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Recent Cases

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GARNISHMENT—JURISDICTION OVER THE RES AND THE SHERIFF'S RETURN

Fulkerson v. Laird[1]

On November 6, 1963, the plaintiff, J. A. Fulkerson, received a default judgment against the Lairds on a promissory note. A general execution was issued on December 27, 1963, returnable on January 20, 1964. The execution was returned *nulla bona* and a summons to garnishee directed to W. E. Foster was issued and was returned by the sheriff as follows:

> And, on the 27th day of March, 1964 summoned W. E. Foster, as Garnishee, copy of the summons being attached hereto and made a part of this return, all in Shannon County, Missouri.[2]

Foster did not answer the summons or interrogatories exhibited to him. Subsequently, the circuit court entered an interlocutory order on September 3, 1964, directing Foster to pay the judgment amount into court. Foster failed to pay said amount into court and plaintiff Fulkerson filed a "Motion for Judgment Against Garnishee." Thereupon Foster filed a "Motion to Quash Execution, Summons to Garnishee and Service of Sheriff's Return Thereto." The circuit court sustained the plaintiff's motion and overruled Foster's. In the Springfield Court of Appeals, the judgment against Foster was reversed on the ground that the sheriff's return was insufficient to confer jurisdiction over the *res* since it reflected no constructive seizure or declaration of garnishment as required by Rule 85.21.[3] This decision by the court of appeals is the subject of this note.

It has been a long stated rule in Missouri and elsewhere that strict compliance with statutory requirements is a prerequisite to support the court's jurisdiction

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1. 421 S.W.2d 523 (Spr. Mo. App. 1967).
2. Fulkerson v. Laird, *supra* note 1, at 525.
3. The court relied on alternative grounds, not brought out by counsel, that could alone have been case dispositive. Rule 76.04 Mo. R. Civ. P. (Sec. 513.040, RSMo 1959) provides that "[e]very execution issued from any court of record shall be made returnable in not less than 30 days, nor more than 90 days, at the option of the judgment creditor, from the date of issuance." January 20, 1964, was only twenty-four days after the date of issuance and was "in plain violation of the mandate." Fulkerson v. Laird, 421 S.W.2d 523, 525 (Spr. Mo. App. 1967).

Rule 90.02 (Sec. 525.020, RSMo 1959) was also violated. It requires specifically that "[t]he return date of the summons to garnishee shall be the return date of the execution." Because the execution was returnable January 20, 1964, all subsequent proceedings, *i.e.*, those on March 27, 1964, were null and void. Fulkerson v. Laird, *supra*, at 527.

over garnishment proceedings.[4] The explanation of this proposition lies primarily in the notion that, because the process was unknown at common law, "every step of the proceeding must find clear sanction in the statutory law."[5] There is also a tendency to note that since garnishment involves a pursuit of property in the hands of third persons, the enactments should be interpreted in favor of those against whom they are invoked so as to not unnecessarily disturb the *status quo*.[6]

But in Missouri, strict compliance with statutory requirements is made difficult by garnishment statutes and rules[7] that have been judicially described as "a confusing hodge-podge."[8] Although Missouri makes no provision for a separate writ of garnishment,[9] chapter 525 RSMo 1959 and Rule 90(A) of the Missouri Rules of Civil Procedure are entitled *"Garnishments,"* and would ostensibly set forth the procedure for notice and summons. Rule 90.02[10] says that in the case of garnishment in aid of execution, the service of garnishment and the subsequent proceedings against and in behalf of the garnishee "shall be the same as in the case of garnishment under an attachment" and shall have "like effect as in the case of an original attachment."[11] A reasonable interpretation of this requirement would be that garnishment in aid of execution was intended to follow the same proceedings that are set forth in Rule 90 for garnishment in aid of attachment. This would mean that Rule 90.05[12] would apply to writs of execution as well as writs of attachment.[13] More than ninety years ago, however, the Missouri courts interpreted the statutory ancestor of Rule 90.02[14] to require reference beyond the *"Garnishment"* chapter and to relate to the statutes under the title *"Attachments."*[15] The

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4. Epstein v. Salorgne, 6 Mo. App. 352, 354 (St. L. Ct. App. 1878); Federal Truck Co. v. Mayer, 216 Mo. App. 443, 450, 270 S.W. 407, 409 (St. L. Ct. App. 1925); State *ex rel.* Shaw State Bank v. Pfeffle, 220 Mo. App. 676, 685, 293 S.W. 512, 516 (St. L. Ct. App. 1927); Rallo Contracting Co. v. Blong, 313 S.W.2d 734, 737 (St. L. Mo. App. 1958). See 6 AM. JUR. 2d *Attachment and Garnishment* § 7 (1963).

5. Blackburn Motor Co. v. Benjamin Motor Co., 340 S.W.2d 155, 160 (St. L. Mo. App. 1960).

6. Blackburn Motor Co. v. Benjamin Motor Co., *supra* note 5; Trinidad Asphalt Mfg. Co. v. Standard Oil Co., 214 Mo. App. 115, 258 S.W. 64, 67 (St. L. Ct. App. 1924).

7. The Missouri Rules of Civil Procedure relating to execution, attachment, and garnishment have corresponding sections in the Revised Statutes of Missouri. The rules supercede the statutes. Mo. R. Civ. P. 41.04.

8. Chenowith v. LaMaster, 342 S.W.2d 500, 501 (Spr. Mo. App. 1961).

9. Mo. R. Civ. P. 90.01. Milliken v. Armour & Co., 231 Mo. App. 662, 664, 104 S.W.2d 1027, 1028 (K.C. Ct. App. 1937).

10. Substantially the same as Sec. 525.020, RSMo 1959.

11. Mo. R. Civ. P. 90.02.

12. Same as Sec. 525.060, RSMo 1959.

13. "The officer serving a *writ of attachment* shall return all bonds taken by him into court, with the writ, and a statement of the names of all garnishees, together with the day and hour and the places when and where they even respectively summoned." Mo. R. Civ. P. 90.05.

14. Wag. Stat. 664 Sec. 2.

15. Keane v. Bartholow, Lewis & Co., 4 Mo. App. 507, 509 (St. L. Ct. App. 1877).

result, as represented in this case, is that the requiremens of Rule 85.21[16] were added to the Rule 90 provisions pertaining to notice of summons of garnishment.

The weakness of this case does not, however, lie in the fact that it endorses the nonmandatory application of Rule 85.21 as much as it lies in the perpetuation the case gives to a harsh interpretation of the Rule's requirements. The determination that Rule 85.21 sets forth nonwaivable jurisdictional prerequisites to a valid garnishment is not new. The rule has different requirements depending upon whether chattels and evidences of debt, or credits are to be attached.[17] If the former are involved, the sheriff must take them into his custody when they are accessible.[18] If they are not accessible, he follows the rule entitled *"Credits"* (Rule 85.21(e)) and must "declare to the debtor of the defendant that he attaches in his hands all debts due from him to the defendants . . . and summons such debtor as garnishee."[19]

Missouri courts have taken this to mean that in attachment proceedings there were two types of jurisdictions to be achieved: jurisdiction over the person of the garnishee[20] in the form of summons, and jurisdiction over the *res* or property[21] in the form of seizure or declaration[22] of attachment.[23] As a result of the court's interrelationship of the attachment and garnishment statutes it was determined that garnishment also required a jurisdiction over the *res*,[24] in spite of the fact that the process makes no use of seizure by the levying officer, as does attachment.[25]

The problem is that while the garnishee can waive defects in attaining personal jurisdiction over him by appearing,[26] answering interrogatories,[27] or engaging in trial,[28] jurisdiction over the *res* can be conferred neither by waiver nor consent,[29]

16. Substantially the same as Sec. 521.170, RSMo 1959. Rule 85 and chapter 521 are entitled *"Attachments."*

17. Mo. R. Civ. P. 90.01 and 90.03 (Secs. 525.010 and 525.030, RSMo 1959) set forth the kinds of property that can be garnished. It is more limited than the area of property subject to attachment. Mo. Bar, *Creditors' Remedies, Attachments* § 4.6 (1967).

18. Mo. R. Civ. P. 85.21 (d).

19. Mo. R. Civ. P. 85.21 (e).

20. Conner v. Pope, 18 Mo. App. 86, 89 (K.C. Ct. App. 1885).

21. Fletcher v. Wear, 81 Mo. 524, 530 (1884).

22. The declaration or notice required by Mo. R. Civ. P. 85.21 (e) need not be oral and can be written. Marx v. Hart, 166 Mo. 503, 521, 66 S.W. 260, 266 (1901).

23. Maulsbury v. Farr, 3 Mo. 439 (1834); Norvell v. Porter, 62 Mo. 309 (1876); Conner v. Pope, 18 Mo. App. 86 (K.C. Ct. App. 1885).

24. Fletcher v. Wear, 81 Mo. 524, 530 (1884); Keane v. Bartholow, Lewis & Co., 4 Mo. App. 507, 508-510 (St. L. Ct. App. 1877).

25. "Garnishment is resorted to in order to avoid the responsibilities incident to the actual seizure and custody of the property." McGarry v. Lewis Coal Co., 93 Mo. 237, 240, 6 S.W. 81, 82 (1887).

26. Rallo Contracting v. Blong, 313 S.W.2d 734, 737 (St. L. Ct. App. 1958).

27. Gates v. Tusten, 89 Mo. 13, 21, 14 S.W. 827, 829 (1886); Dodge v. Knapp, 112 Mo. App. 513, 523, 87 S.W. 47, 50 (St. L. Ct. App. 1905).

28. Epstein v. Salorgne, 6 Mo. App. 352, 354 (St. L. Ct. App. 1878).

29. Epstein v. Salorgne, *supra;* Gates v. Tusten, 89 Mo. 13, 21, 14 S.W. 827, 829 (1886); Kurre v. American Indemnity Co., 223 Mo. App. 406, 413, 17 S.W.2d 685, 687 (St. L. Ct. App. 1929); State *ex rel.* Shaw State Bank v. Pfeffle, 220 Mo. App. 676, 685, 293 S.W. 512, 516 (St. L. Ct. App. 1927).

and defects are held to render the proceedings void and subject to collateral attack.[30] The practical result is that a garnishee who is aware of a defect in attaining jurisdiction over the *res* can, as was done here, stand by mute while the judgment creditor proceeds headlong towards an unavoidable reversal.

Although the consequences of the doctrine are severe, its rationale is not wholly unmeritorious. It starts with the proposition that a garnishment proceeding is *quasi in rem*.[31] Accordingly, it is said, the garnishee has no power to dispense with that part of the statute which relates not to himself but to the property. He cannot, in other words, by any voluntary act on his part, waive those requirements which the statutes prescribe as necessary before the property can be held against its real owner.[32] If, then, the garnishee were not allowed to set up his defense at any stage of the proceedings he would be "required to put himself in the position of allowing a judgment to go against him which would be of no protection to him if he paid it."[33]

The problem with the Missouri approach lies in the effect given the initial proposition that garnishment is a *quasi in rem* proceeding. The term *"quasi in rem"* conjures thoughts of an action involving a person and a wholly distinct physical asset. This is unlike the situation in the present case where the property is an intangible asset. It is doubtful whether an obligation of garnishee to the defendant can be sufficiently distinguished from the person of the garnishee so as to make jurisdiction over the *res* meaningfully different from jurisdiction over the person in any way other than in terms of the result assigned to the failure to accomplish the acts said to produce it. This point was emphasized in *Harris v. Balk*.[34] There the garnishee's creditor (the principal defendant in the garnishment process) argued that a foreign garnishment was void because the situs of the debt was at the domicile of the debtor and the *res* was consequently beyond the foreign court's jurisdiction. The United States Supreme Court rejected this contention saying,

> If there be a law of the State providing for the attachment of the debt, then if the garnishee be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that State.[35]

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30. Howell v. Sherwood, 213 Mo. 565, 576, 112 S.W. 50, 53 (1908). Federal Truck Co. v. Mayer, 216 Mo. App. 443, 450, 270 S.W. 407, 409 (St. L. Ct. App. 1925).

31. Epstein v. Salorgne, 6 Mo. App. 352, 354 (St. L. Ct. App. 1878).

32. Trinidad Asphalt Co. v. Standard Oil Co., 214 Mo. App. 115, 258 S.W. 64, 67 (St. L. Ct. App. 1924); Kurre v. American Indemnity, 223 Mo. App. 406, 413, 17 S.W.2d 685, 687 (St. L. Ct. App. 1929); Rallo Contracting Co. v. Blong, 313 S.W.2d 734, 737 (St. L. Mo. App. 1958).

33. Federal Trucking Co. v. Mayer, 216 Mo. App. 443, 450, 270 S.W. 407, 409. See Conner v. Pope, 18 Mo. App. 86, 89 (K.C. Ct. App. 1885).

34. 198 U.S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023 (1905).

35. Harris v. Balk, *supra* note 34 at 222, 25 Sup. Ct. at 626, 49 L. Ed. at 1026.

This case has been cited in several Missouri cases making like holdings on similar facts.[36]

If the debt goes with the debtor when he journeys into a foreign state, it should likewise accompany him when he responds to personal summons and enters circuit court. Any further conceptual definitiveness is difficult and arguably meaningless. It would seem that when jurisdiction is conferred over the garnishee-obligor it is also confirmed over the obligation, and subsequent actions by the judgment debtor against the garnishee should be subject to the defense of payment.[37]

Perhaps the concern about the garnishee's possible double liability stems from an undiscussed recognition of the ludicrousness of the sheriff declaring that an intangible has been attached in his hands. Since it has been held that jurisdiction over the *res* cannot otherwise be achieved, one party must be adversely affected when the declaration is not made. The court may in effect be saying that the risk of nonperformance of this valueless ritual should not be imposed upon a garnishee who is only a third party, and therefore it must rest with the judgment creditor. The better solution, however, would be to spurn the unnecessary distinction and impose no burden at all.

If the notion that the declaration should be jurisdictional and mandatory is cause for disagreement, the real holding of this case might give rise to revolt. This is the ratification of the rule that, "to confer jurisdiction over the *res* in a garnish-

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36. State v. Kirkwood, 345 Mo. 1089, 138 S.W.2d 1009 (1940); Western Assurance Co. v. Walden, 238 Mo. 49, 141 S.W. 595 (1911); See also: Wyeth Hardware Co. v. Lang & Co., 127 Mo. 242, 29 S.W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626 (1895); Howland v. Chicago Rock Island & Pacific Ry., 134 Mo. 474, 36 S.W. 29 (1896); State *ex rel.* Richardson v. Mueller, 230 Mo. App. 962, 90 S.W.2d 171 (St. L. Ct. App. 1936).

37. There is language in Missouri cases to support this proposition. See Dodge v. Knapp, 112 Mo. App. 513, 522, 87 S.W. 47, 50 (St. L. Ct. App. 1905); Potter v. Whitten, 161 Mo. App. 118, 130, 131, 142 S.W. 453 (Spr. Ct. App. 1912); Western Stoneware Co. v. Pike County Mineral Spring Co., 172 Mo. App. 696, 704, 155 S.W. 1083 (St. L. Ct. App. 1913); Mound City Engraving Co. v. Mobile & Ohio Ry. Co., 146 Mo. App. 463, 470, 124 S.W. 27 (St. L. Ct. App. 1910). These cases were overruled to the extent they were contrary to Federal Truck Co. v. Mayer, 216 Mo. App. 443, 450, 270 S.W. 407, 409 (St. L. Ct. App. 1925).

The concept of jurisdiction over a *res* seems inconsistent with Missouri rulings that garnishment creates no lien on the property of the defendant in the hands of the garnishee. McGarry v. Lewis Coal Co., 93 Mo. 237, 6 S.W. 81 (1887); Marx v. Hart, 166 Mo. 503, 66 S.W. 260 (1901); Dodge v. Knapp, 112 Mo. App. 513, 87 S.W. 47 (St. L. Ct. App. 1905).

In the leading case, McGarry v. Lewis Coal, *supra,* the court said:

> Garnishment is, as the term implies, a warning to the garnishee not to dispose of the property of the defendant in his hands, and that, if he does so dispose of the same, he will subject himself to personal liability for the value, to the extent at least, of the plaintiff's debt or claim. Ordinarily property is not deemed to be in the custody of the law until actually seized and reduced to possession by the officer. McGarry, *supra* at 240, 6 S.W. at 82.

It would seem that if only personal liability is obtained by the garnishment, only personal jurisdiction would be necessary to make the process effective.

ment proceeding, the officer's return[38] must affirmatively show substantial compliance with essential requirements including the injunction . . . [of Rule 85.21(e); § 521.170(5)]."[39] The exasperated creditor now finds himself with a judgment that is vulnerable not just because the sheriff failed to recite precise words to the garnishee, but because the sheriff failed to show in the return that there was such a recital.[40] Moreover, it is not entirely clear whether the making of the declaration is even of any significance. At earlier points along this line of cases it has been said that "the only legitimate evidence" of attachment or garnishment is to be found in the writ,[41] and that "it is the return of the officer upon the writ which constitutes the attachment of the debt due."[42] Given this language, it would not be preposterous to one day receive a holding that jurisdiction over the *res* is conferred by a proper return even though no notice was in fact given.

This decision does not introduce any new theoretical concepts or practical problems to the Missouri law. It is significant only in that it perpetuates an interpretation of the statutes that has made the garnishment process exceedingly unglamourous to judgment creditors. When it is considered alongside two other harsh Missouri rulings, one of which overrules as premature default judgments that are rendered prior to a determination of the amount the garnishee owes the judgment creditor,[43] and the other which allows no lien upon notice of summons of garnishment,[44] the judicial inclination to strictly construe garnishment statutes[45] appears

38. The officer's return is made upon the writ of execution itself and not upon the summons of garnishment. Mo. Bar, *Creditors' Remedies, Garnishment* § 3.7 (1967).

39. Fulkerson v. Laird, 421 S.W.2d 523, 526 (Spr. Mo. App. 1967).

40. In Kansas & T. Coal Co. v. Adams, 99 Mo. App. 474, 74 S.W. 158 (K.C. Ct. App. 1903), the Constable's return stated, "I hereby certify that I delivered a true copy of the within summons to W. R. Vail, . . . attaching in his hands the money of said defendant." Kansas & T. Coal Co. v. Adams, *supra* at 480, 74 S.W. at 160. The court held the return inadequate to establish jurisdiction over the *res* because it did not show the declaration of attachment was made. For a form for an appropriate return, see Mo. Bar, *Creditors' Remedies*, § 3.7 (1967).

41. Norvell v. Porter, 62 Mo. 309, 311 (1876). Many jurisdictions say the sheriff's return is only good evidence that acts in question were performed rather than being determinative. See 6 AM. JUR. 2d *Attachment and Garnishment*, §§ 325, 326 (1967).

42. Gates v. Tusten, 89 Mo. 13, 21, 14 S.W. 827, 829 (1886). Nineteenth century treatises state this proposition as "black-letter law" but rely almost exclusively on Missouri cases, cited *infra*, for support. See DRAKE, ATTACHMENT, § 451(d) (7th ed. 1891); 2 SHINN, ATTACHMENTS AND GARNISHMENT § 611(f) (1896).

43. Chenowith v. La Master, 342 S.W.2d 500, 501, 502 (Spr. Mo. App. 1961). This means that the interrogatories provided for in Mo. R. Civ. P. 90.12, 90.13 can be ignored by the garnishee without consequence unless the judgment creditor is willing to "attach" the body of the garnishee as provided in rule 90.13. Without the information from the interrogatories the judgment creditor has little opportunity to determine the amount due from the garnishee to the judgment debtor and cannot set forth in the default judgment the exact amount garnished. The anomalous result is that the garnishee, by refusing to answer, is able to negate the penalty for refusing to answer.

44. McGarry v. Lewis Coal Co., 93 Mo. 237, 6 S.W. 81 (1887). See note 37, *supra*.

45. See note 4, *supra*.

to amount to a conscious preference for debtors. At any rate, the annoying pitfall here approved only weakens further the garnishment process as a method of collecting perfectly legitimate debts.

ALAN L. ATTERBURY

TORTS—VIOLATION OF CRIMINAL STATUTE AS NEGLIGENCE PER SE

Siess v. Layton[1]

Plaintiff, Siess, by next friend,[2] sued for damages for injuries sustained in an intersection collision with defendant's automobile. At the time of the collision plaintiff was operating a motorbike. Interrogatories revealed that plaintiff was fourteen-years-old and driving in violation of Missouri statutes requiring drivers of motorbikes to be licensed.[3] Defendant sought summary judgment, contending that plaintiff's violation of the licensing statutes constituted contributory negligence as a matter of law. The trial court held that plaintiff had no cause of action because plaintiff was "incompetent as a matter of law."[4] For this reason the court granted defendant's motion for summary judgment. On appeal to the Missouri Supreme Court, the rendition of the summary judgment was reversed. The court found no causal connection between the violation of the licensing statutes and the injury and reasserted this as a valid exception to the negligence per se rule.

As a preliminary matter, attention is directed to the fact that the noted case involves the relatively infrequent assertion of *contributory* negligence per se. While some early cases held that a plaintiff has no cause of action if he was engaging in illegal conduct at the time of the event which forms the basis of his suit,[5] the generally accepted rule today is that in this respect a plaintiff stands on the same footing as a defendant who breaches a statute—he is no better off

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1. 417 S.W.2d 6 (Mo. 1967).
2. See § 517.190, RSMo 1959.
3. § 302.020, RSMo 1959:

It shall be unlawful for any person to . . . (2) Drive other than as a chauffeur any motor vehicle . . . upon any highway of this state unless such person has a valid license as an operator under the provisions of this chapter . . . .

§ 564.470, RSMo 1959:

1. No person under the age of sixteen years shall operate a motor vehicle on the highways of this state.

4. The majority of jurisdictions, including Missouri, do not require that the plaintiff prove freedom from contributory negligence in order to recover, contributory negligence being an affirmative defense. Here the defense may deny Siess a recovery, but he clearly had a cause of action, and the trial court decision may be criticized if for no other reason than the use of such language.

5. Patrican v. Garvey, 287 Mass. 62, 190 N.E. 9 (1934); Masters v. Von Lehmden, 36 Ohio App. 414, 173 N.E. 303 (1930) (Last clear chance not available); Davis, *The Plaintiff's Illegal Act as a Defense in Actions of Tort,* 18 HARV. L. REV. 505 (1905).

and no worse off.[6] In practice, however, a plaintiff who has violated a statute may suffer less prejudice than a defendant,[7] the reason being an observable distaste for contributory negligence as a defense, regardless of form.[8] Thus, while the discussion which follows is cast in terms of *primary* negligence per se, the formal principles apply with equal force to the proof of plaintiff's contributory negligence—even though juries and courts may be less exacting in the application of such principles to evaluate the plaintiff's conduct.[9]

The purpose of a civil action is to adjust private rights between the litigants. The plaintiff, in order to recover, is required to show a reason for shifting the loss, *i.e.*, defendant's negligence,[10] and an important part of this proof consists of showing what the "ordinarily careful and prudent person"[11] would do under similar circumstances. Typically, the negligence—or fault—issue is decided by the jury, which determines both the facts of the defendant's conduct, and "whether this conduct was justifiable or should be condemned."[12] The doctrine of negligence per se does away with this weighing process by the jury, and, as classically enunciated by Thayer,[13] does so in a deceptively simple manner, *viz.*, reasonable men do not break the law and such conduct, being unreasonable, is, *a fortiori*, negligent. Missouri has long been among the majority of jurisdictions which holds that the violation of a criminal statute is negligence per se.[14] The proliferation of law at every level of government has made it increasingly difficult, however, to apply the doctrine literally,[15] and two escapes have been devised.

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6. RESTATEMENT (SECOND), TORTS § 285 (1965); PROSSER, TORTS 204 (3d ed. 1964). *Contra,* 2 HARPER & JAMES, TORTS 996-97 (1956) ("The doctrine appears to be a barbarous relic of the worst there was in puritanism.")

7. Williams v. Black, 147 Tenn. 331, 247 S.W. 95 (1923) (Special considerations given minors in determining contributory negligence held to prevail over a violation of statute as negligence per se); Morby v. Rogers, 122 Utah 540, 252 P.2d 231 (1953) (Same).

8. PROSSER, TORTS 428 (3d ed. 1964). See generally 65A C.J.S., *Negligence,* § 127 (1966).

9. The Missouri Approved Jury Instructions do not distinguish between defendant's "primary" and plaintiff's "contributory" negligence in providing for instructions on this issue. See, *e.g.,* MO. APPROVED INSTR. §§ 11.01-.03, 17.01, 28.01 (1964).

10. "Sound policy lets losses lie where they fall, except where special reason can be shown for interference." HOLMES, THE COMMON LAW 50 (1881).

11. See, *e.g.,* MO. APPROVED INSTR. § 11.02 (1964).

12. Morris, *The Relation of Criminal Statutes to Tort Liability,* 46 HARV. L. REV. 453 (1933). In PROSSER, TORTS 16-26 (3d ed. 1964), are set out six general considerations usually involved in this balancing of conflicting interests: (1) The moral aspect of defendant's conduct, (2) the historical development, (3) the convenience of administration, (4) the capacity to bear loss, (5) the aspect of preventon and punishment, and (6) the motive.

13. Thayer, *Public Wrong and Private Action,* 27 HARV. L. REV. 317 (1914).

14. Missouri applies the same rule to ordinances, administrative regulations, and, at times, even custom. Unless otherwise indicated, "statute" includes ordinances and administrative regulations. Gas Service Co. v. Helmers, 179 F.2d 101 (8th Cir. 1950) (custom); Fields v. Missouri Power & Light Co., 374 S.W.2d 17 (Mo. 1963) (administrative regulation); Monsour v. Excelsior Tobacco Co., 115 S.W.2d 219 (St. L. Mo. App. 1938) (ordinance); Beck v. Wurst Coal & Hauling Co., 293 S.W. 449 (St. L. Mo. App. 1927) (statute).

15. Morris, *The Role of Criminal Statutes in Negligence Actions,* 49 COLUM. L. REV. 21 (1949).

A strong minority of jurisdictions has rejected the negligence per se doctrine and hold, instead, that violation of a statute is merely evidence of negligence to be considered by the jury along with all other evidence.[16] This theory asserts that a violation of a statute *causes* no injury; that it is the act or omission which is relevant; and that this should be governed by the reasonable man standard.[17]

The majority of jurisdictions follows a "negligence per se" theory, but avoids the harsh results by applying a number of exceptions. The practical effect of this approach is to permit the judge to look at the criminal statute; to determine if the standard is applicable to the situation; and, if it is, to use that standard in place of the reasonable man test, leaving the jury only the factual question of whether or not there was a violation. If the criminal standard is deemed inapplicable by the judge, then the jury decides both the reasonable man standard and the question of its violation.[18] In this respect the difference between the majority and the minority may be more formal than real.

Missouri seems to follow the majority approach and recognizes eight exceptions to the negligence per se rule, one of which (No. "8," below) is applicable only when the violation of the statute is alleged to be *contributory* negligence. These exceptions apply when:

(1) The application of the statute is unconstitutional;[19]

(2) The statute was not in fact violated;[20]

(3) There was legal justification for the violation;[21]

(4) The injured plaintiff was not within the class meant to be protected;[22]

(5) The violation was not the proximate cause of the injury;[23]

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16. Lowndes, *Civil Liability Created by Criminal Legislation,* 16 MINN. L. REV. 361 (1932). Lowndes has been the most articulate spokesman for this viewpoint. For an example of this type case, see Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N.W.2d 680 (1949).

17. Lowndes, *supra* note 16, 16 MINN. L. REV. at 371.

18. Morris, *The Relation of Criminal Statutes to Tort Liability,* 46 HARV. L. REV. 453 (1933), and *The Role of Criminal Statutes in Negligence Actions,* 49 COLUM. L. REV. 21 (1949). For a good comparison of the Morris and Lowndes positions, see Comment, 1950 WASH. U.L.Q. 280 (1950).

19. Note, however, the mere fact the statute itself is unconstitutional is not necessarily a defense if the court finds the standard a valid measure of negligence: Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777, 778 (1943); Hartley v. McKee, 86 S.W.2d 359, 361 (St. L. Mo. App. 1935) (by implication); Rudes v. Gottschalk, 159 Tex. 552, 555-56, 324 S.W.2d 201, 204 (1959).

20. Beezley v. Spiva, 313 S.W.2d 691, 695 (Mo. 1958); Gower v. Lamb, 282 S.W.2d 867, 869 (St. L. Mo. App. 1955).

21. Bowman v. Ryan, 343 S.W.2d 613, 622 (St. L. Mo. App. 1961); MacArthur v. Gendron, 312 S.W.2d 146, 150 (St. L. Mo. App. 1958).

22. Kuba v. Nagel, 124 S.W.2d 597, 600 (St. L. Mo. App. 1939); Mansfield v. Wagner Electric Mfg. Co., 294 Mo. 235, 241, 242 S.W. 400, 403 (1922) (Cited by Morris, *supra* note 18, 46 HARV. L. REV. at 473, as a bad application of the doubtful rule of Gorris v. Scott.)

23. Siess v. Layton, 417 S.W.2d 6 (Mo. 1967); Bowman v. Heffron, 318 S.W.2d 269, 274 (Mo. 1948) (contributory negligence per se); Harris v. Hughes, 266 S.W.2d 763, 770 (K.C. Mo. App. 1954).

(6) Even though the injured party is within the class meant to be protected, the injury is so variant as to not be within the intendment of the statute;[24]

(7) The plaintiff induced the violation and is thereby estopped to assert it;[25] and

(8) The violation by the plaintiff was contributory negligence, but the defendant remains liable under the Humanitarian Doctrine or some other doctrine in mitigation of the classic defenses of contributory negligence and assumption of risk.[26]

Despite formal allegiance to the majority position, the language used by the courts suggests that Missouri, in practice, is an "evidence of negligence" jurisdiction. Thus, in *Lochmoeller v. Kiel*,[27] the court said that proof of a violation made a "prima facie" case for the jury. One year later in *Cantwell v. Cremins*[28] the court said that the "rule in both Illinois and Missouri and in most of the states is that a violation of a statute is *evidence of negligence*," and as late as 1963 the court stated that such a violation is a fact merely "tending to prove" negligence.[29] Expressions such as these, when coupled with the rather broad exceptions observed in Missouri, leave little substance to the negligence per se rule.

Although the practical consequences are arguably the same, it is submitted the "evidence of negligence" rule is preferable. This follows for at least two reasons. First, the negligence per se rule can be viewed as inconsistent with what is called "due process of law."[30] Thus, while the legislature is competent to change rules of evidence, and may create certain presumptions, there must be a rational connection between the fact proved and the conclusion inferred therefrom.[31] Similarly, the inference cannot rise to the level of a conclusive presumption unless the fact

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24. Rutledge v. Mo. Pac. Ry. Co., 110 Mo. 312, 322, 19 S.W. 38, 40 (1892) (Statute required "blocking" to prevent feet and legs from being injured. Plaintiff was thrown from the top of a railroad car and caught his arm in unblocked space.)

25. *Cf.* Borrini v. Pevely Dairy Co., 183 S.W.2d 839, 844 (St. L. Mo. App. 1944); Stack v. General Baking Co., 283 Mo. 396, 414, 223 S.W. 89, 94 (1920). These cases do not speak in terms of "estoppel," but the idea is implicit and the facts fit quite neatly into an estoppel analysis. See also, Annots., 47 A.L.R.2d 6, 69 (1956), 63 A.L.R. 277, 280 (1929).

26. This is supported by a multitude of Missouri cases, *e.g.*, Worth v. St. Louis-S.F. Ry. Co., 334 Mo. 1025, 1029-30, 69 S.W.2d 672, 674 (1934), and should remain true when the contributory negligence is a violation of statute. For a case so holding see Arnold v. Owens, 78 F.2d 495 (4th Cir. 1935).

27. 137 S.W.2d 625, 630 (St. L. Mo. App. 1940).

28. 347 Mo. 836, 842, 149 S.W.2d 343, 346 (1941) (emphasis added).

29. Grimes v. Standard Oil Co., 370 S.W.2d 627, 634 (St. L. Mo. App. 1963).

30. It is arguable that the doctrine may also create an undue burden upon interstate commerce by the possible imposition of a different standard of care every few miles through the penal laws of ever village, city and state. Research has yielded no specific case, but an analogy may be drawn from New York Times v. Sullivan, 376 U.S. 254 (1964), wherein a state's tort law was held offensive to first amendment freedoms.

31. Tot v. United States, 319 U.S. 463, 467-68 (1943); City of St. Louis v. Cook, 359 Mo. 270, 275, 221 S.W.2d 468, 470 (1949).

proved is, by itself, conclusive evidence of the legal conclusion inferred.[32] And, finally, a fair opportunity to overcome a statutory presumption must be available.[33]

Departure from any one of the foregoing requirements is, arguably, a violation of the due process clause of the fourteenth amendment. In other words, if, under that due process clause, a legislature cannot provide that the operation of a bus above a speed of 25 m.p.h. within a city shall be "proof" of imprudent driving,[34] how can a trial judge reach the same result by holding that the violation of a penal standard creates a conclusive presumption of "imprudent driving" via the negligence per se rule?

Second, the negligence per se rule may produce an "overbreadth" in that it may subject the defendant to losses disproportionate to wrongs which in other contexts are minor, or petty.[35] Where the legislation does not even speak to civil litigation as such, these results are difficult to explain.[36] It is submitted that evidence of the mere fact of violation places the defendant at a considerable disadvantage even without the negligence per se rule:

> Unless the jury are exceptionally discriminating, however, it is very doubtful whether the carelessness of the defendant in failing to conform to the statute will impress them as much as the illegality of his actions. As a matter of fact, the jury will be more apt to decide against the defendant because he has violated the law than because of any absence of due care.[37]

In summary, Missouri's adherence to negligence per se language creates more difficulties than it is worth.[38] Since negligence per se has been abandoned in all but name, it is difficult to see what disadvantages would result were the doctrine frankly and explicitly repudiated. In substitution, a theory similar to that advanced by the *Restatement*[39] would bring theory into greater harmony with practice.

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32. Mobile, J. & K. C. R. R. v. Turnipseed, 219 U.S. 35 (1910); O'Donnell v. Wells, 323 Mo. 1170, 21 S.W.2d 762 (1929).

33. Western & Atl. R. Co. v. Henderson, 279 U.S. 639 (1929).

34. O'Donnell v. Wells, 323 Mo. 1170, 21 S.W.2d 762 (1929).

35. Morris, *supra* note 18, 46 HARV. L. REV. at 469. Morris has also pointed out that "When prudence justifies conduct that is nevertheless criminal, civil liability for harm done is liability without fault." MORRIS, TORTS 65 (1953).

36. FISHER, VEHICLE TRAFFIC LAW 56-57 (1961), speaking in reference to automobile laws only, states:

> For a great many sound and cogent reasons the civil and criminal aspects of traffic laws should be divorced. While the same regulatory measure figures in both a prosecution for violation and a subsequent damage suit, the purposes of the two *actions* are utterly divergent. The prosecution is to vindicate public interest in compelling adherence to laws enacted for the promotion of its safety and security; the damage suit is to secure an adjustment of purely private rights as between two individuals, plaintiff and defendant.

37. Lowndes, *supra* note 16, 16 MINN. L. REV. at 369.

38. Bracken v. Koch, 404 S.W.2d 201 (St. L. Mo. App. 1966), decided the same question involved in the noted case in the same way. Yet, here another litigant is being forced to take an appeal "all the way" because of negligence per se language in an earlier case.

39. RESTATEMENT (SECOND), TORTS §§ 285-86 (1965).

JURY VERDICT—INVALIDITY DUE TO JUROR NON-PARTICIPATION

City of Flat River v. Edgar[1]

The jury panel in *City of Flat River v. Edgar*[2] was asked the usual voir dire question—"whether any one of them knew of any reason why he couldn't render a fair and impartial verdict . . . ."[3] No member of the panel gave any express answer. Thereafter, a nine-man verdict was returned and judgment entered on the condemnation award in issue.

Defendant procured the jury foreman's deposition stating that two jurors had refused, on religious grounds, to take part in the jury's deliberations. He stated that neither juror had participated in either the discussions or the balloting. Defendant made a timely motion for a new trial, basing it in part on the non-participation of these two jurors and counsel's reasonable diligence in trying to discover their intent to create this defect. Plaintiff objected, both at the taking of the deposition and at the hearing on defendant's motion, that the foreman's testimony was incompetent to impeach the jury's verdict. The trial court overruled plaintiff's objection and ordered a new trial. The St. Louis Court of Appeals affirmed, holding: (1) The constitutional guarantee of "trial" by twelve impartial jurors requires all of them to deliberate; (2) Juror testimony is admissible when directed to constitutionally required juror competency; and, (3) Failure to disclose intent not to participate in response to the voir dire question was a false representation resulting directly in juror disqualification.[4]

As argued by the plaintiff in *Edgar,* jurors generally are incompetent to impeach their own verdicts.[5] This is the firm rule in Missouri and most states as to matters concerning the jurors' manner of arriving at their verdict.[6] Juror testimony

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1. 412 S.W.2d 537 (St. L. Mo. App. 1967).
2. *Id.,* hereinafter cited as *Edgar.*
3. *Id.,* at 539.
4. *Id.,* at 539-540.
5. *E.g.,* Romandel v. Kansas City Pub. Serv. Co., 254 S.W.2d 585, 595 (Mo. 1953). *Cf.,* Justice Cardozo's opinion in Clark v. United States, 289 U.S. 1, 13 (1932), approving Wigmore's analogizing the bar to juror verdict-impeaching testimony as a "privilege" rather than as a question of witness competency or public policy. This so-called "privilege" would seem to be properly assertable only by the juror involved rather than by one of the parties allegedly affected by the improper verdict. In the Clark case, the privilege was asserted in defense of a criminal contempt charge. The question does not seem to be the competency of the juror to testify, but removal of potential testimonial pressures as a bar to free debate and thought processes during deliberations. "Public (or judicial) policy" would appear to be a more appropriate ground for the testimonial bar—as distinguished from juror "competency" in the sense of capacity and ability to so act. Thus, the rule might be more accurately stated, "Jurors may not impeach their own verdicts, because to do so would be contrary to the public (or judicial) policy of promoting free debate and thought processes during jury deliberations." See 8 WIGMORE, EVIDENCE §§ 2345, 2352-2354 (3rd ed. 1940); MORGAN, BASIC PROBLEMS OF EVIDENCE 130-131 (Mo. Bar spec. ed. 1961).
6. *E.g.,* Reich v. Thompson, 346 Mo. 577, 142 S.W.2d 486 (1940) (juror testimony inadmissible, but eavesdroppers testimony to same matters admissible).

is admissible, however, to show an actual lack of competence to act as a juror,[7] unless such objections are of a type which are waivable and have been waived.[8] *Edgar* does not involve that confused area of the law concerning improper juror *activity* during deliberations.[9] Rather, it involves juror *inactivity* during deliberations. Such inactivity, the court's decision seems to broadly hold, is a competency disqualification of clearly constitutional stature.

The right of trial by a fair and impartial jury has been long enshrined by royal contract[10] and successor constitutional guaranties.[11] Therefore, it is not surprising that irregularities in juror qualification which are deemed to sufficiently impair this right may also rise to a constitutional level.[12] In this regard, there is an important, somewhat procedural, distinction between serious or constitutional irregularities and less important or non-constitutional irregularities in juror qualification. Objections to individual prospective jurors are by two kinds of challenges: peremptory and for cause; and, each party has, not a right to select, but, a right to reject prospective jurors in order to obtain a fair and impartial jury.[13] First, each party challenges for cause those on the panel for whom legal cause has been disclosed or discovered. Then, peremptory challenges are exercised arbitrarily within each party's sole discretion.[14] Thus, if circumstances exist which unreasonably prohibit a party from ascertaining or exercising a sufficiently serious (or constitutional) cause for challenging, to that extent the right to intelligently exercise peremptory challenges is impaired.[15] In this situation a new trial is constitutionally required—

See 8 WIGMORE, EVIDENCE § 2354 (3rd ed. 1940); MORGAN, BASIC PROBLEMS OF EVIDENCE 83-85 (Mo. Bar spec. ed. 1961) and LAUER, SPECIAL MISSOURI POCKET PART thereto, at 44; Note, COLUM. L. REV. 1373, 1374 (1947).

7. Generally, Annot. 48 A.L.R.2d 971 (1956). Particular bases and grounds are discussed in detail later in the text.

8. *E.g.*, State v. Crawford, 416 S.W.2d 178 (Mo. 1967); Rose v. Sheedy, 345 Mo. 610, 134 S.W.2d 18 (1939); Harding v. Fidelity & Cas. Co., 27 S.W.2d 778 (St. L. Mo. App. 1930).

9. This area, including particularly quotient verdicts, will be presented in a comment to be published in a future issue of this law review. See the authorities and references in note 6 *supra;* Annots. 73 A.L.R. 93 (1931) (majority verdicts), 52 A.L.R. 41 (1928) (quotient verdicts).

10. See, *e.g.*, Justice Black's impassioned summary, in Republic Steel Corp. v. Maddox, 379 U.S. 650, 669 (1965) (dissent), in favor of the right to a jury trial (existing from at least the time of the Magna Carta) rather than submission to internal labor union governing powers derived from statute, as found by the Court's majority.

11. *E.g.*, U.S. CONST. art. I, § 2, cl. 3, and amend. VI and VII; Mo. CONST. art. I, § 22(a). That the tests are the same for civil and criminal cases, see Annot. 50 L.R.A.(N.S.) 933, 936-938 (1914).

12. *E.g.*, Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578, 586 (Mo. 1954); Privitt v. St. Louis-San Francisco Ry. Co., 300 S.W. 726, 728 (Mo. 1927); City of Flat River v. Edgar, 412 S.W.2d 537, 539 (St. L. Mo. App. 1967); Durham v. State, 182 Tenn. 577, 188 S.W.2d 555 (1945). See also, *e.g.*, Lee v. Baltimore Hotel Co., 345 Mo. 458, 463-464, 136 S.W.2d 695, 697 (1939), quoting Harding v. Fidelity & Cas. Co., 27 S.W.2d 778, 779 (St. L. Mo. App. 1930).

13. State v. Levy, 187 N.C. 581, 587, 122 S.E. 386, 390 (1924).

14. *Id.*, at 584, 122 S.E. at 388.

15. *E.g.*, Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578, 586 (Mo. 1954); State v. Taylor, 64 Mo. 358, 363 (1877); Sadlon v. Richardson, 382 S.W.2d 9, 12 (St. L. Mo. App. 1964). The inter-relationships between peremptory

not because the right to peremptorily challenge is itself constitutional, but because the challenge for cause is sufficiently serious to be classified as constitutional, and the resulting loss of freedom in exercising peremptory challenges is thereby constituted prejudicial per se.[16] Accordingly, constitutional challenges for cause are inherently prejudicial; while non-constitutional challenges are not. This procedural introduction, however, begs the ultimate questions. First, what are constitutional and what are non-constitutional causes for prospective juror challenge? Second, what procedures are necessary to safeguard the availability of remedies for constitutional and non-constitutional challenges of jurors? Finally, what remedies are available or are appropriate where constitutional or non-constitutional causes for juror challenges are either undisclosed or undiscovered?

The determination of juror competence, in the sense of capacity and qualification to so act, has been confusingly generalized in many modern decisions.[17] Although now partially codified,[18] categorical objections to individual juror competence were originally derived from the common law,[19] along with the right of trial by jury itself.[20] Today, two general categories of grounds for challenging juror competence survive: (1) Lack of some special legal qualification;[21] and, (2)

challenges and those for cause are nicely set forth in State v. Levy, 187 N.C. 581, 584-585, 122 S.E. 386, 388 (1924), which includes a quotation from the rationale stated in Blackstone's Commentaries (4 Bl. Com. 353) reading, in part: "Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." While cited with respect to a criminal case jury, the same rationale applies equally for a civil case jury. Annot. 50 L.R.A.(N.S.) 933, 936-938 (1914).

16. This conclusion apparently results because the "right" to exercise peremptory challenges existing at early common law (see note 15 *supra*) is a right "heretofore enjoyed" and therefore accorded constitutional protection in Missouri. See Mo. CONST. art. I, § 22(a); cases cited in note 12 *supra*. See also, discussion on this point in note 44 *infra*.

17. *Compare* Romandel v. Kansas City Pub. Serv. Co., 254 S.W.2d 585, 595 (Mo. 1953) (juror testimonial "competency"); Reich v. Thompson, 346 Mo. 577, 142 S.W.2d 486 (1940) (same); and, City of Flat River v. Edgar, 412 S.W.2d 537 (St. L. Mo. App. 1967) (juror action "competency") *with* State v. Levy, 187 N.C. 581, 585-588, 122 S.E. 386, 388-390 (1924) (individual juror challenge for cause).

18. Details of Missouri's codifications are summarized in the following text and footnotes. See constitutional provisions in the text accompanying and in notes 38, 39 and 40 *infra;* Statutory provisions summarized in note 33 *infra*.

19. "At common law, challenges to the polls were divided into four classes: (1) *propter respectum,* as where the juror was a lord of Parliament, when he could be challenged by either side or by himself; (2) *propter defectum,* being a lack of some qualification required by law, such as residence, age, property, etc.; (3) *propter affectum,* on account of bias, suspicion or [sic] partiality, prejudice, or the like; and (4) *propter delictum,* for criminality, as where the jurors had been convicted of an infamous crime." State v. Levy, 187 N.C. 581, 585, 122 S.E. 386, 388-389 (1924); Annot. 50 L.R.A.(N.S.) 933, 935-938, 946-949, 965-966 (1914).

20. State v. Levy, *supra* note 19, at 584, 122 S.E. at 388; U.S. CONST. amend. VII; Mo. CONST. art. I, § 22(a).

21. Common law challenge classes 1, 2 and 4 as set forth in the quotation from State v. Levy, in note 19 *supra*. See also, Annot. 50 L.R.A.(N.S.) 933, 935 (1914). *Cf.* Missouri's statutes summarized in note 33 *infra*.

Disqualification for bias, prejudice, or the like.[22] The latter category, going directly to the fairness and impartiality of the juror, is clearly of a constitutional level.[23] Under the common law, this category was called *propter affectum*.[24] It could not be waived if a party exercised reasonable diligence in attempting to discover such grounds,[25] and could be asserted to overturn the verdict even long after judgment.[26] Included now, as then, are such matters as interest in the cause,[27] relation to the parties,[28] connection with the parties' attorneys,[29] and direct bias or prejudice for or against either of the parties.[30] The other surviving category of juror challenges, lack of special legal qualifications, is a combination of the other

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22. Common law challenge class 3 set forth in the quotation from State v. Levy, in note 19 *supra*. See also, Annot. 50 L.R.A.(N.S.) 933, 935 (1914). *Cf.*, Missouri's statutes summarized in note 33 *infra*.

23. *E.g.*, Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578 (Mo. 1954).

24. See note 19 *supra*.

25. State v. Brockhaus, 72 Conn. 109, 43 Atl. 850 (1899). See also, Lee v. Baltimore Hotel Co., 345 Mo. 458, 463-464, 136 S.W.2d 695, 697 (1939), quoting Harding v. Fidelity & Cas. Co., 27 S.W.2d 778, 779 (1939); State v. Levy, 187 N.C. 581, 588, 122 S.E. 386, 390 (1924).

26. *E.g.*, State v. Williams, 9 Del. 508, 18 Atl. 949 (1890) (common law); Smith v. State, 2 Ga.App. 574, 59 S.E. 311 (1907) (motion effective six months after verdict but new trial denied; longer periods probably allowed on rationale stated). *Cf.*, Harding v. Fidelity & Cas. Co., 27 S.W.2d 788 (St. L. Mo. App. 1930) (on motion for new trial); Lee v. Baltimore Hotel Co., 345 Mo. 458, 136 S.W.2d 695 (1939) (by court during trial term, but after time for new trial motion). See also, Ballard v. Van Tuyl, 142 App.Div. 278, 126 N.Y.Supp. 820 (1911), where a statute allowed challenge within six months of the verdict for relation of juror to another party.

27. *E.g.*, Barb v. Farmers' Ins. Exch., 281 S.W.2d 297 (Mo. 1955) (mutual insurance company policyholders); Page v. Contoocook Valley R. Co., 21 N.H. 438 (1850) (shareholder). See § 494.190 RSMo (1959). See also, Wilder v. Louisville Ry. Co., 157 Ky. 17, 162 S.W. 557 (1914) (interest in another suit by sister against defendant). Such cases are often considered a matter of relationship, rather than interest in the cause. The Barb case, *supra*, is so classified under Mo. REV. STAT. § 494.190 (1959).

28. *E.g.*, State v. Harris, 69 W.Va. 244, 71 S.E. 609 (1911) (court's opinion by dissenting judge stating common law); Annot. 50 L.R.A.(N.S.) 933, 953, 961, 968-969 (1914). See §§ 494.020(7) (Supp. 1967), 494.190 and 495.150 RSMo (1959). But see Nashville, C. & St. L. Ry. v. Williams, 164 Tenn. 144, 46 S.W.2d 815 (1932) (relation of juror and plaintiff within sixth degree contra statute unknown by juror until after verdict given; no new trial). See also, Annot. 85 A.L.R.2d 851 (1962) (relation to witness).

29. *E.g.*, Privitt v. St. Louis-San Francisco Ry. Co., 300 S.W. 726 (Mo. 1927). See §§ 474.020(7) (Supp. 1967) and 475.150 RSMo (1959).

30. *E.g.*, Chouteau v. Pierre, 9 Mo. 3 (1845) (slavery lawful, freedom of slave in issue; error to refuse voir dire question on panel member's views); Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 S.W. 43 (1907) (juror a leader of violent strike against defendant within three years of suit; non-disclosure as false voir dire answer); Piehler v. Kansas City Pub. Serv. Co., 357 Mo. 866, 211 S.W.2d 459 (1948) (unsettled juror claim against defendant; non-disclosure as false voir dire answer). While religious belief is usually excluded as improper voir dire, if direct relation to potential bias can be shown on the facts of a particular case, such voir dire may be allowed. Smith v. Smith, 7 Cal.App.2d 271, 46 P.2d 232 (1935). See §§ 494.020(7) (Supp. 1967), 494.190 and 495.150 RSMo (1959).

common law grounds.[31] It is now categorized under the common law tag of *propter defectum*,[32] and covers most of the grounds now codified by statute.[33] Such

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31. *Propter respectum*—lord of Parliament (See § 494.031(7) RSMo (1959), excuse from jury duty for government officer or employee); *Propter defectum*—some qualification required by law (See §§ 494.010, .020 (Supp. 1967), except .020(1) and (7) (Supp. 1967), RSMo (1959), qualifications and ineligibilities); and *propter delictum*—criminality (See § 494.020(1) RSMo (Supp. 1967)). State v. Levy, 187 N.C. 581, 585, 122 S.E. 386, 389 (1924); Annot. 50 L.R.A. (N.S.) 933, 935-936 (1914). See also, generally, Annot. 50 L.R.A.(N.S.) 933 (1914) for summaries of other types of qualifications and eligibilities now classified under the general *propter defectum* label: *I.e.*, member of grand jury indicting defendant, member of jury on former trial, age, alienage, property qualifications, residence, elector status, ignorance of language, and deafness or bad eyesight.

32. State v. Levy, *supra* note 31, State v. Brockhaus, 72 Conn. 109, 43 Atl. 850 (1899).

33. The following are Missouri's statutory provisions, briefly identified, and partially quoted, partially summarized:

Ch. 494—GENERAL PROVISIONS AS TO JURIES

Section 494.010 RSMo 1959—Qualifications of jurors.

Every juror, grand or petit, shall be a citizen of the state, a resident of the county or of a city not within a county for which the jury may be impaneled; sober and intelligent, of good reputation, over twenty-one years of age and otherwise qualified.

Section 494.020 RSMo (Supp. 1967)—Persons ineligible for service.

The following persons shall be ineligible to serve as a juror, either grand or petit:

(1) Any person who has been convicted of a felony, unless such person has been restored to his civil rights, or of a misdemeanor involving moral turpitude;

(2) Any person who is unable to read, write, speak and understand the English language;

(3) Any person on active duty in the armed forces of the United States or any member of the organized militia on active duty under order of the governor;

(4) Any licensed attorney at law;

(5) Any judge of a court of record;

(6) Any person who, in the judgment of the court or other authority charged with the duty of selecting jurors, is incapable of performing the duties of a juror because of mental or physical illness or infirmity;

(7) Any person not drawn or selected according to the applicable provisions of chapters 494, 495, 496, 497, 498 or 499, RSMo, as amended. (summarized as here relevant)

Section 494.040 RSMo 1959—Inhabitants of county or city not disqualified when county is a party.

In all actions brought by or against any county or city, the inhabitants of the county or city so suing or being sued may be jurors, if otherwise competent and qualified.

Ch. 495—JURIES IN CLASS TWO COUNTIES (BUCHANAN, CLAY, GREEN AND JASPER COUNTIES)

495.131 RSMo 1959—General provisions as to disqualification and exemption apply.

The provisions of sections 494.010, 494.020, 494.031 and 494.040, RSMo, relating to the qualifications and disqualifications of jurors and exemptions for service as a juror, shall be applicable to jurors drawn and selected under the provisions of this chapter.

495.170 RSMo 1959—Term of service.
No petit juror shall be *compelled* to serve on such jury for more than *two weeks consecutively* during any term of court; provided, that in no case shall this section cause the discharge of an juror during the actual pendency of the trial of any cause. (emphasis added.)

Ch. 496—JURIES IN COUNTIES OF 700,000 INHABITANTS (ST. LOUIS COUNTY) (Supp. 1967)
496.101 RSMo 1959—General provisions as to disqualification and exemption apply.
(Same text as § 495.131 *supra.*)
496.130 RSMo 1959—Petit juror—length of service.
No petit juror shall be *permitted* to serve on such jury for more than *one consecutive week* during any term of court; provided, that in no case shall this section cause the discharge of any juror during the actual pendency of the trial of any cause. (emphasis added.)

Ch. 497—JURIES IN COUNTIES OF 450,000 TO 700,000 INHABITANTS (JACKSON COUNTY) (Supp. 1967)
497.130 RSMo (Supp. 1967)—List of jurors, selection, data processing equipment authorized—questionnaire—(etc.)
(Extensive questionnaire procedures to determine qualifications in accordance with sections 494.010 and .020, *supra,* and .031, summarized in note 34, *infra.*)
497.201 RSMo 1959—General provisions as to disqualification and exemption apply.
(Same text as § 495.131 *supra.*)
497.250 RSMo 1959—Consecutive time petit juror may serve.
(Same text as § 496.130 *supra.*)

Ch. 498—JURIES IN CITIES OF MORE THAN 500,000 INHABITANTS (CITY OF ST. LOUIS)
498.120 RSMo (Supp. 1967)—General provisions as to disqualification and exemption—determination of qualifications.
1. (Same text as § 495.131 *supra.*)
2. (Prospective juror shall establish exemptions.)
3. The jury commissioner and each deputy shall diligently inquire and inform himself, by all lawful means, of the qualifications of residents in the city who may be liable to be summoned for jury duty.
4. Each court of record in the city shall excuse from service as a juror every person who, being examined upon the voir dire, appears to the court to be a person not qualified for jury service.

498.130 RSMo 1959—Examination of prospective jurors—penalties.
(Examinations for juror qualification to be under oath, by prospective jurors and others; contempt penalties for refusals to be examined; misdemeanor penalties for "whoever shall willfully or corruptly make and swear to any false answers to questions put to him by said jury commissioner or any of such deputies . . . .")
498.140 RSMo 1959—Exemptions claimed and proved, how.
(Prospective juror shall establish exemptions.)
498.270 RSMo 1959—Required to serve but once in each year.
No person shall be *required* to serve as a juror, either grand or petit, more than *once in any period of twelve months,* from the time of his previous service. (emphasis added.)

Ch. 499—MAGISTRATE COURT JURIES
499.015 RSMo 1959—General provisions as to disqualification and exemption apply.
(Same text as § 495.131 *supra.*)

Cf., challenges for cause under Missouri's statutory provisions, briefly identified, and partially quoted, partially summarized, are as follows:

challenges include formal juror qualifications and personal capacity in both physical and mental senses.[34] Generally, these grounds were waivable at common law and

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Ch. 494—GENERAL PROVISIONS AS TO JURIES
Section 494.190 RSMo 1959—Challenges for cause in civil cases, grounds of.
No witness or person summoned as a witness in any civil cause, and no person who has formed or expressed an opinion concerning the matter, or any material fact in controversy in any such cause, which may influence the judgment of such person, or who is of kin to either party to any such cause within the fourth degree of consanguinity or affinity, shall be sworn as a juror in the same cause.
Ch. 495—JURIES IN CLASS TWO COUNTIES (BUCHANAN, CLAY, GREEN AND JASPER COUNTIES)
495.140 RSMo (Supp. 1967)—Challenges.
Any person may challenge any juror for cause, for any reason mentioned in sections 494.010 and 494.020 RSMo, and for any other causes authorized by the laws of the state. (*Note: this would include the "common law" of the state.*)
495.150 RSMo 1959—Right to challenge upon the voir dire.
If upon the *voir dire* it appears that any juror is in the employ of any person, firm, or corporation who has within the six months last past employed, or who within such time has had in his or its employ, any attorney on either side of the case being tried, the opposing party shall have the right to challenge such juror for cause.
Ch. 496—JURIES IN COUNTIES OF 700,000 INHABITANTS (ST. LOUIS COUNTY) (Supp. 1967)
496.110 RSMo (Supp. 1967)—Challenging of juror.
Any party may challenge any juror for cause, for any reason mentioned in sections 494.010 and 494.020, RSMo, and for any other causes authorized by the laws of the state. (*Note: Only* parties *may challenge in St. Louis County, whereas* any person *can challenge in class two counties.* Section 495.140 RSMo (Supp. 1967) *supra.*)
Ch. 497—JURIES IN COUNTIES OF 450,000 TO 700,000 INHABITANTS (JACKSON COUNTY) (Supp. 1967)
497.210 RSMo (Supp. 1967)—Challenge for cause.
(Same text as § 496.110 *supra,* with minor variations.)
Ch. 499—MAGISTRATE COURT JURIES
499.080 RSMo 1959—Challenging of jurors.
Any juror may be challenged in any case on the ground that he is of kin to either party, or that he has an interest in the suit, or that he has formed or expressed an opinion in the case and if the magistrate shall find that such ground exists he shall disqualify the juror from sitting in the case.

As can readily be seen, Missouri's statutory provisions for juror challenges are a crazy-quilt of inconsistency.

34. See Missouri's statutory sections cited in the preceding footnote. In addition, grounds for excuse from jury duty on request of the prospective juror are provided in § 494.031 RSMo (1959): (1) Over age sixty-five; (2) Any woman (See also, MO. CONST. art. I, § 22(b)); (3) Practicing doctors and dentists; (4) Clergymen; (5) Professors or teachers; (6) Anyone having had jury duty within one year (*Cf.*, §§ 495.170, 496.130, 497.250, 498.270 (same), set forth in note 33 *supra*); (7) Governmental employees, in any of the three branches of government, when actively engaged in their duties; (8) Where absence from employment would, in the court's judgment, affect public safety, health, welfare or interest; and, (9) Where service would create undue hardship, in the court's judgment.

are now waived by statute if not discovered and asserted before impaneling of the jury[35] or rendering of their verdict.[36] They are almost never grounds for a new trial.[37] The problem presented in *Edgar* can be classified as defining a narrow portion of the line between *propter affectum* or constitutional juror challenges and *propter defectum* or non-constitutional juror challenges. As will be shown, failure to observe these common law distinctions in cases close to the constitutional limits for juror challenges can create a good deal of confusion.

Missouri's 1945 constitutional provisions concerning juror qualification preserve jury trial rights "heretofore enjoyed"[38] and prescribe that "three-fourths of the members of the jury concurring may render a [civil] verdict."[39] They also provide that no person shall be disqualified for jury duty by reason of his religious beliefs so long as the exercise of those beliefs does not limit the rights of others.[40] Such rights of others would include the right to trial by jury. Since the rights "heretofore enjoyed" on adoption of the 1945 constitution included then existing implementing statutes[41] and interpretative cases,[42] it is clear: "The right to a fair and impartial jury is guaranteed by the Constitution,"[43] and "the means and method of enjoyment of that right are left to the reasonable exercise of legislative discretion."[44] Also, "even though three-fourths of them can decide a civil case, parties are entitled to have that decision, whether for them or against them, based on the honest deliberations of twelve qualified men."[45] Therefore, applying to the facts of *Edgar* either the rights "heretofore enjoyed" or the express constitutional

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35. *E.g.*, Section 494.050 RSMo (1959): "No exception to a juror on account of his citizenship, nonresidence, state or age or other legal disability shall be allowed after the jury is sworn."

36. *E.g.*, Okershauser v. State, 136 Wis. 111, 116 N.W. 769 (1908) (statute requiring objection before return of verdict).

37. See Annot. 50 L.R.A.(N.S.) 933, 946-949 (1914).

38. Mo. Const. art. I, § 22(a).

39. *Ibid.*

40. Mo. Const. art. I, § 5: "No person shall, on account of his religious persuasion or belief, . . . be disqualified from testifying or serving as a juror . . . ; But, this section shall not be construed to . . . justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others."

41. Mo. Const. (1945), Schedule, § 2.

42. See *In re* Mognihan, 332 Mo. 1022, 1029-1031, 62 S.W.2d 410, 413-414 (1933), and cases cited therein.

43. *E.g.*, Privitt v. St. Louis-San Francisco Ry. Co., 300 S.W. 726, 728 (Mo. 1927); Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578, 586 (Mo. 1954).

44. *E.g.*, Privitt v. St. Louis-San Francisco Ry. Co., *supra* note 43. Thus, common law regarding juror competency challenges would seem to govern except to the extent codified or changed by legislative discretion. Accordingly, *e.g.*, the previous text discussion of peremptory challenge cases (see text at and note 15 *supra*) indicates the right to *exercise* such challenges is constitutional as a common law right "heretofore enjoyed," although the *existence or number* of peremptory challenges may be set by statute. See § 494.200 RSMo (1959) (civil-three); § 546.180 RSMo (1959) (criminal-variable from three to twenty, depending upon the offense charged and population of the court's jurisdiction).

45. *E.g.*, Piehler v. Kansas City Pub. Serv. Co., 357 Mo. 866, 873, 211 S.W.2d 459, 463 (1948), quoting Lee v. Baltimore Hotel Co., 345 Mo. 458, 463-464, 136 S.W.2d 695, 698 (1939).

provisions on jury trial and religious freedom rights, the decision's result was proper.[46]

There are few reported cases drawing the constitutional/non-constitutional line for juror challenge on the ground of actual deliberative inactivity. In *James v. Ross*,[47] a Tennessee appellate court was able to side-step the issue since the facts could be categorized as improper activity "at the beginning of the jury's deliberations and before any vote was taken . . . ."[48] One juror left her seat at the table, went to a closed window in the jury room, and called and waved through it toward a person whom she mistakenly believed to be her husband whom she expected to join after her duties had been completed. She also enlisted the aid of another juror to help watch at the window for her husband. Since (1) "three ballots were taken before the jury reached its verdict,"[49] (2) no actual non-participation had been shown, and (3) the offered juror testimony was inadmissible as directed only to improper juror activity, a presumption arose in favor of the verdict's propriety. This presumption was not overcome.[50] In another Tennessee case, *Green v. State*,[51] non-participation in the deliberations was not reached, but necessarily would have resulted. An impaneled juror confessed an inability to render a criminal verdict due to religious convictions.[52] Excuse of this juror left but eleven impaneled jurors and a mistrial resulted. The issue before the court was, therefore, double jeopardy through requiring the accused's retrial. The trial court's decision to excuse the juror necessarily must have been based on the premise that juror non-participation in deliberations would have been a disqualification at the constitutional level. Therefore, in affirming that no double jeopardy resulted, the state supreme court expressly approved the trial court's excuse of the juror on this non-participation ground.[53] The Kansas case of *State v. Hansford*,[54] where a juror confessed in-

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46. The legislature having not provided for non-participation in deliberations, constitutional tests as announced by the cases were applicable. Text at and notes 43, 44 and 45 *supra*. Also, the constitution having expressly provided for primacy of the jury trial rights over religious freedom rights, in the circumstances presented in *Edgar*, the constitution must govern. Note 40 *supra*. Interestingly, the constitutional juror disqualification for religious views interfering with jury trial rights was clearly present in *Edgar*, but apparently not raised by the parties and therefore not discussed by the court. Also, voir dire inquiry into prospective juror religious affiliation is usually denied unless there is a proper ground to do so. *E.g.*, Rose v. Sheedy, 345 Mo. 610, 134 S.W.2d 18 (1939). Therefore, on the basis of the *Edgar* and *Rose* cases, it would appear that in Missouri particular inquiry might now be allowed, if it is directed toward avoiding religious non-participation and an invalid verdict.

47. 51 Tenn.App. 413, 369 S.W.2d 1 (1962), *cert. denied* (Tenn. 1963).

48. *Id.*, at 421, 369 S.W.2d at 5.

49. *Ibid.*

50. *Id.*, at 421-422, 369 S.W.2d at 5.

51. 147 Tenn. 299, 247 S.W. 84 (1923), annotated 28 A.L.R. 849 (1924). See also, Annot. 33 A.L.R. 142 (1924).

52. *Id.*, at 302-303, 247 S.W. at 84-85.

53. *Id.*, at 312-313, 247 S.W. at 88.

54. 76 Kan. 678, 92 Pac. 551 (1907).

ability to render a verdict after substantial evidence had been introduced,[55] is quite similar.[56]

The extent of the juror disqualification for inactivity is not clear. In the words of the *Edgar* court: "Implicit in 'trial' by twelve impartial qualified persons is the concept that there be consideration of the issues and the evidence and deliberation thereon upon the part of all twelve . . . ."[57] This seems to paint with too broad a brush. The juror inactivity disqualification does not include non-volitional activity, such as where the jurors' decision is the result of duress or coercion.[58] Only voluntary inactivity was involved—both in *Edgar* and in the double jeopardy cases outlined above. Also, it would seem that the related class of cases involving "going along" with the verdict agreed upon by the remainder of the jury, and the like, would not be included.[59] Improper activity—"going along"—would not be complete inactivity.

Missouri decisions where grounds for challenge are not disclosed because of false voir dire answers present similar fine line distinctions. They seem to fall both within and without the modern "bias or prejudice" contraction of the broader *propter affectum* challenge category of the common law. Those cases involving failure to disclose direct bias or prejudice for or against either of the parties clearly involve constitutional challenges.[60] However, cases closer to the modern line present rationalizing difficulties. *Lee v. Baltimore Hotel Co.*[61] involved an imposter juror. The court seemed to view this situation as within the bias challenge on the common law ground of "suspicion of partiality."[62] It said, "A man who uses dishonest means to get on a jury, does not usually do so for the purpose of honestly deciding the case . . . ."[63] The opinion contains no recitation of dishonest motive. The next step was the *Edgar* decision. Juror non-participation, without more, cannot be said to raise even a shadow of partiality. Therefore, it would seem more appropriate to consider both the *Lee* and *Edgar* situations as within a broader, more direct constitutional challenge category. Why try to fit *Lee* and *Edgar* within an artificial extension of a "bias or prejudice" category when the very terms of the common law classifications indicate a clearer distinction? There seems no question but that imposter and non-participating jurors defeat the right

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55. *Id.*, at 679, 92 Pac. at 551-552.

56. See also, Annot. of State v. Hansford, 76 Kan. 678, 92 Pac. 551 (1907), on double jeopardy due juror excuse after impanelment, 14 L.R.A.(N.S.) 548 (1908).

57. City of Flat River v. Edgar, 412 S.W.2d 537, 539 (St. L. Mo. App. 1967).

58. *E.g.*, State v. Bersch, 276 Mo. 397, 207 S.W. 809 (1918); Wilkins v. Abbey, 168 Misc. 416, 5 N.Y.S.2d 826 (1938); Annot. 19 A.L.R.2d 1257 (1951).

59. See, *e.g.*, Annots. 73 A.L.R. 93 (1931) (majority verdicts), 52 A.L.R. 41 (1928) (quotient verdicts).

60. See cases cited in note 30 *supra.*

61. 345 Mo. 458, 126 S.W.2d 695 (1939).

62. State v. Levy, 187 N.C. 581, 585, 122 S.E. 386, 388-389 (1924): *"propter affectum,"* on account of bias, suspicion or [sic] partiality, prejudice, or the like . . . ." (Quoted from among the four common law challenge grounds quoted in full in note 19 *supra.*)

63. Lee v. Baltimore Hotel Co., 345 Mo. 458, 464, 136 S.W.2d 695, 698 (1939).

to have a fair and impartial jury. Therefore, *propter affectum* indicates a challenge basically *affecting* the juror's ability to fairly and impartially decide; whereas *propter defectum* indicates a lesser *defect* in the juror's qualifications. Piecemeal attempts to codify the common law seem to have led us astray.

Possibly closer to the foregoing analysis than would first appear is the proposition in *Edgar* that silence (inactivity) in response to a direct voir dire question is effective as an implied answer.[64] While silence is often considered either wholly ineffective[65] or ambiguous[66] as an answer, when the question or statement clearly requires an affirmative response, silence can be an unequivocal answer. This has long been the rule for voir dire examination.[67] Therefore, when silence concurs with an actual lack of juror qualifications, a misrepresentation of such qualifications may exist.[68]

The importance of such a potential misrepresentation becomes apparent when we consider the delicate task of avoiding waiver of grounds for a juror challenge. Reasonable pre-trial investigation of the panel,[69] very precisely worded voir dire questions,[70] and timely assertion of discovered challenges[71] are important to preserve errors for constitutional challenge grounds. These same procedures are essential in asserting non-constitutional juror challenges.[72] Non-constitutional challenges must

64. City of Flat River v. Edgar, 412 S.W.2d 537, 539-540 (St. L. Mo. App. 1967).

65. See SIMPSON, LAW OF CONTRACTS § 40 (2d ed. 1965); But see § 400.2-207(2) RSMo (Supp. 1967).

66. *E.g.*, silence as an admission of party opponent—MORGAN, BASIC PROBLEMS OF EVIDENCE 270 (Mo. Bar spec. ed. 1961) and LAUER, SPECIAL MISSOURI POCKET PART thereto, at 88-89.

67. *E.g.*, City of Flat River v. Edgar, 412 S.W.2d 537, 539 (St. L. Mo. App. 1967); Sadlon v. Richardson, 382 S.W.2d 9 (St. L. Mo. App. 1964); Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578 (Mo. 1954). *Cf.*, State v. Crawford, 416 S.W.2d 178 (Mo. 1967) (question on voir dire too loose; non-constitutional challenge ground lost).

68. *E.g.*, City of Flat River v. Edgar, 412 S.W.2d 537 (St. L. Mo. App. 1967); Lee v. Baltimore Hotel Co., 345 Mo. 458, 136 S.W.2d 695 (1939). Note, this rationale does not require intent to not participate, or to participate wrongfully, at the time of the silence—a prerequisite for misrepresentation per se—which was recognized but skipped over by the *Edgar* court. City of Flat River v. Edgar, *supra* at 539-540.

69. *E.g.*, Harrington v. Manchester & L. R.R. Co., 62 N.H. 77 (1882) (defendant's failure to discover share holder status of juror was lack of diligence); *Ex Parte* Sullivan, 155 Fla. 111, 19 So.2d 611 (1944) (undiscovered deputy sheriff on panel; matter of public record). *Cf.*, Gaff v. State, 155 Ind. 277, 58 N.E. 74 (1900) (two jurors were deputy sheriffs; objection to remote to be anticipated, so no waiver).

70. *E.g.*, Smith v. Smith, 7 Cal.App.2d 271, 46 P.2d 232 (1935) (otherwise excludable religious belief voir dire properly specified to bias ground); *Cf.*, State v. Crawford, 416 S.W.2d 178 (Mo. 1967) (question not designed to uncover particular disqualification).

71. *E.g.*, Harding v. Fidelity & Cas. Co., 27 S.W.2d 778 (St. L. Mo. App. 1930) (attorney's inattention failed to catch truthful voir dire challenge cause; held—waiver).

72. *E.g.*, State v. Crawford, 416 S.W.2d 178 (Mo. 1967) (attorney in panel would have been disqualified under § 494.020(4), but only if discovered before jury sworn, due statutory waiver of § 494.050 RSMo); State v. Barr, 223 Mo.App. 766, 20 S.W.2d 599 (St. L. Ct. App. 1929) (similar, undiscovered juror minority).

be discovered and asserted during voir dire, or, at the latest, before impanelment of the jury or before the jurors' verdict, depending upon the jurisdiction's rule.[73] However, failure to disclose non-constitutional grounds in response to precisely worded voir dire questions may sometimes raise non-constitutional challenges to a constitutional level;[74] *i.e.*, by creating a clear misrepresentation of juror qualifications which goes to the fairness and impartiality of the jury. Therefore, as in *Edgar*, the question which requires a positive answer for disclosure of challenge grounds is most useful. If cause is disclosed, it must be handled promptly.[75] If such cause at the constitutional level remains undisclosed, reasonably complete voir dire question coverage will meet the requirement of due diligence, which, together with the fact of non-disclosure, preserves the possibility of procuring a new trial.[76] If a non-constitutional cause remains undisclosed after precise voir dire, this may amount to a misrepresentation sufficient to require a new trial.[77]

Harmless error is not cause for a new trial; the moving or appealing party must be prejudiced if he is to obtain relief.[78] It is here that the trial court's discretion in granting a new trial, if applicable, is most important;[79] and, with an appeal, only abuse of discretion by the trial court can give reversal.[80] Whether the ground for challenge of the juror for cause is constitutional or non-constitutional is often determinative. If constitutional, a new trial is almost universally required (absent lack of diligence by the moving or appealing party) since both a constitutional cause and per se prejudice exist, due to the interaction of such challenges and peremptory challenges, and the trial court's discretionary area is closely circumscribed.[81] By comparison, non-constitutional causes for juror challenge usually are not grounds for a new trial at either the trial court or appellate levels.[82] Only in

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73. See text at and notes 35 and 36 *supra*.
74. See cases cited note 72 *supra*.
75. *E.g.*, Harding v. Fidelity & Cas. Co., 27 S.W.2d 778 (St. L. Mo. App. 1930).
76. *E.g.*, Piehler v. Kansas City Pub. Serv. Co., 357 Mo. 866, 211 S.W.2d 459 (1948); Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 S.W. 43 (1907).
77. *I.e.*, Lee v. Baltimore Hotel Co., 345 Mo. 458, 136 S.W.2d 695 (1939).
78. Prejudice and presence of a constitutionally disqualified juror appear equated in Missouri cases. Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578 (Mo. 1954) (constitutional inter-relationship of peremptory and for cause challenges). This is not necessarily the case in other states; some find constitutional causes per se, with or without proved prejudice, and others may find waiver for even *propter affectum* (usually constitutional) causes. See Annot. 50 L.R.A.(N.S.) 933, 941-946 (1914). However, whether voir dire answers were in fact truthful or were intentional concealment is a matter of discretionary decision. Sadlon v. Richardson, 382 S.W.2d 9 (St. L. Mo. App. 1964); Triplett v. St. Louis Pub. Serv. Co., 343 S.W.2d 670 (St. L. Mo. App. 1961). Therefore, existence of prejudice may lie in the court's discretionary finding on the underlying matter.
79. *E.g.*, Reich v. Thompson, 346 Mo. 577, 142 S.W.2d 486 (1940).
80. *Ibid.*
81. *E.g.*, Piehler v. Kansas City Pub. Serv. Co., 357 Mo. 866, 211 S.W.2d 459 (1948). See also, notes 16 and 44 *supra* (peremptory challenges) and note 78 *supra* (discretionary area).
82. Missouri has long had a statutory bar for lack of challenge before the jury is sworn. Section 494.050 RSMo (1959). Common law decisions in other states are summarized in Annot. 50 L.R.A.(N.S.) 933, 941-946 (1914).

rare instances have multiple non-constitutional grounds been held to so cloud the fairness and impartiality of the verdict that the trial court has been persuaded to grant a new trial.[83] However, if the failure to discover such non-constitutional grounds is due to non-disclosure on direct and precise voir dire questioning, even non-constitutional grounds for juror challenge may be raised to a constitutional level as a species of misrepresentation.[84] Such misrepresentations may be considered to affect the juror's capacity to render a fair and impartial verdict, depending upon the particular situation.[85]

In addition to the "remedy" of a new trial, it appears that alternative and possibly additional remedies either are or ought to be available. For criminal cases, the state can bring criminal charges against jurors who willfully obstruct justice by causing constitutional challenge grounds to subsist.[86] Such criminal charges are in addition to the right, residing in the trial judge, to police the judicial process with appropriate contempt proceedings.[87] It also appears that a criminal prosecution could be initiated by the aggrieved party in a civil suit through complaint to the prosecuting attorney.[88] However, no cases have been found where an aggrieved party has attempted a civil claim. Sounding in tort,[89] such a claim would be for the expenses or other prejudice to such party resulting from being required to present his case in the invalid trial. It would seem that where the non-disclosure is willful, recovery of at least the costs and attorney's fees for the invalidated trial ought to be possible in a civil suit brought jointly by both parties to the invalid trial.[90]

In summary, many decisions involving impropriety in juror deliberations tend to confuse juror "competency" to testify concerning improprieties with juror disqualification for lack of "competency" to so act. While authorities are split on admissibility of testimony concerning improper juror activity in arriving at their verdict,[91] improprieties in juror qualifications can be the basis for a new trial. In

83. *E.g.*, Cameron v. Ottawa Electric Ry. Co., 32 Ont. 24 (1900) (One juryman summoned for and served on panel by mistake; another deaf; third a former shareholder and connected by affinity to secretary of defendant).

84. *E.g.*, Lee v. Baltimore Hotel Co., 345 Mo. 458, 136 S.W.2d 695 (1939).

85. *Ibid.*

86. Clark v. United States, 289 U.S. 1 (1932) (criminal contempt); State v. Serpas, 188 La. 1074, 179 So. 1 (1938) (perjury prosecution).

87. Murphy v. Wright, 167 Iowa 75, 148 N.W. 985 (1914); Witte Hardware Co. v. McElhinney, 231 Mo.App. 860, 100 S.W.2d 36 (St. L. Ct. App. 1937) (dicta); Lightfoot v. Kurn, 164 S.W.2d 77 (Spr. Mo. App. 1942) (dicta). Sections 476.110-.160 RSMo (1959). Note, however, contempt proceedings may not be used to enforce any civil right or remedy. Section 476.150 RSMo (1959). See Annot. 32 A.L.R. 436 (1924).

88. Sections 545.010 (any felony by indictment or information), 557.010-.030 (perjury) RSMo (1959).

89. See § 537.050 RSMo (1959).

90. It is a salutary rule that the processes by which jurors arrive at their verdicts ought not to be subject to potential post-trial contempt or testimonial pressures. But, it by no means follows that jurors should be exempt or privileged as to either the state or private parties when their willful activity is in direct derogation of the judicial process. See Clark v. United States, 289 U.S. 1 (1932).

91. See, *e.g.*, Annots. 73 A.L.R. 93 (1931) (majority verdicts), 52 A.L.R. 41 (1928) (quotient verdicts).

such cases, juror testimony is clearly allowed to establish the existence of at least constitutional juror challenge grounds. Although the line is far from clear, complete juror inactivity in the jury's deliberations allows constitutional challenge of the jury's verdict; while partial inactivity probably is not of a constitutional level, but mere impropriety in the jury's processes. If the existence of a ground for constitutional challenge is not discovered by voir dire examination, the party aggrieved must show reasonable diligence in attempting to discover it or that it was not reasonable to anticipate such a challenge ground. Since the exercise of peremptory challenges is impaired when constitutional level challenges for cause are either undisclosed or overruled, this furnishes prejudice; but, finding sufficient prejudice with non-constitutional challenges is discretionary with the court. Reasonable diligence requires appropriate pre-trial investigation of the jury panel, carefully worded voir dire questions, and prompt motions for disqualification whenever any ground for juror challenge is discovered. If the grounds are of a constitutional level, they may be asserted successfully even after judgment. Non-constitutional juror challenges can be asserted only before empanelment of the jury,[92] except in rare instances where the trial court may exercise its discretion. Discretionary situations arise where either serious multiple grounds or juror misrepresentations have destroyed the right to a fair and impartial trial.

RICHARD N. BROWN

USE OF WRITTEN INTERROGATORIES AS AN AID IN EXECUTION OF JUDGMENTS

United States v. McWhirter[1]

The federal government obtained a default judgment against the appellees on a promissory note in the Federal District Court for the Eastern District of Texas. After unsuccessfully attempting to collect on its judgment, the government served written interrogatories on the appellees. The purpose of these interrogatories was the discovery of some assets which the government could levy upon to satisfy its judgment. Appellees failed to answer, and the government moved for an order compelling appellees to answer the written interrogatories. This motion was denied by the district court on the ground that rule 69(a) of the Federal Rules of Civil Procedures only allowed the taking of depositions and did not include the right to propound written interrogatories. The government appealed this decision, and the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and remanded the case for further proceedings. This note concerns

92. Section 494.050 RSMo (1959). *Cf.*, some states allow juror challenge at any time before the verdict is returned. Okershauser v. State, 136 Wis. 111, 116 N.W. 769 (1908).

1. United States v. McWhirter, 376 F.2d 102 (5th Cir. 1967).

the appellate court's ruling that rule 69(a)[2] authorizes the propounding of written interrogatories pursuant to rule 33 of the Federal Rules of Civil Procedure.

Rule 69(a) provides for the examination of any person, by the judgment creditor or his successor in interest when that interest appears of record, in aid of a judgment or execution in the manner provided by the Federal Rules of Civil Procedure for taking depositions or in the manner provided by the practice of the state where the district court is held. There is no express reference made to the serving of written interrogatories by the judgment creditor. However, it is the view of the Court of Appeals for the Fifth Circuit that the term "depositions" as used in rule 69(a) refers to all the discovery procedures available under rules 26 to 33 of the Federal Rules of Civil Procedure.[3]

To decide what the term "depositions" means as used in rule 69(a), the intent of the framers of the rule should be considered. Major Tolman, secretary to the Advisory Committee on the Federal Rules stated that:

> Rule 69 deals with execution. It follows the present practice and preserves existing statutes. It also allows the deposition rules (rules 26 to 33) to be used in proceedings supplementary to execution. Hearings Before the House Committee on the Judiciary, 75th Congress 3rd Sess., Ser. 17, p. 126 (1938).[4]

This statement indicates that the framers of rule 69, while using only the word depositions, meant to include all the discovery devices provided for in rules 26 to 33. This position is supported by the decision in *Monticello Tobacco Co., Inc. v. American Tobacco Co.*, which held that "the nature of the proceeding requires a broad, rather than a restricted, examination."[5]

The court of appeals accepted Professor Moore's view on the interpretation to be given rule 69(a). Moore points out that "the primary purpose of Rules 26-37 is to obtain discovery prior to trial. The purpose of rule 69(a) is to adapt their procedure to post-judgment discovery . . . And while use of the word 'depositions' in rule 69(a) may seem narrow . . . the general purpose of the rule is apparent. . . ."[6]

In the *Lowenstein* case cited by the court of appeals in the instant decision, a district court held that rule 34 was not included in the post-judgment discovery

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2. The pertinent portion of the rule is as follows: "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held." FED. R. CIV. P. 69(a).

3. United States v. McWhirter, 376 F.2d 102, 106 (5th Cir. 1967).

4. United States v. McWhirter, *supra* note 3.

5. Monticello Tobacco Co., Inc. v. American Tobacco Co., 197 F.2d 629 (S.D.N.Y. 1952).

6. 7 MOORE, FEDERAL PRACTICE § 69.05(1) n.10 (2d ed. 1964).

devices available under rule 69(a).[7] In holding that production of documents under rule 34 was not covered by the provisions of rule 69(a) for examination of any person, that court confined its ruling to a consideration of rule 34, and did not decide or give an opinion as to which of the rules of discovery might be encompassed by rule 69(a).[8] The *Lowenstein* case thus can be distinguished from the instant situation.

The trial court, in denying the government's motion to compel the appellees to answer the written interrogatories,[9] agreed with a statement found in Barron & Holtzoff, *Federal Practice and Procedure*.[10] There it is stated that "the matter is one for amendment of the rule, rather than distortion of the existing language." The matter referred to however, was not the use of rule 33 interrogatories, but was the use of rule 34 procedure for the production of documents. While trying to fit rule 34 into the language of rule 69 requires more than a little distortion of the existing language, this is not true of rule 33 interrogatories. The subject to be examined (any person) is the same under rule 33 as under rule 26. Rule 34, on the other hand, deals with production of documents for inspection and copying, which contain or constitute evidence of matters within the scope of examination of rule 26(b). The key words of rule 69(a) which exclude use of rule 34 procedure but include rule 33 procedure are "any person." Rule 34 deals with documents, papers, books, accounts, letters, photographs, objects or tangible things only, whereas rule 33 deals with persons, as does rule 26. By including the procedure of rule 33 in those available under rule 69 the court here did not expand the area into which the judgment creditor could inquire. The court has only given the judgment creditor an alternative method of asking the same questions that could be asked during the taking of a deposition. Post-judgment procedure is now as flexible as is the procedure for pre-trial discovery. The judgment creditor can examine the judgment debtor in the way he feels is best suited for his situation.

The Advisory Committee on Civil Rules, on November 30, 1967, submitted to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, a draft of proposed amendments to the Federal Rules of Civil Procedure. One such amendment would change the present rule 69(a) to read as follows:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution,

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7. M. Lowenstein & Sons, Inc. v. American Underwear Mfg. Co., 11 F.R.D. 172 (E.D. Pa. 1951).

8. M. Lowenstein & Sons, Inc. v. American Underwear Mfg. Co., *supra* note 7.

9. United States v. McWhirter, 376 F.2d 102, 104 (5th Cir. 1967).

10. 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1484 at 532 (Wright's ed. 1960).

> the judgment creditor or his successor in interest when that interest appears of record, may *obtain discovery from* any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.[11]

"The Amendment assures that, in aid of execution or a judgment, all discovery procedures provided in the rules are available and not just discovery via the taking of a deposition."[12] Adoption of this change would be an affirmation of the instant decision, but rejection of the amendment would not mean that the decision is incorrect. By holding that rule 69(a), as it now reads, includes rule 33 procedures and excludes rule 34 procedure, the court stops short of changing the scope of rule 69(a), an act proper only for the Supreme Court by amendment of the rule, and merely clarifies the existing language of that rule.

After deciding that rule 69(a) does include the rule 33 written interrogatory procedure as an aid in execution of judgment, the court in *McWhirter* states that the same result can be reached under that part of rule 69(a) which allows the judgment creditor, at his election, to follow the existing state discovery practice provided for post-judgment discovery. The language of the applicable Texas rule,[13] like that of rule 69, does not expressly provide for the use of written interrogatories. The Texas courts, however, have held that:

> It is our view that the first two sentences of Rule 737, which are the same as old Article 2002, should be given the same construction that the Supreme Court of Texas has heretofore given the same and that under that portion of Rule 737 written interrogatories are authorized in discovery suits.[14]

The court of appeals could have reached the same result by relying wholly on the application of state procedure to this situation as is permitted by rule 69(a). The fact that they chose to base their decison primarily on the inclusion of rule 33 procedure by rule 69(a) is of importance to lawyers in states such as Missouri where the post-judgment discovery procedure does not include the right to propound written interrogatories to the judgment debtor. The practical effect of this decision will be to allow judgment creditors more flexibility in post-judgment discovery situations.

Support for this result is found in rule 1 of the Federal Rules of Civil Procedure which states that "they shall be construed to secure the just, speedy and

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11. 43 F.R.D. 211, 273 (1968).
12. *Ibid.*
13. TEX. R. CIV. P. 737. The pertinent portion of the rule is as follows: "All trial courts shall entertain suits in the nature of bills of discovery, and grant relief therein in accordance with the usages of courts of equity. Such remedy shall be cumulative of all other remedies. In actions of such nature, the plaintiff shall have the right to have the defendant examined on oral interrogatories, either by summoning him to appear for examination before the trial court as in ordinary trials, or by taking his oral deposition in accordance with the general rules relating thereto."
14. Roy Mitchell Contracting Co. v. Mueller Co., 326 S.W.2d 522, 524-25 (Tex. Civ. App. 1959).

inexpensive determination of every action." There is no prior case law in conflict or agreement with this decision. The Court of Appeals for the Fifth Circuit has thus decided a case of first impression which should be followed by all federal courts because of the sound logic used to reach the decision given and the benefits which will result therefrom.

By placing this interpretation on rule 69 this court is following the intent of the authors of the rule. Judgment debtors are thereby subjected to no new areas of inquiry and judgment creditors holding small judgments are given more flexibility in gaining information needed to obtain payment of their judgments.

HENRY S. CLAPPER

USE OF MULTIPLE PLEAS AS ADMISSIONS

Macheca v. Fowler[1]

In August, 1962, four vehicles heading east in morning rush hour traffic were involved in an accident. The first three cars came to a stop, but the fourth car, driven by Fowler, collided with the rear of the third car, knocking it into the second car, which then struck the first car. Macheca, the driver of the third car, suffered personal injuries and filed suits against the drivers of the other three cars.[2]

Macheca's claims against the drivers of cars number one and number two were subsequently dismissed on motions for summary judgment. Macheca then proceeded to trial against Fowler, the driver of car number four. During the course of the trial Fowler introduced into evidence certain allegations of plaintiff's petition against the drivers of cars number one and two which alleged that these drivers were guilty of negligence. Fowler, the remaining defendant, contended that these allegations that the drivers of cars number one and two were the parties at fault constituted an admission by Macheca that they caused the accident. Macheca testified at trial that Fowler's failure to stop was the cause.[3] Fowler offered these portions of the petition to impeach the testimony of Macheca. The trial court allowed them to be used in this manner. At the conclusion of the trial, the jury found for the defendant.[4]

A subsequent motion for a new trial was sustained because of the alleged error in allowing the portion of plaintiff's petition filed against the drivers of cars number one and two to be introduced into evidence and allowing arguments based on the alleged admissions contained in these pleadings. Motions for a new trial

1. 412 S.W.2d 462 (Mo. 1967).
2. *Id.* at 463.
3. *Id.* at 463-464.
4. *Id.* at 463-464.

were also sustained because of other alleged errors.[5] Fowler appealed the granting of the new trial to the Missouri Supreme Court.[6]

On appeal, the supreme court sustained the order for a new trial and remanded the case. The basis for the decision was a general rule[7] recognized in Missouri, "that in cases involving multiple pleas, a pleading on one issue may not be used as an admission upon another issue in the same case."[8] The court believed the injection of the dismissed pleadings into evidence tended to confuse the issues and that this error was justification for the ordering of a new trial.[9]

When discussing admissions, it should be remembered they can serve two functions in a law suit. First, they constitute substantive and probative evidence on the facts contained within the admission. Second, they serve an impeaching function, if the admission is inconsistent with testimony given by the party against whom it is offered.[10] The Missouri courts, although never discussing these two functions of an admission within the same decision, has at various times in separate decisions recognized that an admission does serve both functions.[11]

Furthermore, it should be recognized there is only one requirement which a statement must meet to qualify as an admission. According to Professor Wigmore, the statement must be offered against the party making the statement by his party opponent.[12] There is no requirement that the admission be "against the interest" of the party making the statement.[13] Even though the Missouri courts have consistently spoken of these statements as admissions against interest, there appears to be no decision where the admission has been excluded because it was self-serving rather than against interest.[14]

The use of pleadings as admissions varies. In Missouri, pleadings filed in other actions, pleadings withdrawn, superceded, or abandoned, and statements of fact contained within the pleadings of the case being tried can be introduced into

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5. *Id.* at 463. "The trial court also sustained the motion for new trial on the grounds that it erred in permitting the defendant to show that, although plaintiff had deleted any claim for lost wages from his petition prior to trial, plaintiff originally claimed a loss in weekly wages of $1,000.00. The court also sustained the allegation of error in permitting argument on the basis of the original claim of lost wages."

6. *Id.* at 463.

7. Wigmore states the rule is accepted in all jurisdictions. 4 WIGMORE, EVIDENCE § 1064, pp. 48-49 (3rd Ed. 1940).

8. Macheca v. Fowler, 412 S.W.2d 462, 465 (Mo. 1967).

9. *Id.* at 466.

10. 4 WIGMORE, EVIDENCE § 1048, pp. 2-6 (3rd Ed. 1940).

11. State v. Anderson, 363 Mo. 884, 892, 254 S.W.2d 609, 615 (1953). "Extrajudicial admissions are, of course, admissible in evidence and are competent as evidence of the existence of the facts which they tend to establish." Liebow v. Jones Store Company, 303 S.W.2d 660, 664 (Mo. 1957). "It is of course always proper to impeach a witness by proof of prior admissions inconsistent with present testimony."

12. 4 WIGMORE, EVIDENCE § 1048, pp. 2-5 (3rd Ed. 1940).

13. *Id.* at 3-5.

14. *Id.* at 5.

evidence for any admissions they contain.[15] When multiple inconsistent pleadings or counts are filed, however, they may not be used as admissions.[16]

Macheca concerned multiple inconsistent pleadings. The rule applied in that case is based upon Missouri pleading statutes.[17] Under these statutes, "great liberality is permitted in the joinder of parties and claims and alternative relief may be sought in the same action."[18] If the courts allowed the use of multiple pleas as admissions, then anyone taking advantage of these pleading statutes would risk being penalized for this action. In the noted case, if Macheca had realized that by filing petitions against all three drivers he was endangering his chances of success, he would probably not have taken advantage of the pleading statutes. This possible hazard will be avoided by applying the *Macheca* rule. Therefore, if the general rule is applied, the rights created by the statutes and the purposes underlying the statutes will be protected and promoted.[19]

The court in *Macheca,* however, believed that *Johnson v. Flex-O-Lite Mfg. Corp.*[20] suggests an exception to the general rule. This exception is applicable when there is a factual inconsistency between allegations contained in the multiple pleadings and trial testimony. When this occurs, the pleading, or the portion containing the inconsistency, should be admitted into evidence.

This exception can be justified by the following reasoning. When the pleading party is able to testify to the facts it is presumed that he knows the facts. A person who is aware of the facts has no need to file inconsistent pleadings, he should plead only what actually happened. Therefore, if the pleader knows what happened and still pleads inconsistently, he has no reason to complain if he must face these inconsistent pleadings at trial.

In *Richardson v. Wendel*[21] an example of this factual inconsistency appeared. At trial the plaintiff testified that one of the defendants ran a red light. Earlier allegations in abandoned pleadings were contrary to this testimony. These abandoned pleadings were then admitted into evidence because the factual inconsistency between the pleadings and the testimony was present.

It should be recognized, however, that legal conclusions may not be relied on as admissions.[22] The court in *Giannone v. United States Steel Corp.*[23] excluded the use of allegations in a petition as admissions, when they concluded the allegations charged negligence but did not contain facts which demonstrated negligence.

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15. For a full discussion of this area see Lawson, *Pleadings and Practice—Evidence—Admissibility of Pleadings into Evidence in Missouri,* 27 Mo. L. Rev. 258 (1962).
16. Macheca v. Fowler, 412 S.W.2d 462, 465 (Mo. 1967).
17. §§ 507.040, 509.050, 509.060, and 509.110 RSMo 1959.
18. Johnson v. Flex-O-Lite Mfg. Corp., 314 S.W.2d 75, 79 (Mo. 1958).
19. *Id.* at 79.
20. 314 S.W.2d 75 (Mo. 1958).
21. 401 S.W.2d 455, 460 (Mo. 1966).
22. Giannone v. United States Steel Corp., 238 F.2d 544, 548 (3rd Cir. 1956). The court in the note case indicates this rule would be applied in Missouri under applicable circumstances.
23. *Supra* note 22, at 548.

Therefore, a general allegation of negligence would not come within the exception unless it contained specific facts which were contradicted at trial.

When the admission is admitted under this exception as it was in *Johnson*,[24] *Richardson*,[25] and *Howell v. Dowell*[26] the reasoning supporting that exception suggests that the admission should be considered only for its impeaching function. On this basis, the courts might be susceptible to an argument that the use of admissions which enter under this exception will be limited to their impeaching function and will not serve a substantive function.

The decision in *Macheca* indicates that the rule against the use of multiple pleas as admissions was adopted to protect those who need to make use of the pleading statutes. These would appear to be persons who are unaware of all the facts and need to plead inconsistently or alternatively to protect their causes of action. *Johnson*, however, indicates an exception to this rule. The exception applies when a factual inconsistency appears between the party's testimony and his pleadings. A party who testifies to the facts should not need to plead inconsistently because he can plead what actually happened. A party in this position is not one of the persons the statute primarily attempts to protect and because of this does not come within the rule followed in *Macheca*.

MICHAEL H. MAHER

CONSTITUTIONAL LAW—SEPARATE COUNSEL FOR INDIGENT CO-DEFENDANTS AS A MATTER OF RIGHT?

Lollar v. United States[1]

Lollar and Ford were charged in the District of Columbia with robbery and assault with a dangerous weapon. Defendants were indigent, and the district court appointed a single attorney to represent them both. At trial, they were convicted, and on appeal Lollar contended that the trial court's appointment of one attorney to represent both defendants deprived him of his constitutional right to the effective assistance of counsel.[2] The court of appeals agreed; it reversed and remanded for a new trial with instructions that Lollar should be represented by his own counsel.

In determining that Lollar had been denied effective assistance of counsel, the court emphasized certain facets of the trial. Throughout his testimony, co-defendant Ford referred to the appellant as "Miss Lollar," "Miss Lolly," or "she" or "sister,"[3] even though Lollar was a man. Furthermore, counsel allowed

24. 314 S.W.2d 75, 79-80 (Mo. 1958).
25. 401 S.W.2d 455, 460 (Mo. 1966).
26. 419 S.W.2d 257, 261 (K.C. Mo. App. 1967).

1. 376 F.2d 243 (D.C. Cir. 1967).
2. *Id.* at 244; U.S. CONST. amend. VI.
3. Lollar had already admitted that he had been a homosexual all his life.

Lollar to take the stand despite his criminal record which was brought out on cross-examination by the prosecution for impeachment purposes. This was probably unnecessary since Ford had already taken the stand and established their defenses.[4] Finally, counsel twice confused the two defendants and was corrected by the judge.

The rule originally articulated in *Glasser v. United States*,[5] that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests," was incorporated into the Criminal Justice Act of 1964.[6]

Acknowledging the well-settled rule that some conflict of interest must be shown to have resulted from joint representation before a conviction will be set aside, the court noted that the cases have not formulated a standard for determining what constitutes sufficient prejudice to justify reversal.[7] In light of the Supreme Court's admonition in *Glasser* against requiring a strong showing of prejudice as a prerequisite to reversal of a conviction,[8] the court formulated its own standard:

> [O]nly where " 'we can find no basis in the record for an informed speculation' that appellant's rights were prejudicially affected," can the con-

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4. 376 F.2d at 247.

5. 315 U.S. 60, 70 (1942).

6. 18 U.S.C. § 3006A(b) (1964): "[T]he court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel . . . ."

7. 376 F.2d at 247. The court noted that there were evidently two lines of authority: One group of cases requires a strong showing of actual prejudice for a reversal, *e.g.*, Lott v. United States, 218 F.2d 675, 681 (5th Cir. 1955). This was a conspiracy case in which the court seemed to acknowledge that a conflict of interest had arisen at trial between the defendants. It stated, however, that there had been "neither objection, claim, nor notice to the court of any alleged conflict between the interests of the three defendants. . . . [T]herefore . . . there was no denial of their constitutional right to the effective assistance of counsel." *Cf.*, United States v. Burkeen, 355 F.2d 241, 244 (6th Cir. 1966); Lugo v. United States, 350 F.2d 858, 859 (9th Cir. 1965). In the latter case the court, in affirming a conviction, refused to "create a conflict of interest out of mere conjecture as to what might have been shown." In Penn v. Smyth, 188 Va. 367, 374, 49 S.E.2d 600, 603 (1948), the court stated: "[T]he mere fact that counsel employed and chosen by petitioner also was retained by and represented co-defendants with conflicting interests does not compel a conclusion that the petitioner was prejudiced thereby, and certainly not to such an extent as to oust the jurisdiction of the trial court and render the proceeding therein a nullity."

Cases in the second group suggest that the mere possibility of prejudice resulting from joint representation is enough to justify a reversal: *e.g.*, Glasser v. United States, 315 U.S. 60, 75-76 (1942); Craig v. United States, 217 F.2d 355, 359 (6th Cir. 1954); Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965); Sawyer v. Brough, 358 F.2d 70, 73 (4th Cir. 1966); Commonwealth *ex rel.* Whitling v. Russell, 406 Pa. 45, 48, 176 A.2d 641, 643 (1962).

8. 376 F.2d at 246. In *Glasser* the Court said that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 76.

> viction stand. . . . In effect, we adopt the standard of "reasonable doubt," a standard the Supreme Court recently said must govern whenever the prosecution contends the denial of a constitutional right is merely harmless error. Chapman v. California, 386 U.S. 18 . . . (1967).[9]

Applying this standard, the court found that although indications of prejudice were not strong, the record failed to convince it beyond a reasonable doubt that the defendant was not prejudiced as a result of the joint representation.[10]

Chief Judge Bazelon, dissenting, indicated that he would seriously consider reversing the conviction without a showing of prejudice if the case were one of first impression. He also noted that an absolute rule requiring individual counsel would free the reviewing court from speculating on what might have happened had defendant been separately represented. However, he felt compelled to follow the prevailing rule which requires a showing of prejudice and concluded that no such showing had been made in the instant case.[11]

The most significant aspect of this case is unquestionably the new standard[12] which the court announced that it will follow when reviewing a record to determine whether a defendant has been denied "effective assistance" of counsel. Although this court in 1965 explicitly denied that it was establishing a rule that co-defendants were entitled to separate counsel as a matter of right,[13] the rule enunciated in the present case will have that effect.

In considering whether joint representation has deprived a defendant of his right to effective assistance of counsel an appellate court has the entire record of trial and proceedings before it. The trial court, on the other hand, in deciding whether co-defendants' interests are in such conflict as to require separate counsel, must make a decision on the basis of the existence of confessions, pleadings, and proceedings which occur prior to trial and conjecture on what will occur at trial.

Some situations present little difficulty; for example, where one defendant pleads not guilty and places most of the blame on his co-defendant,[14] the trial judge should clearly appoint separate counsel. Difficult problems arise, however, where a conflict of interest between two or more defendants is not apparent before trial but develops during the trial.[15] The fact that the trial court could not antici-

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9. 376 F.2d at 247.
10. *Ibid.*
11. *Id.* at 248.
12. See note 9 *supra.*
13. Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965).
14. In Sawyer v. Brough, 358 F.2d 70, 73 (4th Cir. 1966), the court said: "An obvious divergence of interest exists between a defendant who denies his guilt and a co-defendant who not only confesses his own complicity but also accuses the other of participation in the crime. The conflict is even more crucial in the instant case by reason of the fact that Espin's [co-defendant's] confession attempts to cast most of the blame for the robbery on to the 'other party.'" *Cf.*, Wright v. Johnson, 77 F. Supp. 687, 690 (1948); Commonwealth *ex rel.* Whitling v. Russell, 406 Pa. 45, 48, 176 A.2d 641, 643 (1962).
15. Glasser v. United States, 315 U.S. 60, 73, 74 (1942); Craig v. United States, 217 F.2d 355, 358 (6th Cir. 1954); Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965); Sawyer v. Brough, 358 F.2d 70, 72 (4th Cir. 1966). In

pate such a conflict is of little significance[16] and the reviewing court must reverse any conviction in accordance with the rule enunciated in *Glasser*.

Being unable to anticipate the plethora of situations involving a conflict of interest which may arise during the trial, the only way for a trial judge to avoid reversal is unvaryingly to appoint separate counsel for co-defendants. This is especially true in view of the stringent standard that the District of Columbia Circuit has announced that it will apply in reviewing a record for prejudice.[17] On appeal, it would seem that most records will be subject to "informed speculation that the appellant's rights were prejudicially affected . . . ."[18] Indeed, the court in *Lollar* acknowledged that the indications of prejudice were not very strong.[19]

If the rule in the present case is followed by the other circuits and has the anticipated effect of prompting trial judges automatically to appoint separate counsel for indigent co-defendants, it will have at least two beneficial effects on the administration of criminal law. First, the automatic appointment of separate counsel will prevent unanticipated conflicts of interest arising during trial[20] and thus avoid reversals on appeal. Second, even though joint representation may not engender a discernable conflict of interest between defendants, it may nevertheless impair counsel's effectiveness.[21] The rule in the present case will render a defendant's counsel more effective since he will be able to deal exclusively with the protection of the interests of one person.

RICHARD D. MOORE

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the *Sawyer* case, one of the defendants had given a confession incriminating the other defendant. The state took the defense by surprise when it introduced the confession into evidence. Both defendants had denied giving any statements or confession to the officers. In the principle case the possibility of prejudice first manifested itself at trial.

16. Sawyer v. Brough, 358 F.2d 70, 74 (4th Cir. 1966).
17. 376 F.2d at 247.
18. *Ibid.*
19. *Ibid.*
20. See note 15 *supra.*
21. As the Court in Glasser v. United States, 315 U.S. 60, 75 (1942) said: "Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness." See also People v. Lanigan, 22 Cal. 569, 576, 577, 140 P.2d 24, 29 (1943), and Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965), where the court discusses problems inherent in joint representation. In the latter case, defense counsel admitted that he had virtually ignored one defendant and had "unwittingly" made all comments with reference to the other defendant. Moreover, defense counsel had made no effort to dissociate one defendant from the other against whom the Government had a much stronger case.

PRESUMPTIONS ARISING FROM PROOF OF MOTOR VEHICLE OWNERSHIP

Chandler v. New Moon Homes, Inc.[1]

Plaintiff was injured in a collision between the car in which she was riding and defendant's truck. The basis of the action against the corporate defendant was respondeat superior. Evidence at trial was sufficient to show fault of the truckdriver. No proof of driver's identity, mission, or employment, however, was offered to show the respondeat superior elements of an employment relationship and action within the scope of that relationship. The only proof of such elements was the defendant's ownership of the truck. The trial court and the Kansas City Court of Appeals held that once there is proof defendant owned the truck, a procedural presumption arises that the truck was being driven by a servant of the owner and within the scope of employment. Since the defendant offered no contrary evidence, this presumption continued and supported a verdict based on respondeat superior. Upon transfer to the Supreme Court, the case was reversed. The Supreme Court held that proof of ownership alone was not enough to raise a presumption of employment and scope of employment.

Prior to *Chandler* the law in Missouri was somewhat unclear whether proof of ownership alone created a presumption of both employment and scope, *or* if employment was not to be presumed from proof of ownership, and scope could only be presumed when ownership and employment were proved by evidence. The main support for the presumption used by the trial court is the case of *Fleishman v. Polar Wave Ice and Fuel Co.*[2] There plaintiff was struck by a wagon bearing defendant's name and coming from the direction of defendant's lot. As this was sufficient to establish ownership, the plaintiff was held to have made out a prima facie case of respondeat superior.[3] Several appellate court cases had followed

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1. 418 S.W.2d 130 (Mo. En Banc 1967).
2. 148 Mo. App. 117, 127 S.W. 660 (St. L. Ct. App. 1910).
3. Eventually the rule became one of a procedural presumption rather than a prima facie case. Arnold v. Haskins, 347 Mo. 320, 147 S.W.2d 469 (1941); Ross v. St. Louis Dairy Co., 339 Mo. 982, 98 S.W.2d 717 (1936). The difference between procedural presumption and prima facie case under the usual analysis is significant. A procedural presumption has the effect of placing the burden of producing evidence on the party not desiring a finding of the presumed fact. In the *Fleishman* situation the presumed facts were employment and scope, if the triers of fact were to find that defendant owned the vehicle. Such findings being adverse to defendant's interest, defendant would normally come forward with evidence opposite the presumed facts of employment and scope. This evidence having been introduced, the presumption would disappear, and the plaintiff would be required to meet his production burden without the aid of any presumption. "'Presumptions, may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.'" Mokowik v. Kansas City, St. Joseph & Council Bluffs R.R., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906). A prima facie case is made out when the party having the duty of producing evidence on a certain fact has satisfied the judge that the jury should be allowed to consider whether that certain fact exists or not. The significance here is that the proponent of the fact is assured of getting a jury verdict as to the fact. WIGMORE, EVIDENCE 2494 (3rd ed. 1940).

the *Fleishman* rule.[4] The Missouri Supreme Court had never met the question squarely, since in all cases prior to *Chandler* evidence showed both vehicle ownership and an employment relationship; nevertheless, the court had cited the *Fleishman* rule in dictum.[5]

The leading Missouri case in the area is *Guthrie v. Holmes*.[6] There the driver was shown to be defendant's chauffeur and operating defendant's pleasure car at the time of plaintiff's injury. The court held as follows:

> . . . [I]f it be proved (as here) that the car was owned by defendant, and if it be further proved (as here) that the chauffeur was in the general employment of defendant, then the presumption arises that such chauffeur was within the scope of his employment when the accident occurred. This, however, is as broad as the rule goes.[7]

Many cases have cited the *Guthrie* rule,[8] and some have considered it a dispositive pronouncement of the law in this area.[9] At least one appellate court case has interpreted *Guthrie* as being applicable only to the pleasure car situation; therefore, the *Fleishman* rule may be applied to business vehicles.[10] Another appellate court case reasoned that *Guthrie* did not preclude allowing a presumption of employment and scope from proof of ownership only.[11] Due to the limiting language of *Guthrie*, it is questionable whether the *Fleishman* rule should have been considered good law. At any rate, both the *Fleishman* and *Guthrie* rules seemed to persist as distinct presumptions, and such was recognized by the Supreme Court as recently as 1963.[12]

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4. *E.g.*, Harris v. Mound City Yellow Cab Co., 367 S.W.2d 43 (St. L. Mo. App. 1963); Hampe v. Versen, 224 Mo. App. 1144, 32 S.W.2d 793 (St. L. Ct. App. 1930); Mann v. Stewart Sand Co., 211 Mo. App. 256, 243 S.W. 406 (K.C. Ct. App. 1922).

5. Arnold v. Haskins, 347 Mo. 320, 147 S.W.2d 469 (1941); Barz v. Fleischman Yeast Co., 308 Mo. 288, 271 S.W. 361 (En Banc 1925); O'Malley v. Heman Construction Co., 255 Mo. 386, 164 S.W. 565 (1914).

6. 273 Mo. 215, 198 S.W. 854 (En Banc 1917). The case of Hays v. Hogan, 273 Mo. 1, 200 S.W. 286 (1917), is also an important case in the area. There it was shown that defendant was the owner of the car and father of the driver, but there was no evidence showing the son was an agent or the servant at the time the cause of action arose. The court rejected any presumption of agency.

7. Guthrie v. Holmes, *supra* note 6, at 233, 198 S.W. at 858.

8. Terminal Warehouse of St. Joseph, Inc. v. Reiners, 371 S.W.2d 311 (Mo. 1963); Snead v. Sentlinger, 327 S.W.2d 202 (Mo. 1959); Berry v. Emery, Bird, Thayer Dry Goods Co., 357 Mo. 808, 211 S.W.2d 35 (1948); Collins v. Leahy, 347 Mo. 133, 146 S.W.2d 609 (1941); State *ex rel* Steinbruegge v. Hostetter, 342 Mo. 341, 115 S.W.2d 802 (En Banc 1938); State *ex rel* Kurz v. Bland, 333 Mo. 941, 64 S.W.2d 638 (1933).

9. Snead v. Sentlinger, *supra* note 8 (*Guthrie* rule is a "bare minimum"); Berry v. Emery, Bird, Thayer Dry Goods Co., *supra* note 8 (*Guthrie* facts are "barely sufficient").

10. Mann v. Stewart Sand Co., 211 Mo. App. 256, 243 S.W. 406 (K.C. Ct. App. 1922).

11. Rockwell v. Standard Stamping Co., 210 Mo. App. 168, 241 S.W. 979 (St. L. Ct. App. 1923).

12. Terminal Wharehouse of St. Joseph, Inc. v. Reiners, 371 S.W.2d 311 (Mo. 1963).

Chandler has clarified the rule and seemingly has settled the law. Expressly overruling those cases citing *Fleishman*, the court decided the rule should not go beyond that allowed in *Guthrie*.[13] It was reasoned that a presumption of employment and scope from ownership alone can no longer be justified as a matter of necessity, "because under our present day discovery procedures whatever the defendant knows about agency and scope of employment the plaintiff can also know. . . ."[14] Pointing out that interrogatories and requests for admission aid the plaintiff inexpensively and promptly, the court concluded that failure to extend *Guthrie* would not appear to "cause meritorious causes to fail through inability of plaintiff to produce affirmative evidence of essential facts."[15]

The majority rule in the United States is contrary to that of *Chandler* in that a presumption of agency and scope of employment will be raised upon proof of ownership alone.[16] In a substantial number of jurisdictions, however, the majority rule has been repudiated.[17] These courts and other courts not adopting the majority rule have employed various solutions in resolving the problem. Several have recognized a rule similar to that followed in *Chandler*.[18] Some of the cases are willing to presume agency and scope of employment, if it is shown the vehicle was in the service of the owner's business.[19] For example, showing that ice had just been

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13. Chandler v. New Moon Homes, Inc., 418 S.W.2d 130 (Mo. En Banc 1967). The requirement of "general employment" could cause some problems in the future application of the rule. The Court explained that the term did not designate any superior rank, but "it is used in the sense of not being limited to a particular class, type, or field of employment." (at n. 2, p. 133).

14. *Id.* at 135.

15. *Id.* at 137.

16. *E.g.*, Stanley v. Hayes, 276 Ala. 532, 165 So.2d 84 (1964); Baker v. Maseeh, 20 Ariz. 201, 179 Pac. 53 (1919); Dowling v. Nicholson, 101 Fla. 672, 135 So. 288 (1931); Brill v. Davajon, 51 Ill. App.2d 445, 201 N.E.2d 253 (1964); Hoerr v. Hanline, 219 Md. 413, 149 A.2d 378 (1958); Coopersmith v. Kalt, 119 N.J.L. 474, 196 Atl. 649 (1938); Boydston v. Jones, 177 S.W.2d 303 (Tex. Civ. App. 1944); Bradley v. S. L. Savidge, Inc., 13 Wash.2d 28, 123 P.2d 780 (1942); Payne v. Kinder, 147 W.Va. 352, 127 S.E.2d 726 (1962); Gehloff v. De Marce, 204 Wis. 404, 234 N.W. 717 (1931). A similar rule has been embodied in statutes. *E.g.*, CONN. GEN. STAT. REV. § 52-183 (1958); N.C. GEN. STAT. § 20-71.1(b) (1951); TENN. CODE ANN. §§ 59-1037, 59-1038 (1955). See also 9 WIGMORE, EVIDENCE § 2510a (3rd ed. 1940); MCCORMICK, EVIDENCE § 309 (1954); 42 A.L.R. 898 (1926); 74 A.L.R. 951 (1931); 96 A.L.R. 634 (1935); 27 A.L.R.2d 167 (1953).

17. Roach v. Parker, 48 Del. 519, 107 A.2d 798 (1954); Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946); Gainesboro Telephone Co. v. Thomas, 234 Ky. 373, 28 S.W.2d 34 (1930); Tice v. Crowder, 119 Kan. 494, 240 Pac. 964 (1925); Merchants Co. v. Tracy, 175 Miss. 49, 166 So. 340 (1936); Stumpf v. Montgomery, 101 Okla. 257, 226 Pac. 65 (1924).

18. Casteel v. Yantis-Harper Tire Co., 183 Ark. 475, 36 S.W.2d 406 (1931); F. E. Fortenberry & Sons, Inc. v. Malmberg, 97 Ga. App. 162, 102 S.E.2d 667 (1958); Manion v. Waybright, 59 Idaho 643, 86 P.2d 181 (1938); Gainesboro Telephone Co. v. Thomas, *supra* note 16; Merchants Co. v. Tracy, *supra* note 17; Stumpf v. Montgomery, *supra* note 17.

19. Webb v. Dixie-Ohio Express Co., 291 Ky. 692, 165 S.W.2d 539 (1942); Cofield v. Borgdorf, 238 La. 297, 115 So.2d 357 (1959); Wehling v. Linder, 248 Mich. 241, 226 N.W. 880 (1929) (the vehicle must be driven "incident to the owner's business").

delivered to one of defendant's customers would be enough to raise the presumption.[20] A distinction between pleasure and commercial vehicles is drawn by some courts, applying the majority rule to the latter but not the former.[21] The leading Kansas decision has language to the effect that plaintiff must offer proof of agency and scope of employment, before a case is made out (*i.e.*, plaintiff is not aided by any presumption arising from ownership).[22]

At least two jurisdictions couch the rule in terms of inferences. In Oregon an inference of agency and scope may be made upon proof of ownership alone;[23] while in California the plaintiff must also show employment before an inference of scope is allowed.[24] Both courts say that the inference may be overcome by defendant's direct uncontradicted evidence opposite the presumed facts.[25] In Missouri the defendant may overcome the presumption by offering "substantial evidence tending to show the real facts. . . ."[26] Even though the California and Oregon courts speak in terms of inferences, while Missouri and other jurisdictions use the term presumption, the operation of the rules would seem to result in only minimal differences in the plaintiff's ability to survive a motion for a directed verdict.

The rationale for any of the above plaintiff-aiding presumptions or inferences is naturally the most important consideration from an analytical standpoint. A few courts justify presumptions in this area on probability.[27] It has been said that "it is reasonable to presume that a person driving another's vehicle on a public highway is doing so as the agent of the owner in the pursuit of the owner's business and within the scope of his employment."[28] Judge Learned Hand denies the propriety of basing such a presumption on probability. He reasons that a procedural presumption cannot logically be based on probability, for if it were then there would be no need for it originally.[29] Also rejecting the probability argument,

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20. Cofield v. Borgdorf, *supra* note 19.

21. McDougall v. Glenn Cartage Co., 169 Ohio St. 522, 160 N.E.2d 266 (1959); Double v. Myers, 305 Pa. 266, 157 Atl. 610 (1931). Other cases have repudiated any such distinction. *E.g.*, Chandler v. New Moon Homes, Inc., 418 S.W.2d 130 (Mo. En Banc 1967); Webb v. Dixie-Ohio Express Co., 291 Ky. 692, 165 S.W.2d 539 (1942).

22. Tice v. Crowder, 119 Kan. 494, 240 Pac. 964 (1925). *Accord,* Lammana v. Stevens, 5 Boyce 402, 93 Atl. 962 (Del. 1915).

23. Judson v. Bee Hive Auto Service Co., 136 Ore. 1, 294 Pac. 588 (1930), *rev'd on rehearing* 136 Ore. 5, 297 Pac. 1050 (1931).

24. Stewart v. Norsigian, 64 Cal. App.2d 540, 150 P.2d 554 (1944). *Contra,* Malmstrom v. Bridges, 8 Cal. App.2d 5, 47 P.2d 336 (1935) (dictum only required ownership).

25. Judson v. Bee Hive Auto Service Co., 136 Ore. 1, 294 Pac. 588 (1930), *rev'd on rehearing* 136 Ore. 5, 297 Pac. 1050 (1931). Maupin v. Solomon, 41 Cal. App. 323, 183 Pac. 198 (1919).

26. Rosser v. Standard Milling Co., 312 S.W.2d 106, 111 (1958); Snead v. Sentlinger, 327 S.W.2d 202 (1959) ("substantial controverting evidence").

27. Pa. R.R. v. Lord, 159 Md. 518, 151 Atl. 400 (1930); J.A. & E.D. Transport Co. v. Rusin, 202 S.W.2d 693 (Tex. Civ. App. 1947), *rev'd on other grounds,* 206 S.W.2d 95 (Tex. Civ. App. 1947).

28. Ahlberg v. Griggs, 158 Minn. 11, 196 N.W. 652, 653 (1924).

29. Alpine Forwarding Co. v. Pa. R.R., 60 F.2d 734 (2d Cir. 1932).

Chandler flatly denies that general experience in today's widespread use of vehicles supports such a presumption.[30]

Another possible reason is given by Wigmore: "A person who owns a valuable and dangerous apparatus should be cautious against its misuse by irresponsible persons." If misuse is the result, then such person should bear the risk of not obtaining evidence.[31] The court in *Tice v. Crowder* responds, "The section quoted from Wigmore reveals the bug under the chip—liability of the owner because of ownership." To find liability where defendant's sole relation to the injury is as owner is surely an "exemplification of the deep-pocket theory of liability."[32] Certainly this interplay is revealing of factors, philosophical though they may be, that are not normally found expressed in reported opinions, but could be the most important of all.[33] Whether such a social policy is the basis for the *Chandler* rule is purely conjectural.

The most important justification and the one cited most frequently by the courts is the owner's superior access to information as to who was operating the vehicle and in what capacity. As such the courts adopt a policy of requiring the defendant to come forward with this information or suffer a directed verdict as to the presumed fact.[34] It has been admitted a presumption may work an occasional hardship on vehicle owners and employers, but a less liberal rule, it is contended, would defeat a larger number of meritorious claims because of the unavailability of information.[35]

As noted above, the *Chandler* court rejected this "owner's superior access" notion on the ground that discovery procedures enable the plaintiff in a practical way to know what defendant knows. The court certainly was not compelled to this conclusion. Prior Missouri cases reason that the advent of discovery devices has not obviated the res ipsa loquitur doctrine, since discovery has some practical inadequacies.[36] Similarly, *Chandler* could have said discovery devices are adequate for plaintiff to discover employment but suffer from practical inadequacies in discovering scope. Had such a position been taken it would be clear why the court was willing to retain the *Guthrie* presumption of scope while rejecting a presumption of employment. The court, however, distinguishes employment *and scope* from res

30. Chandler v. New Moon Homes, Inc., 418 S.W.2d 130 (Mo. En Banc 1967).
31. 9 WIGMORE, EVIDENCE § 2510a (3rd ed. 1940).
32. Tice v. Crowder, 119 Kan. 494, 500, 502, 240 Pac. 964, 965-966 (1925).
33. In Young v. Masci, 289 U.S. 253 (1933), the Supreme Court recognized that presumptions in this area are a judicial response to the inability of the respondeat superior doctrine to cope "with the menacing problem of practical responsibility for motor accidents."
34. Baker v. Maseeh, 20 Ariz. 201, 179 Pac. 53 (1919); West v. Kern, 88 Ore. 247, 171 Pac. 413 (1918); Pa. R.R. v. Lord, 159 Md. 518, 151 Atl. 400 (1930); Philip v. Schlager, 214 Wis. 370, 253 N.W. 394 (1934) (presumption is based solely on such policy and not upon any inference of fact).
35. West v. Kern, *supra* note 34; Enea v. Pfister, 180 Wis. 329, 192 N.W. 1018 (1923).
36. Bone v. General Motors Corp., 322 S.W.2d 916 (Mo. 1959); Jones v. Terminal R. Ass'n, 363 Mo. 1210, 258 S.W.2d 643 (1953), Warner v. Terminal R. Ass'n, 363 Mo. 1082, 257 S.W.2d 75 (1953).

ipsa loquitur on the basis that they are a "much narrower field of inquiry" than res ipsa loquitur and can readily be discovered.[37]

In doing this, *Chandler* has rejected the main basis for the *Guthrie* rule presuming scope of employment. As such, what is the status of the *Guthrie* rule in Missouri? The court says that the rule should not go beyond that allowed in *Guthrie*. This dictum seems to indicate the court's willingness to retain the *Guthrie* rule, but at the same time no language in *Chandler* indicates a reason for presuming scope of employment. One reason for the presumption could be the social policy argument advanced by Wigmore. Another could be stare decisis, as the *Guthrie* rule has been cited and followed in a long line of cases.[38] Should the court be asked to overrule *Guthrie* in some future case, either of these reasons could be used to sustain the *Guthrie* rule.

As a final point it should be noted that *Chandler* stands for the proposition that discovery devices may be a substitute for procedural presumptions. As such, *Chandler* should find its place in future arguments for overruling presumptions or against the creation of new presumptions. Presumptions based on the superior access to information idea will be especially vulnerable to the *Chandler* rationale.

RICHARD NIXON

CORPORATIONS—RIGHT OF A FRACTIONAL SHARE TO VOTE FOR DIRECTORS

Benson v. Eleven-Twenty St. Charles Co.[1]

The Eleven-Twenty St. Charles Co. was incorporated in 1947 to purchase and manage parking garages in St. Louis. Between 1947 and 1964 it paid substantial dividends and increased its net worth to around $1,000,000. The corporation had three shareholders, three directors and ten shares of stock. Mandel, the organizer, was the holder of five shares of stock, and Gitt and Benson each held two and one half shares. Shareholder agreements governing the sale of shares indicate that Mandel was to have control of the corporation. After a disagreement with Mandel, Gitt and Benson decided to challenge his control of the board of directors at the annual shareholders meeting in February, 1964. They did this by nominating two directors instead of one. Mandel also nominated two directors. Benson and Gitt attempted to cast seven and one half votes for each of their nominees. Mandel, as president and presiding officer, ruled that fractional shares could not vote. He then cast his fifteen votes for his nominees and declared them elected.

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37. Chandler v. New Moon Homes, Inc., 418 S.W.2d 130, 137 (Mo. En Banc 1967).

38. Cases cited note 8 *supra*.

1. 422 S.W.2d 297 (Mo. 1968).

Benson brought an action to have the election declared void and the corporation liquidated and dissolved on the theory that had the fractional shares been allowed to vote, there would have been a dead-lock in the election of directors that would allow a court of equity to liquidate the corporation under the theory of *Handlan v. Handlan*[2] or section 351.485 of the Missouri business corporation laws. The trial court held for the defendant, and the plaintiff appealed to the Supreme Court of Missouri. The supreme court affirmed the decision of the trial court, reasoning that section 351.300 RSMo 1959 did not allow fractional shares to vote unless otherwise provided and that there was no provision otherwise in this case. It said that the decision was consistent with its interpretation of Article 11, Section 6 of the Missouri Constitution (provision for cumulative voting) to permit classification of common and preferred stock as voting and non-voting.

The court discussed the Pennsylvania case of *Commonwealth ex rel. Cartwright v. Cartwright*[3] which held that while the legislature could change the corporation laws to allow fractional shares to vote, the current statutes did not permit fractional shares to vote. The Missouri court failed to distinguish the Pennsylvania constitution and statutes from the Missouri Constitution and statutes. In Pennsylvania the constitutional provisions determine only that votes may be apportioned among several candidates when voting for directors.[4] The number of votes each shareholder may have in elections for directors is determined by statute.[5] In Missouri the Constitution determines both the number of votes a shareholder may have and how they may be cast in an election for directors.[6] In Pennsylvania the legislature can change the number of votes a shareholder may have; it cannot change the way the votes may be cast. In Missouri both the number of votes and the method of voting are guaranteed by the Constitution and the legislature is without power to change either one. Thus, the only case the court could cite for the proposition that fractional shares can not vote is clearly distinguishable.

Article 11, Section 6 of the Missouri Constitution says: ". . . each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected. . . ." It might be argued that this provision creates a requirement against non-voting shares of any kind. However, in *State ex rel. Frank v. Swanger* the court held that the shareholders could agree that preferred stock could not

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2. 360 Mo. 1150, 232 S.W.2d 944 (1950).
3. 350 Pa. 638, 40 A.2d 30 (1944); see Annot. 155 A.L.R. 1088 (1944).
4. PA. CONST. art. 16, § 4. "In all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as they prefer."
5. "In all elections for directors, every shareholder entitled to vote shall have the right in person or by proxy, to multiply the number of votes to which he may be entitled by the number of directors to be elected, and he may cast the whole number of such votes for one candidate or he may distribute them among any two or more candidates." 15 PA. STAT. tit. 2852, § 505 (1936).
6. MO. CONST. art. 11, § 6.

vote for directors when they organized the corporation.[7] That case was decided in 1905 under Article 12, Section 6 of the Constitution of 1875 which was identical to the current Article 11, Section 6. In 1963 the court reaffirmed *Swanger* in *Shapiro v. Tropicana Lanes, Inc.*[8] The *Shapiro* case allowed a corporation to issue non-voting common stock. The theory of these cases is that when the constitution says "each shareholder shall have the right to cast as many votes" it means each shareholder having the right to vote under the articles of incorporation. Shareholders can agree at the time they make this contract that only certain shares may vote and be within the constitutional provisions.[9] But without a contractual denial in the articles, with only a statutory limitation at variance with constitutional law, these cases might be interpreted as allowing all shares the right to vote for directors. In the case noted there was no such denial in the articles.

Section 351.300, RSMo 1959 allows a corporation to issue either certificates for fractional shares or scrip in lieu thereof. This section has been the same since 1943. It is a copy of the now repealed section 157.22 of the Illinois Business Corporation Act. In 1957 Illinois modified section 157.22 to comply with section 22 of the *Model Business Corporation Act*.[10] That section guarantees fractional shares voting rights. The court in the *Benson* case assumed that when the Missouri General Assembly did not copy section 22 in 1963 when it revised the corporation laws that it did not intend for fractional shares to vote. This may be an erroneous assumption. When Illinois changed its statute from the section identical to section 351.300 to section 22 of the Model Act, it was explained to the Chicago Bar that the changes were to clarify other points and no mention was made of any change in the voting rights of fractional shares.[11] The annotators of the *Model Business Corporation Act* assumed that section 351.300 allowed fractional shares to vote,[12] as did the author of an article in the Journal of the Missouri Bar.[13] There is authority to the contrary.[14] Allowing fractional shares to vote under section 351.300 would seem to be in keeping with a literal interpretation of the constitutional cumulative voting guarantee and the requirement of the *Swanger* and *Shapiro* cases that non-voting shares be created by shareholder agreement at the time of incorporation.

The Missouri corporation laws recognize the difference between voting for directors and voting on other matters. Section 351.245(1) says: "Each outstanding share entitled to vote . . . shall be entitled to one vote on each matter. . . ." Section 351.245(3) dealing with the election of directors says: "Each shareholder shall have the right to cast as many votes in the aggregate as shall equal the num-

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7. 190 Mo. 651, 89 S.W. 872 (Mo. En Banc 1905).
8. 371 S.W.2d 237 (Mo. 1963).
9. *Id.* at 241.
10. Ill. Laws, 1957 p. 2192 § 1.
11. Carson, 1957 *Amendments to the Illinois Business Corporation Act*, 39 CHI. B. REC. 259, 260 (1957).
12. MODEL BUSINESS CORPORATION ACT ANNOTATED § 22, para. 2.02 (1960).
13. Kraus, *Cumulative Voting for Directors in Missouri Corporations*, 16 J. Mo. B. 441, 446 (1960).
14. Rosenbaum, *Classified Boards in Missouri*, 32 Mo. L. REV. 251 n.6 (1967).

ber of voting shares so held . . . multipled by the number of directors. . . ." The former section is phrased in terms of the rights of the share and the latter is phrased in terms of the rights of the shareholder. Since the Constitution covers only the election of directors, it is allowable for the former section to restrict "each" share to "one" vote and in so doing disfranchise fractional shares. However, under the *Shapiro* case all shares are entitled to vote for directors except those disfranchised by the contract.[15] Thus, when the latter section refers to "the number of voting shares," it necessarily is including all shares not made non-voting by the articles of incorporation. Unless fractional shares are made non-voting by the articles, they should be able to vote under section 351.245(3).

It is submitted that the court erred in the *Benson* case. A literal reading of the constitutional cumulative voting guarantee and the statutes would seem to require that fractional shares be allowed to vote for directors. Such a decision would be consistent with the theory of the *Shapiro* case. It would not cause any inconvenience to large public corporations that potentially have many fractional shares because the *Shapiro* case would allow them to be disfranchised in the articles. Since cases where fractional shares will be significant are not likely to come up frequently, the significance of the *Benson* case would seem to be a warning to drafters of articles of incorporation to provide therein for fractional shares.

GEORGE LANE ROBERTS, JR.

WORKMEN'S COMPENSATION SUBROGATION: WHEN MUST A SUBROGATED EMPLOYER PAY A PORTION OF RECOVERY EXPENSES?

Maryland Cas. Co. v. General Electric Co.[1]

Respondent's deceased husband, an employee of appellant Maryland Casualty Company's insured, was killed in the course of his employment due to a defective high voltage switch manufactured by General Electric Company. A workmen's compensation award of $15,500 was entered in favor of the respondent and thereafter the appellant, claiming subrogation to the rights of the employee or his survivors under section 287.150, RSMo, 1959[2] filed suit against General Electric

15. Shapiro v. Tropicana Lanes, Inc., 371 S.W.2d (Mo. 1963).

1. 418 S.W.2d 115 (Mo. En Banc 1967).

2. § 287.150(1), RSMo (1959), provides that, "Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or . . . dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer, after deducting the expenses of making such recovery shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation."

Company for the employee's wrongful death.[3] The respondent joined appellant's suit as co-plaintiff, consulted with the appellant's attorney and testified at the trial which was conducted by the appellant's attorney and resulted in a recovery of $25,000 from General Electric Company.

The present dispute arose over distribution of the recovery proceeds between the appellant and the respondent. The respondent contended that recovery distribution should have been made under subsection 3 of section 287.150, RSMo 1959,[4] and appellant contended that distribution should have been made under subsection 1, thereof. Subsection 3 applies only when the recovery has been *effected* by the employee or his survivor and requires that the employer or his insurer pay a proportionate share of the recovery expenses. Subsection 1 places the entire expense burden on the employee or his survivor because under this subsection the employee or survivor realizes a gain from the recovery only when expenses have been paid and the employer has been fully reimbursed for the amount of the compensation award.

The trial court found that the recovery had been *effected* by the respondent and allocated the proceeds pursuant to subsection 3. The supreme court reversed, holding that joining as co-plaintiff, conferring with the appellant's attorney and testifying at trial was not enough to *effect recovery*.

This decision is significant in that it provides the first reported judicial interpretation of the words *effect recovery* as used in the context of subsection 3. The decision gives no definitive test for future cases other than several quoted definitions of *effect recovery* i.e., "accomplished, brought to pass, completed, produced, carried to completion or consummated," and the language: "We will not allow an employee or his dependents double recovery[5] in the absense of clear intention on

3. § 287.150 RSMo (1959), provides that when a third party causes an injury for which the employer is obligated under the workmen's compensation act, the employer or his insurer is subrogated to the employee's rights against the third party. This statute has been interpreted to allow either the employee or the employer to recover the total amount due and the party recovering becomes trustee of the other party's interest in the recovery proceeds, McKenzie v. Missouri Stables Inc., 34 S.W.2d 136 (St. L. Mo. App. 1930). The employer will have an interest in the recovery in all cases because his right in the proceeds has priority over the employee's right. The employee participates in the proceeds only after the employer has been reimbursed for payments made under the compensation award. The employee will have an interest in the recovery only if the amount received is larger than the amount of the compensation award.

4. 287.150(3), RSMo (1959), provides that, "Whenever recovery against the third person is effected by the employee or his dependents, the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and the attorney's fee has been paid the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered, or the balance of the recovery may be divided between the employer and the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation."

5. Presumably, the term double recovery refers to cases in which the employee's combined proceeds from the compensation award and the third party suit exceed his theoretical net proceeds after expenses had he recovered only from the

the part of the legislature that we do so. The law favors a construction which avoids unjust or unreasonable results."[6] The court also intimated that a broad interpretation of the words *effect recovery* would in reality be a judicial repeal of subsection 1.[7]

The court apparently feels that subsection 3 applies only in cases where the employee is clearly and primarily responsible for gaining the recovery. When the employee has met this burden is a question of fact, but it would seem that in most cases the original filing of the petition would be a requisite element of his burden.

The court's narrow interpretation would seem to be consistent with the purpose of subsection 3. Such subrogation and expense allocation statutes have been generally described as techniques by which legislatures provide monetary

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third party and had not received a compensation award. This result may be deemed a double recovery because the employee has been fully indemnified by the third party and has also received compensation from the employer.

It should be noted that the relationship between the employer and employee is not that of indemnity insurer and insured. The latter relationship is based on contract and normally places the burden of litigation expenses on the insurer, thus indemnifying the insured for both injuries and litigation costs. The employer's obligation, however, is based on statute and the limits of that obligation must be determined by statute interpretation. By enactment of subsection 1 in 1925 the legislature elected to place the expense burden on the employee and leave him in the position he would have been in if there had been no compensation award. The subsequent enactment of subsection 3 in 1955 allows the employee a *double recovery* and the court's disapproval of *double recovery* would indicate that only when the employee has clearly effected the recovery will subsection 3 be invoked.

6. In finding that it was improper to apply subsection 3 in the principle case, the court was precluded from resolving the parties' dispute as to the proper method of allocating proceeds under this subsection. Interpretation of the subsection 3 distribution formula is in a state of confusion due to the Kansas City Court of Appeal's decision in Knox v. Land Constr. Co., 345 S.W.2d 244 (K.C. Mo. App. 1961). One aspect of that court's interpretation dealt with the statutory language, "After the expenses and the attorney's fee has been paid the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due to the employer bears to the total amount recovered." This language was held to mean that after the expenses have been deducted from the recovery fund, the employer's share of the remaining fund shall be determined by multiplying the remaining fund by the ratio that the total amount of the compensation award bears to the total amount recovered. The excess is distributed to the employee. The court chose to ignore the last sentence of subsection 3 which provides that "any part of the recovery paid to the employee or his dependents . . . shall be treated by them as an advance payment by the employer on account of any future installments of compensation."

Both aspects of the Knox interpretation have been criticized in Brown, *Subrogation in the Missouri Workmen's Compensation Act—Section 287.150*, 26 Mo. L. Rev. 336 (1961), have been disregarded by the Missouri Industrial Commission in Genevieve v. Morrell Meat Packing Co., Ind. Comm. Mo., ZZ-26007 (1960), in ruling that the employee's distributed share should be treated as advance award payments and that the employer's share of the net recovery after expenses should be determined by the ratio that the amount of award actually paid at date of recovery bears to the total recovery. The Knox interpretation clearly magnifies the double recovery effect of subsection 3 and is contrary to the principle case's mandate against *double recovery*.

7. Maryland Cas. Co. v. General Electric Co., 418 S.W.2d 115, 117 (Mo. En Banc 1967).

incentives for both employers and employees to vigorously seek recovery against third parties.[8] The court's interpretation of *effect recovery* will not destroy the incentive provided by subsection 3 but will induce greater diligence because employees will have to vigorously seek recovery to receive the benefits of this subsection.

Probable legislative purpose is apparent if the history of subsections 1 and 3 are viewed together. Subsection 1 was enacted in 1925[9] and subsequently the purpose thereof was held to be to protect employers and assure that the ultimate discharge of any obligation to the employee would be made by blameworthy third parties.[10] The rationale of this interpretation was that the employer should be made whole as nearly as possible and that the employee should bear litigation costs just as he would have if there had been recovery against the third party with no workmen's compensation award.

In 1955 subsection 3 was added to the statute.[11] Since subsection 1 was not amended or deleted, it would seem that the legislature intended it to serve the same function it had in the past and that the addition of subsection 3 was intended to cure an inequity. Consistent with this reasoning are suggestions that the purpose of subsection 3 is to provide an equitable allocation of costs when the employee actually handles the litigation.[12] Under this interpretation it is doubtful that an employer who has shouldered more than half the work load was intended to be deprived of a subsection 1 distribution. As the court commented, the legislature did not word the clause in terms of contribution or substantial contribution to effecting the recovery but used the absolute term *effect recovery*.[13] It would seem that anything less than half the labors of recovery could not logically be deemed an effecting of recovery.

Undoubtedly, cases might arise where cooperation between parties is such that it would be extremely difficult to designate one of them as primarily responsible for the recovery. However, in such cases it is likely that the rapport will be such that a distribution agreement will be reached as is permitted by subsection 3.[14] Should this not be the case, the court's language discouraging double recovery might be interpreted to justify a finding for the employer. In terms of primary responsibility, it could be said that the employee is equally but not primarily responsible for the recovery.

In view of such a test, it would seem proper to inquire as to the circumstances in which an employee could hope to *effect* a recovery. If the employee files the petition he will clearly be able to prosecute the action and effect the recovery.

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8. 101 C.J.S. *Workmen's Compensation* § 1042 (1958).
9. Mo. Laws 1925, at 374, § 11.
10. McKenzie v. Missouri Stables, Inc., 34 S.W.2d 136 (St. L. Mo. App. 1930).
11. Mo. Laws 1955, at 597, § 1.
12. Brown, *Subrogation in the Missouri Workmen's Compensation Act—Section 287.150*, 26 Mo. L. Rev. 336 (1961); Genevieve v. Morrell Meat Packing Co., Ind. Comm. Mo., ZZ-26007 (1966).
13. Maryland Cas. Co. v. General Electric Co., 418 S.W.2d 115, 117 (Mo. En Banc 1967).
14. See note 4 *supra*.

If the employer files the petition, the employee may join the action and conceivably would be entitled to investigate and to call witnesses and conduct cross-examination at trial. Thus, an unusually ingenious and industrious employee might be primarily responsible for the recovery even though the employer was first to the courthouse.

If the employer is first to file a petition, it is not clear that the employee might not file a second petition thus creating a race to judgment with the winner being deemed to have effected recovery.[15] A judgment in one action would clearly have a collateral estoppel or res judicata effect as to the other action,[16] but it is not clear that the defendant would be able to have the second action abated prior to a judgment in the first suit.[17] If the defendant does not seek an abatement or if the court refuses to grant it, the employee might well effect the recovery via a second petition.

By providing a procedure whereby the employee's share of expenses depends on who effects the recovery, the legislature has created a competitive relationship between the employee and the employer in a situation where their co-operative efforts would seem a more desirable objective. It would seem that if both the employee and the employer wish to take part in prosecuting the third party suit, an early agreement as to allocation of litigation labors and expenses is the only way to guarantee both parties an equitable share of the proceeds and assure that the best possible case is presented at the trial.

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15. Either the employer or the employee or both together may recover against the third party. State *ex rel.* W. J. Menefee Constr. Co. v. Curtis, 321 S.W.2d 713 (Spr. Mo. App. 1959).

16. There is but one cause of action, O'Hanlon Report, Inc. v. Needles, 360 S.W.2d 382 (St. L. Mo. App. 1962).

17. The cases are clear that continuance of a second action is permitted if both actions involve the same parties, Brink v. Kansas City, 350 Mo. 845, 217 S.W.2d 507 (Mo. En Banc 1949); State *ex rel.* U.S. Fire Ins. Co. v. Terte, 351 Mo. 1089, 176 S.W.2d 25 (Mo. En Banc 1943), and Rule 55.31(8) of the MISSOURI RULES OF CIVIL PROCEDURE expressly provides for abatement in these circumstances. But, since the employer may bring the action in his own name, McKenzie v. Missouri Stables, Inc., 225 Mo. App. 64, 34 S.W.2d 136 (St. L. Ct. App. 1931), the parties in the two suits are not technically the same. However, since the recovering party is deemed the trustee of an express trust for the benefit of the non-recovering party, Zasslow v. Service Blue Print Co., 288 S.W.2d 377 (St. L. Mo. App. 1956); Jenkins v. Westinghouse Elec. Co., 18 F.R.D. 267 (W. D. Mo. 1955), it could be said that relief should be granted. At minimum it would seem that the identity of parties is such that a court of equity could grant injunctive relief against the second suit to avoid duplicity of law suits and double expense for the defendant, Muth v. St. Louis Trust Co., 77 Mo. App. 493 (St. L. Ct. App. 1898).

TORTS—NEGLIGENT PERFORMANCE OF A CONTRACT—PRIVITY: HAVE THE EXCEPTIONS FINALLY SWALLOWED THE RULE?

Westerhold v. Carroll[1]

The defendant in the noted case entered into a contract with the Archdiocese of St. Louis of the Catholic Church whereby, in addition to his other duties as architect, he agreed to supervise and inspect the performance of the contractor which was constructing a church for the Archdiocese. Payments by the owner to the contractor were required to be made upon certification by the defendant that work claimed to have been performed and materials furnished and delivered had, in fact, been performed and delivered, and that the amounts of such payments correctly reflected the percentage of the work actually then performed and the percentage of the materials then supplied.[2] In the course of his duties, the defendant certified that more work had been done and more materials delivered than was actually the case. Consequently, when the contractor defaulted on the construction contract and the surety was called in to complete the building, there were insufficient funds remaining under the contract to compensate the surety for the work remaining and it incurred losses in excess of $93,234.[3] The surety made demand for payment of these losses upon plaintiff pursuant to an indemnification agreement entered into previously as an inducement to the surety to execute a performance bond and a labor and material bond which the construction contract had called for.[4] The plaintiff was forced to pay the surety $17,500 in full settlement of his liability and incurred other expenses in the amount of $2,250.

Subsequently, plaintiff brought suit in the Circuit Court of the City of St. Louis alleging that his losses as indemnitor were directly and proximately caused by the carelessness, negligence, and wrongful acts of the defendant in that defendant wrongfully and negligently failed to inspect and supervise the work performed and the materials furnished and delivered, and negligently certified more work done and materials furnished than actually were, which resulted in a substantial overpayment to the contractor and left insufficient funds for the amount of work and materials required to complete the building. Plaintiff alleged that defendant knew or should have known, by the exercise of ordinary and reasonable care, that the amounts certified were in excess of the services rendered and therefore, he acted carelessly and negligently in the performance of his duties as architect.[5]

However, the trial court sustained a motion to dismiss plaintiff's petition on the ground that it failed to state a claim upon which relief could be granted.[6]

In reversing and remanding the case, the Missouri Supreme Court did not construe the construction contract,[7] but confined itself to the issue of whether

1. 419 S.W.2d 73 (Mo. 1967).
2. *Id.* at 74.
3. Westerhold v. Carroll, 419 S.W.2d 73, 75 (Mo. 1967).
4. *Id.* at 74.
5. Westerhold v. Carroll, 419 S.W.2d 73, 75 (Mo. 1967).
6. *Id.* at 74.
7. Westerhold v. Carroll, 419 S.W.2d 73, 75 (Mo. 1967).

in the absence of privity of contract the facts in the case imposed on the defendant a legal duty to the surety to exercise ordinary care in executing the certificates.[8] For the purpose of discussion, the court assumed that the plaintiff was subrogated to the claims of the surety and could maintain any action against the architect which the surety could have maintained.[9]

The requirement of privity has had a long and somewhat odious history in the field of torts. Stemming from the old English case of *Winterbottom v. Wright*,[10] the idea that one could not recover in tort for damages arising out of the negligent performance of a contract unless he was a party or a privy to it was used to prevent recovery in cases where recovery would have been allowed had there been no contract. The *Winterbottom* rule was not broken until *MacPherson v. Buick Motor Co.*,[11] wherein the court said that a manufacturer of chattels had a responsibility to the ultimate consumer which rested, not upon the contract, but upon the relationship arising from the purchase and the foreseeability of harm if proper care in the manufacture were not used.

However, where the negligent performance of a contract results in injury to an intangible economic interest, courts have been reluctant to depart from the requirement of privity.[12] The reason seems to have been a deep and abiding fear of the prospect of possible unlimited liability to an indeterminate group of people,[13] and a noticeable inclination to allow recovery more readily where the damages are visible and apparent, as in personal injury or serious property damages cases.[14] In addition, there is the idea that to allow a third party to recover would be to burden the contracting parties with an obligation which they did not voluntarily assume and deprive them of control over their own contract.[15]

The court in *Westerhold* said it would not be bound by the rule of privity where the reasons for it were not applicable to the facts and circumstances of the case.[16] Although "any extension of the limits and liability in this field should be

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8. *Id.* at 76.

9. Westerhold v. Carroll, 419 S.W.2d 73, 76 (Mo. 1967).

10. 10 M. & W. 109, 152 Eng. Rep. 402 (1842). For a Missouri case which adopted the *Winterbottom* reasoning, see Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234, 15 S.W. 1112, 12 L.R.A. 746 (1891).

11. 217 N.Y. 382, 111 N.E. 1050 (1916). For a list of cases indicating the application of *MacPherson* in Missouri, see Lesser v. William Holliday Cord Associates, Inc., 349 F.2d 490, 492 (8th Cir. 1965).

12. See Anderson v. The Boone County Abstract Company, 418 S.W.2d 123 (Mo. 1967) and Ultramares Corporation v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

13. Ultramares Corporation v. Touche, *supra* note 12, at 179, 174 N.E. at 444. This was one of the principal reasons put forth for the privity doctrine in *Winterbottom*.

14. PROSSER, TORTS 688-89 (3rd ed. 1964). See also Note, 46 CAL. L. REV. 851, 852 (1958).

15. Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234, 15 S.W. 1112, 12 L.R.A. 746 (1891) and Marvin Safe Co. v. Ward, 46 N.J.L. 19 (1884).

16. Westerhold v. Carroll, 419 S.W.2d 73, 79 (Mo. 1967). The court relied heavily on two New York cases, Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) and Ultramares Corporation v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), in ruling that privity was not applicable. In *Glanzer*, a third party was allowed

done on a case-to-case basis, with a careful definition of the limits of liability, depending upon the differing conditions and circumstances to be found in individual cases,"[17] the court felt that the sufficiency of the plaintiff's petition should be determined by the application of ordinary rules of negligence.[18]

Noting as a general principle that an obligation may be assumed by contract out of which may arise a duty to third parties,[19] the court felt that the existence of such a duty here should be determined by foreseeability. In other words, could the defendant reasonably anticipate that harm or injury to the surety would be the likely result of his negligent acts? Implicit in this is a recognition by the court that injury to an intangible economic interest can be just as harmful as injury to person or property.

The court found that the defendant could easily foresee the possibility of harm to the surety by his negligent certification.[20] Also, it disposed of defendant's claim that his negligence was not the proximate cause of plaintiff's loss[21] by pointing out that the contractor's default was not an intervening cause but merely the incident the contract provisions had been drawn to guard against.

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to recover for harm negligently inflicted upon an intangible economic interest. The defendant, a public weigher, negligently overstated the weight of some beans on a certificate given to the seller which the plaintiff relied on in purchasing them. The court in an opinion written by Judge Cardozo fixed liability on the defendant in spite of lack of privity because of a duty imposed by law, given the contract and the relationship of the parties. The very "end and aim" of the weighing was to shape the conduct of the plaintiff. Defendant's knowledge of this imposed a duty upon him to weigh carefully for the benefit of all who were relying upon him. In *Ultramares,* the same judge denied recovery in a suit by a third party who had relied on a certified balance sheet prepared by the defendants in making a loan to a corporation which was actually insolvent. The corporation had asked the defendants to make an audit which they did in a negligent fashion, causing the certified balance sheet to be erroneous. Judge Cardozo felt that privity should not be dispensed with here because the plaintiff's connection with the transaction was not close enough to give rise to a duty on the defendant's part. The service was performed primarily for the benefit of the client and not for unknown investors. Cardozo was afraid that to allow recovery here would be to expose accountants "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."

The Missouri court noted that the prospect of unlimited liability was not present here since the amount of damages could never exceed the value of the difference between the work actually done and that certified, and liability could not extend to anyone not in actual privity other than the surety and his subrogees. Also, the person not in privity who would be injured by defendant's negligence was known, and the "end and aim" of the contract for certification was for the benefit of the surety as much as for the owner. In reaching this conclusion, the court relied on language in Hall v. Union Indemnity Co., 61 F.2d 85, 88 (8th Cir. 1932).

17. Westerhold v. Carroll, *supra* note 16, at 77-78.

18. Westerhold v. Carroll, 419 S.W.2d 73, 80 (Mo. 1967).

19. *Ibid.* See also PROSSER, TORTS 658 (3rd ed. 1964).

20. Westerhold v. Carroll, 419 S.W.2d 73, 80 (Mo. 1967). The court noted with approval another case in which the same result was reached. See State of Mississippi, for the use of National Surety Corporation v. Malvaney, 221 Miss. 190, 72 So.2d 424, 43 A.L.R.2d 1212 (1954).

21. See brief for respondent, p. 13, Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967).

The consequences of the *Westerhold* decision could be far-reaching. Logically, there is no reason why the language in this case could not be applied to anyone who in the course of his business or profession supplies information to or for the benefit of third parties where it is foreseeable that his negligence would result in injury to their economic interest.[22] Also, even though the court made a specific finding of reliance in this case,[23] one wonders if this element would be necessary in every case. Quoting a California case,[24] the court listed the following as factors to be balanced and considered in determining whether a person should be held liable to a third party not in privity:

> 1. The extent to which the transaction was intended to affect the plaintiff.
> 2. The foreseeability of harm to the plaintiff.
> 3. The degree of certainty that the plaintiff suffered injury.
> 4. The closeness of the connection between the defendant's conduct and the injury suffered.
> 5. The moral blame attached to the defendant's conduct.
> 6. The policy of preventing future harm.[25]

Reliance on the part of the plaintiff is not listed and in fact was not present in *Biakanja,* where these factors were first listed.[26] Conceivably, a Missouri court could find for the plaintiff in the absence of reliance, if one or more of the above elements were satisfied.

Finally, the question arises as to whether this latest exception really swallows the rule of privity. Although the Missouri court talked in terms of another exception and only considered the plaintiff's petition in terms of negligence after it was satisfied that the usual reasons for imposing the privity requirements were not present, is there anything left for the privity rule to operate on? It would seem that all suits by a third party for the negligent performance of a contract could be analyzed and decided in negligence terms, using the various factors set forth above by the court, without resort to the artificial contract term, privity.

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22. See M. Miller Co. v. Central Contra Costa Sanitary District, 198 Cal. App.2d 305, 18 Cal. Rptr. 13 (1961) where an engineering company was held liable to a bidder on a sewer project who had relied on a soil report which the defendant had negligently prepared for the sanitary district; and Hedley Byrne & Co. v. Heller & Partners [1964], A.C. 465 where liability for negligence was extended to pecuniary loss in any case where some "special relation" between the parties could be found. See also Prosser, *Misrepresentation and Third Persons,* 19 VAND. L. REV. 231 (1966).

23. Westerhold v. Carroll, 419 S.W.2d 73, 79 (Mo. 1967). Note that the RESTATEMENT, TORTS, § 552 (1938) lists reliance as one of the elements necessary for recovery for negligent misrepresentation.

24. Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16, 65 A.L.R.2d 1358 (1958).

25. Westerhold v. Carroll, 419 S.W.2d 73, 81 (Mo. 1967).

26. Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16, 65 A.L.R.2d 1358 (1958). In Biakanja, the defendant, a notary public, was held liable for negligently failing to have a will properly witnessed. As a result, the plaintiff, who was the sole beneficiary under the will, received only ⅛ of the decedent's estate through intestate succession. See Note, 46 CAL. L. REV. 351 (1958).

The law of torts has made great strides since the days of *Winterbottom v. Wright,* and it is now possible to limit the spectre of unlimited liability through application of the concept of duty or proximate cause. In addition, the idea that to allow a third party to recover would be to burden the contracting parties with an obligation which they did not voluntarily assume is not true, once it is found that the relationship between the plaintiff and the defendant is such that the defendant owes a duty to use due care in performing his contract. If the factors set forth in *Westerhold* are present, the defendant has voluntarily assumed an obligation imposed by law. This does not mean that he must perform his contract exactly as agreed in order to avoid liability to a third party, but only that he must use due care.

The language of *Westerhold v. Carroll* leads one to believe that in the future Missouri courts will justify any decision withholding liability to a third party for negligence in performing a contract on tort grounds rather than lack of privity.

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