contained in the warranty deeds.

After judgment for defendant, the court of appeals, hearing the case *de novo,*

1. 410 S.W.2d 361 (St. L. Mo. App. 1966).
2. The deed in question contained the following covenants:
   1). Complete architect's plans and specifications on all lake residences must be submitted for approval by Lake Development Enterprises before building operations commence;
   2). No residence shall be wholly or partly covered with tar paper, metal or canvas, and no tent house or shack shall be on said lot;
   3). No storage tank shall be above ground on said lot without written consent of the grantor;
   4). No building or construction of any kind may be made on the "parkway" surrounding said Lake without the written consent of the grantor (This covenant is the one allegedly violated);
   5). All docks for the mooring of boats shall be of standard design that will be furnished by grantor with a building permit;
   6). No outbuildings shall be built on said lot.
3. The "parkway" is a strip of land completely surrounding the lake and lying between the lake and the property line of the lake front lots.
4. *Supra* note 2, restriction number 4.
5. *Supra* note 1, at 365.

reversed the trial court and found plaintiff not guilty of laches.[6] The case was remanded with directions to enter judgment requiring defendant to remove his building from the "parkway."[7]

Laches in Missouri is a purely equitable doctrine which operates independently of the statute of limitations[8] to deny relief to one who has stood idly by with knowledge of his rights and allowed the situation to so change that it would be an injustice to others to grant the relief sought.[9] Generally a defendant seeking to assert the defense of laches must prove three elements:

1). Plaintiff knew of his legal rights;[10]
2). An unreasonable delay in asserting those rights;[11]
3). A change in circumstances during the delay which operates to the disadvantage of defendant.[12]

The most difficult task for the court is determining when a delay is unreasonable. There are no mechanical rules to be followed, and each case must be determined on its own peculiar circumstances.[13] If no one is injured or prejudiced by the delay, an equity court will not usually bar a suit prior to the running of the applicable statute of limitations.[14] However, a much shorter period will suffice when the delay causes substantial injury.[15]

Since laches cannot be measured in terms of a specific period of time, it is essential to determine what is meant by a delay which operates to the disadvantage of defendant. Generally, the injury to defendant must result from the making of valuable improvements, loss of evidence, death of a party, or some other change in the status of property or the relations of the parties, which makes it inequitable to permit enforcement of the claim.[16] However, the change in conditions need not be the result of action by the parties. For example, the fluctuation of land values,[17] or the death of a key witness[18] may satisfy the requirement of prejudice to defendant.

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6. *Supra* note 1, at 368.
7. *Supra* note 1, at 369.
8. Adams v. Gossom, 228 Mo. 566, 584, 129 S.W. 16, 21 (1910).
9. Ruckels v. Pryor, 351 Mo. 819, 831, 174 S.W.2d 185, 189 (1943).
10. *Ibid.*
11. Palfrey v. Killian, 224 Mo. App. 325, 329, 27 S.W.2d 462, 463-64 (St. L. Ct. App. 1930).
12. Stephenson v. Stephenson, 351 Mo. 8, 16, 171 S.W.2d 565, 568 (1943).
13. Smith v. Washington, 11 Mo. App. 519, 525 (St. L. Ct. App. 1882). "Unreasonable delay" does not mean "unreasonable length of time." A few weeks may suffice to constitute laches if the circumstances so warrant. Plattenburg, *The Defense of Laches and a Correlative,* 59 W.VA. L. REV. 266 (1957).
14. Summers v. Abernathy, 234 Mo. 156, 167, 136 S.W. 289, 292 (1911).
15. Delay of 60 days constituted laches when valuable improvements were 98% completed by the defendant. State v. Stanton, 311 S.W.2d 137 (K.C. Mo. App. 1958). Dictum to the effect that a delay of a few weeks is sufficient for laches. Depue v. Miller, 65 W.Va. 120, 64 S.E. 740 (1909).
16. Jones v. Fidelity Nat'l Bank & Trust Co. of Kansas City, 362 Mo. 712, 729, 243 S.W.2d 970, 979 (*En Banc* 1951); Rebman v. Rebman, 384 S.W.2d 663 (Mo. 1964).
17. Reel v. Ewing, 71 Mo. 17 (1879). The plaintiff-mortgagee sued on a contract to redeem a deed of trust. Plaintiff had gone into possession two years be-

Although laches is a species of equitable estoppel,[19] it is distinguishable from estoppel in that it does not require a change of position by defendant.[20] Where plaintiff sits back and awaits the rise in value of land or some future event to determine his course of action, and defendant is injured by the delay, plaintiff may be barred by laches regardless of any change of position by defendant.[21] On the other hand, essential elements of equitable estoppel are a knowing representation by one party, and a detrimental change of position on the faith of that representation by another.[22]

In the principal case, the court was not convinced that plaintiff had knowledge of the construction being undertaken by defendant before its completion.[23] In view of the evidence presented, it is difficult to imagine the court denying laches on this basis alone. There was testimony that plaintiff's employee had a duty to inspect the lake daily, and it seems unlikely that he would fail to discover a building of such proportions as to obstruct the view of the lake.[24] Also, the fact that plaintiff sent two letters to defendant during the construction period indicating his disapproval is further evidence that plaintiff had knowledge of the construction. The court considered these two letters primarily as evidence of lack of assent by plaintiff, but proving plaintiff's assent to the construction would not be necessary to establish laches. The court's discussion of assent is restricted to the doctrine of acquiescence, which is distinguishable from laches.[25]

Assuming for the moment that plaintiff's knowledge of the construction was not an issue, a much more compelling reason exists for the court's decision. The second requirement for laches is an unreasonable delay by plaintiff in asserting his legal rights. Defendant produced no evidence as to the length of that delay. There was no evidence on how long it took to erect the structure, or how long it had been completed before suit was brought. Lack of evidence on this issue was probably the most important factor in denying laches. It is difficult to understand why no evidence on this issue was presented, since a very short period of time may be an

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fore bringing suit to compel redemption and the land decreased in value during that time. Plaintiff was barred by laches.

18. Rebman v. Rebman, *supra* note 16. Death of a party to the original transaction, which increased the difficulty of proof by defendant, was sufficient change of condition to bar relief.

19. "Laches is but a manifestation of estoppel in pais. The latter is the genus, the former merely a species." Powell v. Bowman, 279 Mo. 280, 292, 214 S.W. 142, 145 (En Banc 1919).

20. Shelton v. Horrell, 232 Mo. 358, 374, 134 S.W. 988, 991 (1911); Breit v. Bowland, 231 Mo. App. 433, 437, 100 S.W.2d 599, 601 (K.C. Ct. App. 1936).

21. *Ibid.*

22. United Fin. Plan v. Parkview Drugs, 250 S.W.2d 181, 184 (K.C. Mo. App. 1952).

23. *Supra* note 1, at 368.

24. *Supra* note 1, at 365.

25. "The equitable doctrines of laches and acquiescence are very much akin and almost identical." This case distinguishes acquiescence as a doctrine which precludes relief in cases where it appears that the defendant acting upon the implied assent of the plaintiff has materially changed his conduct with respect to the subject matter. Blackford v. Heman Constr. Co., 132 Mo. App. 157, 164, 112 S.W. 287, 290 (St. L. Ct. App. 1908).

unreasonable delay when coupled with valuable improvements as in the principal case.[26]

Where the injury to defendant results from the making of valuable improvements, there is also an element of good faith to be considered. *Meriwether v. Overly*[27] indicated that any improvements must have been made in reliance on defendant's own title or right to make them. Understandably, the good faith nature of the improvements is a factor to be considered by the courts in determining equitable rights, but it is questionable that good faith is an absolute requirement where improvements have been made. In the principal case, the numerous violations of the covenants by other property owners would probably satisfy any good faith requirement concerning defendant's improvements. It seems reasonable that defendant could have, in good faith, believed plaintiff had forfeited any right to enforce the covenants by his apparent acquiescence in the violations.

The court refused to sustain laches in this case, and impliedly ruled there was no unreasonable delay by plaintiff in asserting his rights, when there was no evidence as to the length of that delay. Generally, the courts insist on a prompt assertion of rights in cases where the moving party seeks to place the parties in status quo because of the unusual opportunity for prejudice to the other party.[28] However, in the absence of any evidence on the length of delay by plaintiff, it is inconceivable that a plea of laches could prevail. Whether defendant would have prevailed if he had presented evidence on the lapse of time is speculative, but certainly his position would be more tenable.

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26. State v. Stanton, 311 S.W.2d 137 (K.C. Mo. App. 1958). A delay of sixty days, when accompanied by valuable improvements, was held sufficient.

"All of the surrounding facts and conditions must be considered along with lapse of time. When so considered a comparatively short lapse of time may suffice." Virginia C. Mining, Milling & Smelting Co. v. Clayton, 233 S.W. 215, 218 (Mo. 1921).

27. 228 Mo. 218, 242, 129 S.W. 1, 9 (1910). (Dictum).

28. Taylor v. Short, 107 Mo. 384, 392-93, 17 S.W. 970, 972 (1891).

DESCENT AND DISTRIBUTION—WILLFUL KILLING OF SPOUSE—EFFECT ON RIGHT OF SURVIVING SPOUSE TO STATUTORY ALLOWANCE

In Re Estate of Laspy[1]

On January 1, 1955, Elsie May Laspy shot and killed her husband in the Laspy home following a New Year's party. During the course of the party Mr. Laspy was angry with her and had beaten and threatened several times to kill her. As the party was drawing to a close, the Laspys were in their bedroom when Mr. Laspy reached into his closet, and Mrs. Laspy, thinking that he was reaching for a gun with which to shoot her, picked up a pistol and shot him three times, killing him almost instantly. In fact, Mr. Laspy was not reaching for a gun at all. Mrs. Laspy was subsequently tried and convicted of voluntary manslaughter; her claim of self-defense failed. She was sentenced to 10 years in prison, and the conviction was affirmed by the Missouri Supreme Court.[2]

Thereafter, she petitioned for a widow's allowance in money for one year's maintenance and for four hundred dollars in cash in lieu of specific personal property, pursuant to sections 474.250,[3] .260,[4] RSMo 1955. She was unsuccessful in both the probate and circuit courts, and the Kansas City Court of Appeals affirmed.

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1. 409 S.W.2d 725 (K. C. Mo. App. 1966).

2. State v. Laspy, 323 S.W.2d 713 (Mo. 1959). The factual details of the killing were reported in the civil case, *In re* Estate of Laspy, *supra* note 1.

3. "Exempt Property of Surviving Spouse or Minor Children.—The surviving spouse, or unmarried minor children of a decedent are entitled absolutely to the following property of the estate without regard to its value: The family bible and other books, all wearing apparel of the family, all household electrical appliances, all household musical and other amusement instruments and all household and kitchen furniture, appliances, utensils and implements. Such property shall belong to the surviving spouse, if any, otherwise to the unmarried minor children in equal shares." It will be noted that there is no express exception to this statute in the event of a willful killing.

4. "Family Allowance of Spouse and Minor Children.—In addition to the right to homestead and exempt property the surviving spouse and unmarried minor children of a decedent shall be entitled to a reasonable allowance in money out of the estate for their maintenance during the period of one year after the death of the spouse, according to their previous standard of living, taking into account the condition of the estate of the deceased spouse. The allowance so ordered may be made payable in one payment or in periodic installments, and shall be made payable to the surviving spouse, if living, for the use of such surviving spouse and the minor children; otherwise to the guardians or other persons having the care and custody of any minor children; but in case any minor child is not living with the surviving spouse, the court may make such division of the allowance for maintenance as it deems just and equitable. The court may authorize the surviving spouse to receive any personal property of the estate in lieu of all or part of the money allowance authorized by this section, and in any case where the court makes such allowance in money, the surviving spouse shall be entitled to select and receive any personal property of the estate, of a value not exceeding such allowance in money, which shall be in lieu of and which value shall be credited against the allowance. The right of selection provided for herein is subject to the provisions of section 473.620, RSMo. The allowance herein authorized is exempt from all claims, charges, legacies, and bequests." It will be noted that there is no express exeception to this statute in the event of a willful killing.

In reviewing the lower court proceedings, the first problem facing the court of appeals was what effect, if any, should the manslaughter conviction have on the civil action instituted by Mrs. Laspy. In the trial *de novo* in circuit court, the record of Mrs. Laspy's final conviction for manslaughter was received into evidence and was given conclusive effect; she was not allowed to introduce evidence that she shot in self-defense or to attack the criminal conviction in any other way. Although in the majority of jurisdictions a conviction in a criminal case is not admissible in a civil case to prove the facts upon which it is based,[5] the trend is in the opposite direction, especially when the criminal is seeking to reap the fruits of his criminal act in a civil action.[6] While in those courts which admit the criminal conviction it is generally only *prima facie* evidence,[7] the minority rule, gaining wider acceptance, is that it is conclusive.[8] It has been said many times in Missouri opinions that criminal convictions are not admissible in civil actions.[9] However, in *Laspy* the Kansas City Court of Appeals noted that this rule is only valid when the defendant in the criminal case is also the defendant in the civil case. In Missouri, the court declared, when the criminal affirmatively seeks to benefit from his criminal act in a civil action, the record of his criminal conviction will be received in the civil case as conclusive evidence of the facts upon which it is based. That the Missouri courts would take this position was suggested in a Federal Court of Appeals case from the Eighth Circuit,[10] and this seems to be the better reasoned position.

With regard to the substantive issue of the widow's rights in the decedent's estate, this was a case of first impression in Missouri, although cases involving the same general problem have arisen in the past. A similar question is presented in the following situations, provided the killing is sufficient to warrant a conviction for murder or voluntary manslaughter: heir or distributee kills intestate; devisee or legatee kills testator; beneficiary kills insured; joint tenant kills joint tenant; one tenant by the entirety kills the other; reversioner or remainderman kills the life tenant. Given one of these fact situations, problems arise when the killer attempts to take property from the estate of the deceased in one way or another.

A basic problem, at the heart of all of the aforementioned factual situations, is whether a constitutional provision prohibiting the forfeiture of estates because of a criminal conviction is offended when the killer is prevented from taking property from the estate of his victim. In Missouri[11] and most other jurisdictions[12] the consensus is that such a constitutional provision is not offended, the general reasoning

5. Smith v. Dean, 226 Ark. 438, 290 S.W.2d 439 (1956); Rednall v. Thompson, 108 Cal. App.2d 662, 239 P.2d 693 (Dist. Ct. App. 1952); Annot., 18 A.L.R.2d 1287 (1951).

6. Mineo v. Eureka Security Fire & Marine Ins. Co., 182 Pa. Super. 75, 125 A.2d 612 (1956); Knibbs v. Wagner, 14 App. Div.2d 987, 222 N.Y.S.2d 469 (1961).

7. Greenburg v. Winchell, 136 N.Y.S.2d 877 (Sup. Ct. 1954); Smith v. Andrews, 54 Ill. App.2d 51, 203 N.E.2d 160 (1964).

8. *In re* Kravitz' Estate, 418 Pa. 319, 211 A.2d 443 (1965).

9. Sklebra v. Downey, 220 Mo. App. 5, 285 S.W. 148 (St. L. Ct. App. 1926); Myers v. Maryland Cas. Co., 123 Mo. App. 682, 101 S.W. 124 (K.C. Ct. App. 1907).

10. Connecticut Fire Ins. Co. v. Ferrara, 277 F.2d 388 (8th Cir. 1960).

11. Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908).

12. Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933).

being that the killer is not forfeiting anything—he is merely prevented from acquiring property in an unlawful manner, *i.e.*, by murder or voluntary manslaughter. After disposing of the constitutional argument, providing it is ever reached,[13] other problems remain with respect to each of the aforementioned factual situations.

Perhaps the most common situation is where the heir or distributee kills the intestate. There are four different views as to the effect of the killing on the heir's right to take property from the estate of the deceased by intestate succession.[14] One view holds that the right of succession is not impaired at all.[15] Another view holds that there is no right of succession, provided there is a conviction for murder or voluntary manslaughter.[16] A few states hold that the killer retains the right of succession, but that it is held on constructive trust for the benefit of those who would have succeeded had the killer pre-deceased the victim.[17] The fourth view, and the one that prevails in Missouri, is that the right to succeed is lost whether or not there is a conviction, so long as the killing is of such a nature that a conviction for murder or voluntary manslaughter would be possible.[18] In spite of an intestate descent statute that admits of no such exception on its face, the reasoning of the Missouri decisions has been that the statute was passed subject to the common law rule that no one should be allowed to profit from his wrongful act.

When a devisee or legatee kills the testator, the general rule is that he can take nothing by virtue of the provisions of the will.[19] Another view is that the killer holds title on constructive trust for the benefit of the heirs of the victim, to whom he will be compelled to convey title.[20]

When land is held as entireties property, there are three different views as to what happens to the property so held when one spouse kills the other.[21] One view is that the killing has no effect on the right of survivorship.[22] In other states the killer holds a certain interest on constructive trust, although the courts differ on the interest held.[23] The third view, and the one that is followed in Missouri, is that the killer retains his half interest, but that he has no right to

13. The constitutional argument is frequently never mentioned by the court, the implicit understanding being that it has no application. In other cases the constitutional argument never arises because in some states the killer is not prevented in any way from taking and enjoying property from the estate of his victim.

14. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1089 (1966). See generally 9 ALA. L. REV. 58 (1956); 7 MIAMI L. Q. 524 (1953); Annot., 39 A.L.R.2d 477 (1955).

15. McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906).

16. *In re* Tarlo's Estate, 315 Pa. 321, 172 Atl. 139 (1934).

17. Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948).

18. Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908).

19. *In re* Wilkin's Estate, 192 Wis. 111, 211 N.W. 652 (1927), 11 MINN. L. REV. 680 (1927); Annot., 36 A.L.R.2d 960 (1954).

20. Whitney v. Lott, 134 N.J. Eq. 586, 36 A.2d 888 (Ch. 1944).

21. See 9 ALA. L. REV. 58 (1956); Annot., 32 A.L.R.2d 1099 (1953).

22. Weneker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939), 24 MINN. L. REV. 430 (1940).

23. Compare Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927), with Sherman v. Weber, 113 N.J. Eq. 451, 167 Atl. 517 (Ch. 1933).

the deceased spouse's half.[24] In denying the right of survivorship, the reasoning in Missouri again is that one should not be allowed to profit from his own wrongful act.

Courts have split four different ways when a joint tenant kills the other.[25] Some hold that the right of survivorship is not affected and the killer holds the entire estate.[26] Another view is that the killer retains his half interest in the property, but that there is no right of survivorship.[27] Other courts hold that the killer acts as a constructive trustee for the benefit of the deceased tenant's representatives.[28] A fourth view, and one not found in the entireties cases, is that the killer has no right of survivorship and also loses the interest he had in the property before the killing.[29]

When a remainderman or reversioner kills the life tenant, some courts hold that the remainder or reversion still vests.[30] However, in a Missouri case, the grantor conveyed a defeasible fee to the grantee, reserving a possibility of reverter contingent upon the grantee predeceasing him. Then the grantor killed the grantee. The court indicated that title would not have reverted to the grantor, but for the fact that he was insane at the time of the killing, so that a homicide conviction would not have been possible.[31]

When a primary beneficiary of a life insurance policy kills the insured, some courts will not allow him to take the proceeds, but allow them to go to the person, other than the killer, who would most likely have taken by intestate succession had the killing not occurred, this determination being based on mortality tables.[32] Another view pays the proceeds to the estate of the insured.[33] Other courts pay the proceeds to the alternative beneficiary.[34] In a Missouri case it has been suggested that if a beneficiary kills the insured under circumstances where a conviction for voluntary manslaughter or murder would be possible, he would not be allowed to take the proceeds under the policy.[35]

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24. Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948); Fitzgerald, *Tenancy by the Entirety—Disposition of Property Where One Co-Tenant Murders the Other,* 13 Mo. L. REV. 463 (1948).

25. See Annot., 32 A.L.R.2d 1099 (1953).

26. Smith v. Greenburg, 121 Colo. 417, 218 P.2d 514 (1950).

27. *In re* King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952), 1953 WIS. L. REV. 567.

28. Vesey v. Vesey, 237 Minn. 295, 54 N.W.2d 385 (1952).

29. Bierbrauer v. Morgan, 244 App. Div. 87, 279 N.Y.S. 176 (1935). This view does not offend the constitutional provision concerning forfeitures since the general reasoning is that had the killing not occurred, the victim would still be living and would eventually receive the killer's interest by survivorship.

30. Blanks v. Jiggetts, 192 Va. 337, 64 S.E.2d 809 (1951). See Annot., 24 A.L.R.2d 1120 (1952).

31. Eisenhardt v. Siegel, 343 Mo. 22, 119 S.W.2d 810 (1938) (dictum); James, *Descent and Distribution—Murder of Ancestor—Intention of the Killer,* 4 Mo. L. REV. 210 (1939).

32. See 26 A.L.R.2d 987 (1952).

33. Beck v. Downey, 191 F.2d 150 (9th Cir. 1951).

34. Metropolitan Life Ins. Co. v. McDavid, 39 F. Supp. 228 (E.D. Mich. 1941).

35. Hopkins v. Metropolitan Life Ins. Co., 151 S.W.2d 527 (St. L. Mo. App. 1941) (dictum).

With these cases as a background, the Kansas City Court of Appeals was faced with a new but similar question in *Laspy*. In some states, the problem is taken care of by statute, *e.g.* Pennsylvania, where a willful and unlawful killer is treated as if he predeceased his victim when he petitions for a statutory allowance.[36] In Ohio there is a statute providing for an allowance for a surviving spouse, similar to Missouri's, and also a statute providing that a willful killer cannot inherit from his victim. When a husband murdered his wife and instituted a suit for his statutory allowance, it was held that the statute which prevented him from inheriting from his wife also prevented him from taking his statutory allowance.[37]

Not having the aid of a statute which forbids willful killers from taking property from victim's estates, the court relied on the general reasoning of past Missouri decisions in holding against the plaintiff. It reasoned that sections 474.250, .260, RSMo 1955 were passed subject to the common law rule that no one is to profit from his own wrongful act. The effect of the case is to apply an old and established principle to a new situation, and in view of past precedent and in the interest of a just and reasonable rule of law, it is submitted that the decision is a sound one.

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36. 20 P.S. § 3443.
37. Bauman v. Hogue, 160 Ohio St. 296, 116 N.E.2d 439 (1953).