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The Impact of Nineteenth Century Missouri Courts upon Emerging Industry: Chambers of Commerce or Chambers of Justice?

*Honorable Thomas C. Clark**

*It's the economy, stupid!*¹

I. INTRODUCTION

Changes occur, but nothing really changes. Although economic considerations dominate American society as evidenced by recent presidential elections, economic considerations are not limited to the executive branch of the United States government. Prodigious efforts have been expended by legal scholars to categorize nineteenth century American judicial systems as glorified chambers of commerce, which served and subsidized emerging and developing industries in America. Equally prodigious efforts have been expended by legal scholars advocating that nineteenth century American judicial systems served as chambers of justice, which adjudicated disputes fairly and consistently within the legislative will and legal precedent. Against the backdrop of these diverse perceptions of nineteenth century justice, this Article dissects Missouri Supreme Court jurisprudence from 1821 to 1870 in an effort to confirm or dissent from the scholarly opinions expressed above.

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1. See Elizabeth Valk Long, *To Our Readers*, TIME, Nov. 1, 1993, at 4; *American Pie It's the Economy Stupid*, U.S. NEWS & WORLD REPORT, Feb. 12, 1996, at 6.

In his persuasive and exhaustive work,² Morton Horwitz devotes significant time and effort to supporting his theory that the judicial system changed rules and adopted legal theories to protect the capital wealth of emerging American industries against “raids” by claimants seeking damages for personal injury or deprivation of property rights.³ Horwitz directly accuses the state courts of denying claims against developing industries and, thereby, serving as social engineers in subsidizing economic development.⁴ Citing isolated cases from eastern state courts, Professor Horwitz concludes that state courts changed the rules and established judicial precedents which effectively burdened the weaker and less fortunate of society with the costs of industrializing nineteenth century America.⁵

Gary T. Schwartz challenges Horwitz’ thesis.⁶ First, Schwartz simplifies Horwitz’ conclusion, claiming that nineteenth century tort law provided a subsidy to economic enterprise.⁷ Schwartz then reads and analyzes numerous tort cases from two geographically different coastal states, New Hampshire, home of the textile industry in the nineteenth century, and California, allegedly

2. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 67-101 (1977).

3. *Id.* at 88, 89. Horwitz writes that, “in a variety of complex and ingenious ways, courts began to establish rules which substantially limited the liability not only of the state but of private corporations chartered to undertake works of economic improvement.” *Id.* at 69.

4. *Id.* at 99-101. Horwitz contends that because “common law doctrines were transformed to create immunities from legal liability” and thereby provided “substantial subsidies for those who undertook schemes of economic development . . . there developed a pattern of subsidization through the use not of the tax system but of the legal system.” *Id.* at 99-100.

5. *Id.* at 99. Horwitz concludes that “subversion of the expanding public law principle of just compensation by the increasingly ruthless application of the private law negligence principle must be seen as a phenomenon of industrialization. . . . Indeed, the law of negligence became a leading means by which the dynamic and growing forces in American society were able to challenge and eventually overwhelm the weak and relatively powerless segments of the American economy.” *Id.*

Horwitz confirmed his conclusion, when he stated, “[N]evertheless, it does seem fairly clear that the tendency of subsidy through legal change during this period was dramatically to throw the burden of economic development on the weakest and least active elements in the population. By contrast, it seems plausible to suppose that in a period when the property tax provided the major share of potential state revenue, the burdens of subsidy through taxation would have fallen disproportionately on the wealthier segments of the population.” *Id.* at 101.

6. Gary Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *Yale L.J.* 1717 (1981).

7. *Id.* at 1718. Schwartz defined the term subsidy, when he stated that “a liability rule presumably amounts to a subsidy if it entails a departure from an otherwise appropriate liability standard designed to relieve a class of injurers [sic] from the expenses of liability.” *Id.*

a significant tort haven after its 1849 statehood.⁸ Schwartz' analysis persuasively refutes Horwitz' thesis, reestablishing traditional concepts of a fair justice system. Schwartz concludes that "the nineteenth century negligence system was applied with impressive sternness to major industries and that tort law exhibited a keen concern for victim welfare," but with exceptions in California employer and governmental liability law.⁹

What better bellwether state by which to measure the opposing theses of Horwitz and Schwartz than Missouri,¹⁰ a rural, midwestern state, historically multi-cultural,¹¹ with long-tenured statehood from 1821? Missouri Supreme Court decisions from as long ago as 1821 are available, and study of this legal precedent can fairly and adequately adjudge the partiality or impartiality of this state's judicial system in nineteenth century tort cases. Unlike the Horwitz and Schwartz articles, which broadly covered nineteenth century tort cases,¹² this analysis focuses not only on what Missouri's Supreme Court *said*, but what it *did*¹³ in tort and related cases directly involving industry litigants from statehood

8. *Id.* at 1719.

9. *Id.* at 1717-20. Note that California governmental liability law is not relevant to this Article. This Article analyzes whether economic considerations unfairly influenced Missouri state courts to favor emerging industry interests over individual interests and does not evaluate governmental liability. Employer liability is subsequently discussed in Part VI which discusses affirmative defenses under the fellow-servant doctrine.

10. See HORWITZ, *supra* note 2, at 78. In addition, Missouri is certainly a permissible jurisdiction to analyze since Horwitz refers to judicial decisions from the state of Maine, the other half of the Maine-Missouri Compromise. See also FRANCIS A. WALKER, THE STATISTICS OF THE POPULATION OF THE UNITED STATES, EMBRACING THE TABLES OF RACE, NATIONALITY, SEX, SELECTED AGES, AND OCCUPATIONS, U.S. DEP'T OF THE INTERIOR 44 (1872) (listing the population of St. Louis as 10,020 in 1820 and 351,189 in 1870 and the population of Missouri as 55,088 in 1820 and 1,603,146 in 1870); CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 30 (1970) (listing the population of Missouri as 67,000 in 1820 and 1,721,000 in 1870). The population data apparently depends upon the resource.

11. For examples of French and Spanish influence within Missouri see generally Clark v. Hannibal & St. Joseph R.R. Co., 36 Mo. 203, 224 (1865); Garesche v. Boyce, 8 Mo. 228, 232 (1843); Administrators of Wright v. Thomas, 4 Mo. 577 (1835); O'Fallon v. Daggett, 4 Mo. 343, 349 (1835).

12. Compare HORWITZ, *supra* note 2, at 67-101 (Horwitz investigated isolated tort cases from eastern seaboard states), with Schwartz, *supra* note 6, at 56-76 (Schwartz conducted an exhaustive study of New Hampshire and California case law).

13. See, e.g., Boland v. Missouri R.R. Co., 36 Mo. 484, 493 (1865). Compare what the court said with what it did. The Boland court vigorously said that the standard for contributory negligence should be commensurate with the capacity of the injured person in order to be fair to "an infant, an idiot, or a person non compos mentis." Indeed, it would be harsh to expect "an infant, an idiot, or a person non compos mentis" to abide by the same negligence standard as "one who had arrived at the age to possess ordinary

through 1870.¹⁴ In their respective analyses of the legal competition between emerging industry and individual rights, neither Horwitz nor Schwartz refers to any judicial decision involving indentured servitude or human bondage, concepts abhorrent to free enterprise and liberty. Similarly, this analysis directly shuns judicial decisions involving slavery because those cases are anomalous, inherently distinguishable, and not instructive. This position was shared by the Honorable Chief Justice John Marshall, whose opinion is quoted as follows in *Perkins v. Reeds*:¹⁵

Can a sound distinction be taken between a human being, in whom another has an interest, and inanimate property? A slave has volition and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid the proceeding, but it might endanger his life or health.¹⁶

That distinction between humans and inanimate property underscores the inapplicability of common carriers' strict liability in slavery cases as further explained by Chief Justice Marshall:

Being left at liberty, he [the slave] may escape; the carrier has not, and cannot have, the same absolute control over him that he has over inanimate matter.

judgment and discretion." In *Boland*, the victim was a two year old child who wandered onto the tracks and was killed when run over by the defendant's horse car. Despite all the discussion and attention given to the selection of an appropriate standard of contributory negligence and the need for jury decision, the trial court and the supreme court evaded both issues, by deciding that the driver was *not negligent* and ruling for the defendant. After all its "preaching" against the harshness of an ordinary negligence standard for "an infant, an idiot, or a person non compos mentis," the *Boland* court did not address the contributory negligence of the victim, precluded jury participation, and simply ruled for the defendant. *Boland* was one of only four identified cases decided *exclusively* by judicial decree without a trial on the merits or jury assistance. Interestingly, this decision has been heralded for its dicta on contributory negligence, but its exclusively judicial decision making has been largely ignored.

14. 1820 to 1870 is representative of the periods surveyed by both Horwitz and Schwartz. See HORWITZ, *supra* note 2, at 67-101; Schwartz, *supra* note 6, at 1717-56. Horwitz divided his analysis into three time periods. The first was 1795-1820, in which the implied contract theory of nonfeasance (common law negligence) changed to a concept of misfeasance (nineteenth century negligence). The second from 1820-1839, in which collision cases involving strangers supplemented judicial inquiry into injury with the added inquiry into carelessness. The third from after 1840, in which the negligence concepts of collisions are generally applicable. HORWITZ, *supra* note 2, at 67-101. Schwartz's analysis covers the nineteenth century within New Hampshire and California. Schwartz, *supra* note 6, at 1717-56.

15. *Perkins v. Reeds*, 8 Mo. 31 (1843).

16. *Id.* at 33.

In the nature of things, and in his character, he resembles a passenger, and not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than that which is applicable to the carriage of common goods.¹⁷

Slaves suffering injury and harm during passage on a common carrier generated atypical litigation because legal protection was afforded the master-owner and not the injured slave. The slave owner's property interest in the slave was protected for injury or harm to the slave,¹⁸ and, by operation of penal statute, was also protected for escape.¹⁹ Unauthorized transportation of slaves risked legal action by owners against transporters, whose culpability ranged from strict liability to willful intent.²⁰ The ultimate irony of these cases culminated in *Calvert v. Steamboat Timoleon*.²¹ Steamboat *Timoleon* defended against the master's suit asserting a legal fiction, that the "slave" in question, although still in bondage, was legally an emancipated free person. Poetic justice prevailed. The court held that emancipation was exclusively a personal right, which, if disputed, was unavailable to third parties or steamboats as a defense.²² The railroad industry encountered similar consequences for unauthorized transportation of slaves,²³ and these cases are equally inapplicable because humans are not property.

II. STEAMBOATS AND NAVIGATION

A. Private Shoreline Usage Limited to Emergencies

Nature's Creator endowed the State of Missouri with the foremost and least expensive canal system in the land, bequeathing the Mississippi and Missouri Rivers. Navigation and fishing interests claimed the benefits and clashed with

17. *Id.*

18. See *Johnson v. Steamboat Arabia*, 24 Mo. 86 (1856). In *Johnson*, a young enslaved male, required to work for an officer of the ship while being transported from Kentucky to St. Louis, fell overboard and drowned. Judgment for the plaintiff slaveowner was affirmed against the steamboat *Arabia* for wrongfully forcing the enslaved male to work on the boat which led to his death. *Id.* at 87.

19. See *Withers v. Steamboat El Paso*, 24 Mo. 204, 210 (1857). The court said that the penal statute, "was intended to be, a substantial protection to the slave property of our citizens residing in the vicinity of our large rivers."

20. See *id.*; but see also *Russell v. Taylor*, 4 Mo. 550 (1835) (holding that the trial court's instructions were too broad and reversing a verdict directed for the defendant, remanding the case for a new trial), and *Lee v. Sparr*, 14 Mo. 371 (1851) (the court upheld a directed verdict in favor of the defendant steamboat).

21. *Calvert v. Steamboat Timoleon*, 15 Mo. 595 (1852).

22. *Id.* at 595-97.

23. See, e.g., *Rogers v. Pacific Railroad*, 35 Mo. 153 (1864).

private shoreline interests. Establishing precedent regarding the inevitable competition between individual and industry interests, the Missouri Supreme Court endorsed the long-tenured maxim, “[E]very one should so use his rights as not to injure or molest others in the enjoyment of theirs.”²⁴

In *O’Fallon v. Daggett*, plaintiff sued in *trespass quare clausum fregit* seeking damages for injury inflicted by defendants’ establishment of repair facilities and attendant land usage along plaintiff’s Mississippi River shoreline for an extended six-week period. Plaintiff claimed title of ownership and the right to damages, while defendants insisted that the Mississippi River was a public highway and a common navigable stream providing shoreline upon which boats landed and “lade and unlade” their vessels of cargo and passengers “at their like, free will and pleasure.”²⁵ The trial court, sitting as a jury, adopted defendants’ legal position and entered judgment for defendants.²⁶ Upon appeal, however, the Missouri Supreme Court recognized and respected plaintiff’s ownership, noting that the “Spanish Government granted the land to the water’s edge.”²⁷ Furthermore, balancing competing interests and acknowledging the existence of nautical emergencies necessitating landings, the court conceded defendants’ right to repair, but said that “the right to repair must, therefore, be limited to cases of emergency, and not extended to cases of mere convenience.”²⁸ Establishing what would become long-standing precedent and policy, the court rejected unrestricted navigation industry usage of private shoreline to the exclusion of private ownership rights, holding as follows:

It seems to us, this qualification of the privilege to occupy the bank, when the property is in a private person, is reasonable; the general interests of navigation have been anxiously guarded by most commercial nations, and so they are with us, but it does not follow that the private rights of the people who own the land are, for that reason, to be disregarded. When a vessel is on a voyage and meets with any accident, which makes it necessary to touch the bank, she has a right to do so, leaving the bank, when private, as soon as practicable.²⁹

This pronouncement was not challenged in subsequent navigation litigation, despite the fact that Missouri courts’ jurisdiction over the Mississippi River was not judicially confirmed until 1850.³⁰

24. *O’Fallon v. Daggett*, 4 Mo. 343 (1835).

25. *Id.* at 343.

26. *Id.*

27. *Id.* at 347.

28. *Id.* at 349.

29. *O’Fallon*, 4 Mo. at 348.

30. *Swearingen v. Steamboat Lynx*, 13 Mo. 519 (1850).

B. Liability for Entrustment of Property

Legal distinctions attach to the method by which property is entrusted to another and generally these distinctions determine the legal principles and rules by which disputes are adjudicated by the Missouri courts.³¹ While significant legal consequences naturally flow from plaintiff's chosen theory of recovery,³² contractual duties incurred and liability imposed profoundly differ between bailments for hire by common carriers and generic bailments, and so might the results.³³ To evaluate judicial treatment of navigation interests for losses or damages to property requires full knowledge of the facts, the dispute and the disposition, regardless of any "artificial" legal designations. The following two Sections of this Article demonstrate that the Missouri Supreme Court adhered to established legal principles, avoided technical dispositions by trial judges, favored jury resolution of disputes, and impartially applied the consequences. These two Sections also distinguish between common carriers for hire and parties performing simple bailments.

Common carriers for hire are insurers of their bailed cargo, save acts of God and public enemies.³⁴ Although proof of negligence or inattention supports recovery against a common carrier for hire, recovery also can be predicated upon proof of damage to, or loss of, entrusted goods. By contrast, in simple bailments the bailee must exercise ordinary care in controlling or managing another's property and is only liable for ordinary negligence or inattention.³⁵

31. See *Smithers v. Steamboat War Eagle*, 29 Mo. 312, 315 (1860) (distinguishing common carrier liability); see also *Perkins v. Reeds*, 8 Mo. 33, 35 (1843) (citing *Boyce v. Anderson*, 2 Peters 150, 154-55 (1829), in which Chief Justice Marshall proclaims the inapplicability of general principles governing the law of bailment, normally used by courts in cases of lost property, specifically the doctrine of common carriers, when the case involves lost human property) (emphasis added).

32. See, e.g., *Smithers*, 29 Mo. at 312 (1860). Defendant's appeal was predicated upon plaintiff's failure to specifically assert defendant's status which was central to plaintiff's common carrier theory of recovery; yet the court upheld plaintiff, saying the petition was adequate in this regard. *Id.* at 315.

33. See *id.*

34. *Wolf v. American Express Co.*, 43 Mo. 421, 425 (1869). Emphatically, the supreme court recites that the common carrier is "not only responsible for any loss or injury to the goods he carries which is caused by his negligence, but the law raises an absolute and conclusive presumption of negligence whenever the loss occurs from any other cause than 'the act of God or the public enemy.'" *Id.* The court further clarified the "Act of God" exception, stating that:

The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause he is still responsible.

Id.

35. *Smithers*, 29 Mo. at 315.

1. Bailments for Hire (Common Carriers)

“Intimidating” best describes the common carrier for hire’s “stringent responsibility.”³⁶ After claimant has proven common carrier-for-hire status and damage to the goods, the common carrier shoulders the burden of proving causation by an act or peril which is legally recognized as an exemption.³⁷ Still, the common carrier incurs liability if the “injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods.”³⁸ The common carrier is always responsible for any “loss occasioned by his negligence and inattention to duty.”³⁹

Best illustrating claimants’ advantage in proceeding against, and seeking recovery from, a common carrier on the bailment-for-hire theory is *Smithers v. Steamboat War Eagle*. Plaintiff’s horse was transported from St. Louis to Lexington, Missouri, aboard the steamboat *War Eagle*. While unloading, the horse fell off the staging and was killed.⁴⁰ Plaintiff’s petition alleged that defendant’s officers and crew were careless, unskillful, misdirected and negligent, but failed to allege that the defendant was a common carrier. Still, plaintiff submitted his case to the jury on the theory of common carrier liability and received the jury verdict. On appeal, defendant insisted that plaintiff’s recovery depended upon proof of defendant’s negligence, together with appropriate instructions, citing *Ready v. Steamboat Highland Mary*.⁴¹ The supreme court affirmed plaintiff’s judgment, construed plaintiff’s petition to sufficiently plead common carrier status, and disregarded plaintiff’s negligence allegations as “surplusage.”⁴²

For inexplicable reasons, in *Pomeroy v. Donaldson*, at plaintiff’s request, the court instructed the jury on both common carrier liability⁴³ and on

36. *Wolf*, 43 Mo. at 425.

37. *Id.* at 426; see also *Sawyer v. Hannibal & St. Joseph R.R. Co.*, 37 Mo. 152, 164 (Common carriers “are not responsible where all reasonable care, skill and diligence, prudence and foresight have been employed. They are not liable for mere accident or misadventure, any more than for the act of God, or the public enemy, for any sudden convulsion of nature, or an unknown or unforeseen destruction, or an unknowable insufficiency. . .”).

38. *Wolf*, 43 Mo. at 426.

39. *Id.*

40. *Smithers*, 29 Mo. at 313.

41. 17 Mo. 461 (1853). Plaintiff lost his horse during a steamboat voyage. The court considered but did not determine whether freight charges of \$5 had been paid for the passage of the horse, or the resultant status of the steamboat. Thus, the decision did not rest upon the steamboat’s common carrier-for-hire status, but rather upon the ordinary negligence of a simple bailee. *Id.*

42. *Smithers*, 29 Mo. at 313.

43. 5 Mo. 36 (1837) (“[A] ferryman was bound to use the strictest diligence, and like a common carrier, was liable for all accidents, except such as were the act of God,

defendant's negligence.⁴⁴ At defendant's request, the court also instructed the jury that plaintiff could not recover if he or his agent negligently drove the horse and wagon onto the boat.⁴⁵ The supreme court affirmed plaintiff's jury verdict, noting that the jury was well instructed regarding the liability of the defendant ferryman and the consequences of plaintiff's negligence. The supreme court surmised that the jury seemingly found that defendant negligently caused the accident.⁴⁶

The Missouri Supreme Court has consistently thrust upon common carriers the duty "to transport goods to a particular destination [which] necessarily includes the duty to *deliver* them in safety. . . in proper time and manner, and at a proper place, and *prima facie* to the consignee personally,"⁴⁷ as was required in *Bartlett v. Steamboat Philadelphia*. Despite plaintiff's absence when the steamboat *Philadelphia* landed and discharged its cargo, leaving plaintiff's cargo of "gunnies" on the dock, plaintiff's jury verdict still was affirmed. In the absence of any custom or usage, common carriers were further obligated to store the freight or return it if plaintiff or an agent failed to appear.⁴⁸

Consignee's acceptance of goods delivered to a different site than specified in the contract did not extinguish plaintiff's breach of contract claims against the common carrier, unless expressly waived.⁴⁹ The supreme court preserved plaintiff Atkisson's breach of contract claim, but gave other reasons for reversing plaintiff's judgment after a jury verdict. Offsetting that reversal, the supreme court affirmed recovery based on negligent towing by the steamboat *Diurnal* in *Miles v. Steamboat Diurnal*,⁵⁰ again deferring to the jury decision. Uncertainty reigns when the common carrier returns the freight, but is denied its freight charges because the value of the freight is comparable, making it

or the enemies of the State.").

44. *Id.* ("[T]he defendant was answerable for the acts and negligence of his agents employed at the ferry in taking passengers across.").

45. *Id.*

46. *Id.* at 39.

47. *See Bartlett v. Steamboat Philadelphia*, 32 Mo. 256, 259 (1862); *see also Erskine v. Steamboat Thames*, 6 Mo. 371, 373 (1840).

48. *Bartlett*, 32 Mo. at 259.

49. *Atkisson v. Steamboat Castle Garden*, 28 Mo. 124, 128 (1859). Goods consisting of lumber and whisky were delivered to and accepted by plaintiff at a point short of the destination. The jury verdict for plaintiffs was reversed due to incorrect evidentiary rulings, and an incorrect measure of damages which should have been the value of the goods at the point of destination less freight charges and costs of transportation.

50. 34 Mo. 588 (1864). Miles contracted with the defendant to tow its "bow-dock," [a small floating dock used to raise the bows of steamboats so as to permit certain repairs to be made] but in passage, the bow-dock sank and was lost. The supreme court upheld the plaintiff's jury verdict and approved the instructions which allowed recovery based upon defendants' negligence rather than common carrier status. *Id.* at 590-91.

economically unfeasible to return the goods.⁵¹ Acknowledging that the “uniform usage” or “custom” was to return any rejected freight, the supreme court held that practice unreasonable if the goods were of a “perishable nature” or the “freight (return charge) constitutes a large proportion of their value” at the destination.⁵² The carrier’s acts were accordingly governed by the circumstances of the case.

Judicial retreat from imposing further strict duties upon common carriers based upon a clause in the bill of lading occurred in *Sturgess v. Steamboat Columbus*.⁵³ Sweet potatoes being transported from Natchez to St. Louis rotted during an eleven-day delay at Cairo due to low channel. The bill of lading provided “the privilege of reshipping in case of low water.”⁵⁴ The trial judge heard the evidence and entered judgment for plaintiff, holding that the common carrier was obligated to “reship” when delayed by low water; however, the supreme court reversed and remanded the case, designating the reshipping provision as a privilege to the carrier and not obligatory.⁵⁵ Perhaps without design, but nonetheless enforcing an image of fairness, the Missouri Supreme Court affirmed another trial judge’s award of \$50 for damages to a piano on a “contract of affreightment.”⁵⁶

Technical rulings by trial judges favoring defendant steamboats met supreme court resistance. In *Erskine v. Steamboat Thames*⁵⁷ and *Camden v. Steamboat Georgia*,⁵⁸ plaintiffs sued common carriers for failure to deliver goods. In *Erskine*, the trial court entered judgment for defendant because plaintiffs’ petition failed to allege that plaintiffs made demand for the goods. In *Camden*, the trial court sustained defendant’s demurrer to plaintiff’s general allegations, describing the bailed property as “divers other goods and merchandise” and entering judgment for defendant.⁵⁹ In both cases, the supreme court reversed and remanded, concluding that the *Erskine* petition was properly framed and directing the trial court to allow Camden to amend its petition. Such leniency ceased in *Syme v. Steamboat Indiana*.⁶⁰ In remanding this case to the

51. See *Steamboat Keystone v. Moies*, 28 Mo. 243 (1859). *Steamboat Keystone* hauled iron castings from St. Louis to Eldridge Brothers Company at Wyandott, Kansas Territory, encountered rejection and returned the castings to St. Louis. Jurors more than doubled the one-way freight charges of \$72, rendering a \$150 verdict to *Steamboat Keystone* which was reversed and remanded by the supreme court. *Id.* at 243-44, 247.

52. *Id.* at 245.

53. 23 Mo. 230, 232 (1856).

54. *Id.*

55. *Id.*

56. *Leith v. Steamboat Pride*, 16 Mo. 181 (1852).

57. 6 Mo. 371, 371-72 (1840).

58. *Id.* at 381, 388.

59. *Id.* at 383.

60. 28 Mo. 335, 337 (1859). Plaintiff’s goods being shipped by defendant from New Orleans to St. Louis were never delivered. Plaintiff’s petition failed to allege that

trial court, the supreme court set aside the jury verdict, and held that the petition was scarcely distinguishable from an “ordinary gratuitous bailment”⁶¹ petition and therefore was deficient.

In summary, of the ten foregoing common carrier-for-hire cases against the steamboat industry, all six jury trials resulted in plaintiffs’ verdicts, four of which were affirmed⁶² and two of which were reversed and remanded⁶³ by the supreme court. Four cases were adjudicated by trial judges, two favoring the defendants⁶⁴ and two favoring the plaintiffs,⁶⁵ three of which were reversed and remanded by the supreme court. Steamboat *Keystone*, as plaintiff, received a jury verdict in its suit to collect freight charges, but suffered reversal on appeal. An overall analysis suggests impartial and even-handed judicial treatment of navigation interests, but certainly not favoritism.⁶⁶

2. Gratuitous Bailments

In *Ready v. Steamboat Highland Mary*,⁶⁷ plaintiff sued for the negligent loss of his horse while traveling from Rocheport, Missouri, to the Kansas Territory on the steamboat *Highland Mary*. The trial court entered judgment for plaintiff for \$125 because defendant’s boat had attempted a nighttime passage through a known difficult and dangerous course on the Missouri River near the mouth of

defendant was a common carrier, that the goods were ever received, that defendant converted the goods, or that any consideration was paid for the shipment. At trial, defendant objected to presentation of evidence respecting those missing allegations, but was overruled, and the jury returned a verdict for plaintiff. *Id.* at 337.

61. *Id.* at 337.

62. *Miles v. Steamboat Diurnal*, 34 Mo. 588, 588 (1864); *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256, 259 (1862); *Smithers v. Steamboat War Eagle*, 29 Mo. 312, 313 (1860); *Pomeroy v. Donaldson*, 5 Mo. 36, 37 (1837).

63. *Atkisson v. Steamboat Castle Garden*, 28 Mo. 124 (1859); *Syme*, 28 Mo. at 335.

64. *Camden v. Steamboat Georgia*, 6 Mo. 381, 381 (1840); *Erskine v. Steamboat Thames*, 6 Mo. 371, 371 (1840).

65. *Sturgess v. Steamboat Columbus*, 23 Mo. At 230 (1856); *Leith v. Steamboat Pride of the West*, 16 Mo. 181 (1852).

66. *See Atkisson*, 28 Mo. at 129; *Steamboat Keystone v. Moies*, 28 Mo. 243, 249 (1859); *Syme*, 28 Mo. at 337; *Camden*, 6 Mo. at 381; *Erskine*, 6 Mo. at 37. *See also* *Railey v. Porter*, 32 Mo. 471 (1862). Of interest in *Railey* is the fact that although a common carrier for hire, steamboat *A.C. Goddin* was liable to plaintiffs for misdelivery of hemp seed to T.B. Wallace instead of C.O. Wallace at Lexington. Defendants, “forwarding and commission merchants,” were not exonerated from responsibility and remained liable to plaintiffs for ordinary negligence for their failure to give notice of the shipment to the consignee. *Id.* at 474. This illustrates stern judicial treatment being uniformly administered, and not just sternly administered towards the navigation industry.

67. 17 Mo. 461 (1853).

the Little Blue River. The Missouri Supreme Court reversed the trial court and remanded the case, holding that all circumstances surrounding the passage over dangerous and difficult courses in the river must be considered in determining any negligence by the boat operators and adding that negligence could not be inferred from night passage alone.⁶⁸ Upon remand, a jury verdict for Ready ratified the earlier judgment. With reluctance, the supreme court remanded *Ready II* because potentially harmful hearsay testimony was admitted.⁶⁹ Notably, however, the Missouri Supreme Court remanded the case to the trial court for final disposition.⁷⁰

Ready also is significant for what was not done. The amended petition in *Ready* alleged that the horse had been carried for hire, while the answer denied any such contract between the parties. No factual determination was made. The obligation of a carrier for hire is very different from that of a carrier without reward, but both courts declined to address bailment for hire.⁷¹ The supreme court ignored facts and legal theory pertaining to bailment for hire and confined its review to the negligence of the gratuitous bailee.⁷²

In contrast to the steamboats' common carrier liability as bailees for hire of cargo, which was pervasive and readily enforced, the Missouri Supreme Court firmly and consistently protected riverboat owners from that same common carrier liability for losses resulting from gratuitous bailments of *money* (i.e., "specie") to crew members.⁷³ In *Whitmore v. Steamboat Caroline*, the court upheld the trial court's directed verdict for the steamboat *Caroline*, stating that imposition of liability upon boat owners for unplanned, gratuitous and secret undertakings of crew members to deliver money in kind would render a "great injustice" because there was no "reciprocity" or benefit to the owners commensurate with the risk.⁷⁴ In *Whitmore*, plaintiff transferred \$1,500 in gold to the clerk of the steamboat *Caroline* for safekeeping during passage up the

68. *Id.*

69. *Ready v. Steamboat Highland Mary*, 20 Mo. 264 (1855). Upon retrial before a jury, plaintiff prevailed, winning a judgment for \$125. However, the judgment was again reversed because of the erroneous admission of hearsay statements made by the boat's pilot. The pilot had stated that he did not intend to pass by the mouth of the Little Blue that night. The court responded:

Upon this ground, then, we would not disturb the judgment; but this court is, with reluctance, compelled to send the case back, for the act of the court below, in admitting that part of Sublett's deposition, in which he details a conversation between himself and Mr. Holland, a pilot on the boat.

Id. at 265.

70. *Id.*

71. *Ready*, 17 Mo. 463.

72. *Id.*

73. *Chouteau v. Steamboat St. Anthony*, 20 Mo. 519 (1855); *Whitmore v. Steamboat Caroline*, 20 Mo. 513 (1855).

74. *Whitmore*, 20 Mo. at 518.

Illinois River. The gold was to be tendered in payment for the purchase of wheat at the end of the trip. During passage, the gold was reported stolen; plaintiff sued and the trial court directed a verdict for defendant because plaintiff failed to prove a known usage or custom that steamboats carried money for hire.

Whitmore simply followed the supreme court's holding in "Chapter III" of the four-chapter saga of *Chouteau v. Steamboat St. Anthony*.⁷⁵ The court opined that steamboat owners' liability as common carriers for the loss of money entrusted by passengers to the ship's clerk depended upon strict proof of a known usage, that the steamboat carried money for hire on account of the owner, or that such was a known usage within the steamboat trade.⁷⁶ "Freight or money must be proportioned to the risk assumed. No owner of a boat would permit her to carry money without a reward compensating for the risk, if he was aware that he would be liable in the event of its loss."⁷⁷

Thus distinguishing steamboats' common carrier liability as bailees for hire from the more lenient gratuitous bailee standard requiring simple proof of negligence, the supreme court in "Chapter IV" of the *Chouteau v. Steamboat St. Anthony* saga conclusively terminated steamboat liability for gratuitous bailments. The supreme court commented that "a steamboat is not a person who can undertake a gratuitous bailment."⁷⁸ Still, this halo of judicial immunity from liability for gratuitous bailments of money granted steamboats a safe haven, but not an absolute sanctuary from liability as a common carrier of money. Only if plaintiffs achieved very formidable proof requirements, proving either that the steamboats' standard usage was to carry money for hire on account of the owners or that such was a known usage within the steamboat industry, would the steamboats be held liable.

Ultimately, *Chouteau* tested both the patience and judicial skills of the supreme court, as evidenced by the following comment: "[T]his is the third or fourth time this cause has been in this court, and it would be some consolation to know when there will be an end of it."⁷⁹ Nevertheless the supreme court did not finalize the disposition as it did in *Whitmore*, but remanded the case to the trial court for further proceedings as it had done in *Ready*.

In objectively assessing the judicial treatment afforded to individual plaintiffs versus the steamboats in these bailment cases, it is apparent that impartial application of legal principles predominated even though defendants generally prevailed. *Ready* was "reluctantly" remanded for disposition by a trial court or jury, both of which had already returned verdicts for plaintiff. Lower court dispositions in *Chouteau* were reversed four times for comprehensive

75. 11 Mo. 226 (1847); 12 Mo. 389 (1849); 16 Mo. 216 (1852); 20 Mo. 519 (1855).

76. *Chouteau*, 16 Mo. at 222-25; see also *Whitmore*, 20 Mo. at 518.

77. *Whitmore*, 20 Mo. at 513, 517.

78. *Chouteau*, 20 Mo. at 521.

79. *Id.*

reasons, twice for each party. Admittedly, Professor Horwitz could selectively point to *Whitmore* to support his thesis that state courts protected the steamboat industry in Missouri, but to do so ignores that *Whitmore* was only one of four identified cases that was exclusively decided by judicial decree (without a trial on the merits or jury decision). However, the Missouri Supreme Court's reluctance to hold owners responsible for unauthorized and "dubious" gratuitous bailments of money to employees was fairly balanced by formidable proof requirements allowing recovery from steamboat owners who countenanced gratuitous bailments of money to employees as their "standard usage" or as a "known usage."

C. Collision Cases

Professor Horwitz credits the steamboat collision cases for releasing English jurisprudence from the shackles of common law actions of trespass and trespass on the case.⁸⁰ Classifying actors within such cases as either active or passive, he advocates that such cases forced the courts to start looking at circumstances surrounding carelessness. Judicial analysis of the steamboat cases also distinguishes victims as "strangers" to whom neither contract nor implied contract was applicable.⁸¹ Horwitz contends that these changes provided the means by which state courts favored emerging industry.

Appraisal of judicial treatment of steamboats as an emerging industry requires an examination of steamboat litigation in Missouri, especially the collision cases. Steamboat collision cases best portray the transition from judicial usage of the common law forms of action, with concepts of strict liability, to more contemporary concepts of liability based upon negligent conduct. Close investigation reveals consistent and uniform application of principles of law by the Missouri Supreme Court to all litigants without exception and without any ploy or design to attain a judicially preferred disposition.

1. Steamboat Collisions with Others

The first important steamboat collision decision in Missouri abided by the entrenched maxim, "[Y]ou shall so use your own as not to hurt your neighbor's property."⁸² In *Steamboat United States v. Mayor of St. Louis*,⁸³ the court adopted a strict liability approach by imposing liability on the steamboat *United States* which, while trying to dock, struck and sank the keelboat *Tom Roberts*. The *Tom Roberts* was moored and "well secured" at the dock. Nevertheless, the

80. HORWITZ, *supra* note 2, at 88, 89.

81. HORWITZ, *supra* note 2, at 88, 89.

82. *Steamboat United States v. Mayor of St. Louis*, 5 Mo. 230, 233 (1838).

83. *Id.*

court imposed liability without considering fault by the steamboat *United States*, holding steamboats to the “strictest and most scrupulous care in navigating our rivers.”⁸⁴

Thereafter, in two similar boating collision cases, the court assessed each party’s exercise of ordinary care and any contributory negligence, rather than imposing strict liability.⁸⁵ In *Chouteau v. Uhrig*, the trial court instructed the jury to determine “if the loss of the keel-boat was occasioned by the omission of *ordinary care* on the part of the officers or hands employed on the steamboat.”⁸⁶ Defendants’ evidence showed that appellant Chouteau’s crew exercised every precaution to avoid collision while trying to land after dark during a storm. Despite defendants’ evidence, the jury reached a verdict for plaintiffs for \$450, which was affirmed.⁸⁷ Likewise, in *Steamboat Western Belle v. Wagner*,⁸⁸ the defendant steamboat collided with and sank plaintiffs’ flatboat loaded with wheat and whiskey. The flatboat was docked when the steamboat tried to land to acquire wood, albeit after dark and during a storm. Recognizing contributory negligence as the issue, the trial court instructed that the verdict must be for the defendant steamboat if any fault or negligence on the part of the operators of the flatboat caused the accident or injury.⁸⁹ The jury rendered a verdict in favor of the plaintiff flatboat owners. The supreme court reversed and remanded the case for retrial, finding error in the verdict-directing instruction. Nevertheless, contributory negligence became a determinative issue in navigation mishaps.

To circumvent the unfair and harsh consequences of contributory negligence, the supreme court distinguished passive or remote negligence from negligence which proximately caused the injury.⁹⁰ In *Adams v. Wiggins Ferry Co.*,⁹¹ defendant’s vessel collided with and sank an improperly moored barge. The Missouri Supreme Court affirmed judgment for the plaintiff, as his negligence was merely passive, and noted, “[B]ecause one has committed a fault

84. *Id.*

85. *Steamboat Western Belle v. Wagner*, 11 Mo. 30, 32 (1847); *Chouteau v. Uhrig*, 10 Mo. 62, 66 (1846).

86. *Uhrig*, 10 Mo. at 64.

87. *Id.*

88. *Western Belle*, 11 Mo. at 30, 32.

89. *Id.* at 31.

90. *See Adams v. Wiggins Ferry Co.*, 27 Mo. 95, 101 (1858). The *Adams* court noted:

We conceive the law . . . to be, that, although where both parties are in fault, where there is negligence on both sides, and both *actively* contribute to the injury at the time of its commission, there can be no recovery, yet, where there is a mere passive fault or negligence on the part of the plaintiff, the defendant is bound to observance of ordinary care and prudence in order to avoid doing him a wrong.

Id. at 101.

91. *Id.*

or been guilty of a negligence, he does not thereby place himself at the mercy of every one who may encounter or come in the way of the object"⁹²

The supreme court continued to avoid any unfairness imposed by strictly technical decisions. In *Cable v. St. Louis Marine Railway & Dock Co.*,⁹³ technicalities regarding the real party in interest did not negate plaintiff's verdict arising from a Mississippi River boat accident. The Missouri Supreme Court followed precedent established in the wrongful death case of *James v. Christy*⁹⁴ decided just two years earlier.

2. Steamboat Collisions with Steamboats

Similarly, collision litigation between steamboats conformed to the same legal principles of negligence and contributory negligence. Distinctions between active and passive negligence were determinative and provided the proper standard of conduct. In *Atchison v. Steamboat Dr. Franklin*,⁹⁵ involving a Mississippi River collision between the steamboat *Amarath* and the steamboat *Dr. Franklin*, plaintiff's judgment was affirmed. The supreme court emphasized that the jury had been properly instructed, specifically noting the contributory negligence instruction.

Another plaintiff's verdict, in 1854, withstood defendants' contentions of instructional error generated by the conflict between adopted navigational rules and custom or usage.⁹⁶ The supreme court concluded in *Rogers v. McCune* that taking "all the instructions together, as forming the law of the case,"⁹⁷ the jury was correctly instructed on negligence and contributory negligence.⁹⁸ Furthermore, the court explained that the law determines what constitutes "proper precautionary measure[s] . . . to avoid collisions"—a judicial decision—while the jury determines whether such acts are performed.⁹⁹

In *Galena, Dunleith & Minnesota Packet Co. v. Vandergrift*, defendants' jury verdict and judgment were affirmed despite "voluminous instructions"

92. *Id.* at 98. ("One person being in fault will not dispense with another's using ordinary care for himself.")

93. 21 Mo. 133 (1855).

94. 18 Mo. 162 (1853).

95. 14 Mo. 63, 71 (1851).

96. See *Rogers v. McCune*, 19 Mo. 557 (1854). Steamboat *Die Vernon*, while descending the Mississippi River, struck and sank the steamboat *Archer*, drowning 35 people. Rules of the Upper Mississippi River Pilots' Association and general custom regarding steamboat travel were admitted into evidence and considered by the jury, but the court commented that the weight of the testimony, if credited by the jury, was sufficient to show that the custom was not dispositive in the case. *Id.* at 567.

97. *Id.* at 569.

98. *Id.* at 562, 568.

99. *Id.* at 568.

which may have confused the jury.¹⁰⁰ The court held that, overall, the instructions properly directed the jury to the duties of the parties.¹⁰¹

Hence, the foregoing cases demonstrate that, despite the supreme court withholding complete endorsement of each given instruction, judicial emphasis was placed upon the cumulative effect of the overall package of instructions in supporting the jury decision. Three steamboat collision cases had no impact on this Article. When the steamboat *Shelby* collided with the steamboat *John Quincy Adams*, plaintiff won the jury verdict and judgment, but suffered reversal by the supreme court on an evidentiary ruling.¹⁰² *Yore v. Steamboat C. Bealer*¹⁰³ established Missouri jurisdiction over boat collisions in Missouri waters regardless of the owners' citizenship. Likewise, Missouri jurisdiction over boating collisions in Missouri waters, specifically including the Mississippi River, was established in *Swearingen v. Steamboat Lynx*.¹⁰⁴

D. Wrongful Death

Predictably, the Missouri Supreme Court's uncompromising judicial impartiality applied unabated to both steamboats and individuals, including passengers who sustained injuries and/or death. In *James v. Christy*, an explosion on board, caused by the negligence of the steamboat's crew, resulted in the death of a fifteen-year-old passenger.¹⁰⁵ The decedent's father sued for the wrongful death of his son, but while litigation was ongoing, the father himself suffered an early and untimely death. His administrator was substituted as plaintiff. On motion, the suit was abated by the trial court.¹⁰⁶ The Missouri Supreme Court reversed the judgment, holding that the suit did not abate by the

100. 34 Mo. 55, 63 (1863).

101. *Id.* at 63. Plaintiff's *Royal Arch* was ascending the Mississippi River when it collided with defendants' *Empire City* sinking the *Royal Arch*. Over-emphasis on the duty of the *Royal Arch* crew to stop and back up when the collision became probable, by itself, constituted instructional error, but that error was cured by the other instructions. *Id.*

102. *Patrick v. Steamboat J.Q. Adams*, 19 Mo. 73, 77 (1853).

103. *Yore v. Steamboat C. Bealer*, 26 Mo. 426, 429 (1858).

104. 13 Mo. 519, 521 (1850). Steamboats *Lynx* and *Ohio* collided in the Mississippi River; trial resulted in a defendants' verdict based upon the circuit court judge's instruction restricting recovery to the territorial limits of Missouri. *Id.* at 519. The supreme court held that Missouri law applied to collisions on Missouri's waterways including the Mississippi River, concluding that otherwise a neutral territory would exist along Missouri's borders "where contracts could not be enforced and wrongs must go unredressed." *Id.* at 521.

105. 18 Mo. 162 (1853).

106. *Id.* at 164.

father's death; his administrator was the proper party in interest to continue the case.¹⁰⁷

The father, as plaintiff, claimed damages for both the value of his son's services plus the society or comforts afforded by a child to his parents. Thereafter, the father died, extinguishing any claim for loss of society and comfort with his son. The father's estate, as successor plaintiff, was confined to a singular claim—the actual value of the son's services during the father's lifetime. The supreme court significantly diminished the value of the estate's claim by confining the damages to the lifetime of the father, now deceased. Still, the supreme court saved the estate's claim from abatement and remanded the case for jury decision. Effectively, the supreme court preserved the claim for wrongful death against the steamboat, but significantly limited the recoverable damages.

Missouri's second major wrongful death case, in 1869, adjudicated the alleged contributory negligence of a minor female, Annie Morrissey, who drowned while on passage across the Mississippi River on defendant's vessel.¹⁰⁸ In *Patrick Morrissey v. Wiggins Ferry Co.*, ample evidence at trial demonstrated decedent's imprudence and want of care. This resulted in a jury verdict for defendant because the court gave a contributory negligence instruction which denied recovery unless the jury believed the injury occurred "without any negligence or want of care"¹⁰⁹ on the part of the decedent. The supreme court remanded the case, holding that this instruction constituted error. As earlier requested by plaintiff's counsel, the Missouri Supreme Court held that the trial court should have instructed, "[I]f the deceased 'only remotely contributed to the accident' and defendants' employees were the direct and immediate cause, and might have prevented it by the exercise of prudence and care, the defendant is liable."¹¹⁰ With resounding emphasis, the court stated that "nothing can be clearer."¹¹¹ Significantly, the court did not adjust the standard of care to the decedent's minority status.¹¹²

Part II of this Article evaluated Missouri Supreme Court treatment of steamboat industry interests, especially when matched against individual interests. Opinions formed from sheer tabulation of supreme court affirmations or reversals risk premature and erroneous conclusions about judicial fairness. Close scrutiny of supreme court decisions is necessary to determine what was done, and why, in order to paint a true picture of judicial treatment. As an example, generalizations cushioned upon a single affirmation of a directed verdict and judgment in favor of a steamboat (*Whitmore*) would be foolhardy.

107. *Id.*

108. *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380, 382 (1869).

109. *Id.* at 381.

110. *Id.* at 384.

111. *Id.*

112. *Id.* at 380

This careful investigation discloses consistently fair and even-handed treatment implemented by strict adherence to principles of law and by judicial deference to jury decisions, sans judicial maneuvering. Even in the gratuitous bailment of money cases arising from suspicious circumstances in which mischievous employees secretly, and without authority, accepted sealed packages of money for delivery, the court imposed common carrier bailee-for-hire liability, albeit subject to rigid requirements of proof. Even the *Whitmore* decision is easily explained by judicial discipline and *stare decisis*, considering the *Chouteau* precedent. Moreover, the court's movement from strict liability to liability for negligence in the steamboat collision cases did change the rules as suggested by Horwitz, but only in the neutral setting of steamboat versus steamboat or business, and not individual against steamboat. In this and other settings, as this Article will show, judicial dispositions did not unduly favor industry interests. In fact, save *Boland*, not one decision suggests or permits an inference of bias, economic or otherwise, by the Missouri Supreme Court in favor of industry litigants.

III. MILLDAMS

Professor Horwitz credited canal and railroad influences for the ascension of industrial interests from 1844 to 1873, with the big boost coming from substitution of statutory compensation for common law nuisance-strict liability compensation.¹¹³ The time-honored maxim had been "that every one should so use his rights as not to injure or molest others in the enjoyment of theirs."¹¹⁴ This maxim enjoyed acclaim, particularly in English jurisprudence.¹¹⁵ However, with developing industries, economic pressures forced the judicial system to impose alternative compensation for any transgressions.¹¹⁶

Schwartz' thesis¹¹⁷ analyzes the New Hampshire textile industry cases.¹¹⁸ Shocking by comparison with today's litigious society, not one injured employee sued his or her textile employer at that time.¹¹⁹ Schwartz determines that the textile industry only encountered litigation consequential to dam construction and newly-constituted surface waters.¹²⁰ Missouri milldam operations causing damages spawned equitable actions, especially nuisance litigation, which was closely "policed" by the supreme court. Only *Taylor v. Holman*¹²¹ reversed the

113. HORWITZ, *supra* note 2, at 67, 71.

114. O'Fallon v. Dagget, 4 Mo. 343, 349 (1836).

115. HORWITZ, *supra* note 2, at 67, 71.

116. HORWITZ, *supra* note 2, at 67, 71.

117. Schwartz, *supra* note 6.

118. Schwartz, *supra* note 6, at 1719.

119. Schwartz, *supra* note 6, at 1737.

120. Schwartz, *supra* note 6, at 1737-39.

121. 45 Mo. 371 (1870).

milldam role as a tortfeasor. The court held a tenant liable in simple negligence for injury to the mill.

Two adjoining landowners petitioned the Circuit Court of Saline County in 1840 for permission to build a milldam across the Lamine River.¹²² The jury, in *Hook v. Smith*,¹²³ assessed that the damages would be \$10 due to Hook's dam and no damages due to Smith's dam. Accepting that jury assessment, the trial court discharged the jury and granted Smith, the downstream petitioner, permission to construct the dam. The supreme court affirmed with the bold announcement, "Supposing each mill site of equal value to the public, this was reason enough to justify the court in granting the petition of Smith. . . ."¹²⁴ This decision firmly thrust economic considerations into judicial determinations.

Disdainful of injunctive prohibitions, the court frequently reversed injunctive relief that halted milldam construction.¹²⁵ In *Welton v. Martin*,¹²⁶ and in *Arnold v. Klepper*,¹²⁷ the supreme court dissolved trial court injunctions for factual deficiencies and the lack of a "complaining party" who had first "established his right to redress by an action at law."¹²⁸ These decisions spurred milldam development by limiting judicial remedies to actions at law.

Economic considerations governed legislative treatment of milldams and received judicial approval in cases of strict adherence to statutory requirements, as indicated in *Willoughby v. Shipman*.¹²⁹ The trial court permitted elevation of a milldam which predictably would cause damages to plaintiff's spring of pure water, spring-house, out-houses, curtilages, gardens, orchards and mansion-house.¹³⁰ Despite enabling legislation, the supreme court cautioned that "the public necessity for the erection of a mill ought to be very apparent to justify a court in inflicting injury on any person."¹³¹ With conviction, the court added that a "never-failing spring of pure water is invaluable to the health and comfort of family, and should not be destroyed by the sanction of a court unless the paramount necessities of the public for a mill demand the sacrifice."¹³²

Still, the Missouri Supreme Court abided by the legislative mandate of Section 18 of R.C.1845, directing lower courts to do likewise before authorizing milldam construction.¹³³ Although inconsequential in this Article, milldam litigation demonstrated judicial deference to legislative policy, tempered by

122. *Hook v. Smith*, 6 Mo. 225, 227 (1840).

123. *Id.*

124. *Id.* at 228.

125. *Arnold v. Klepper*, 24 Mo. 273 (1857); *Welton v. Martin*, 7 Mo. 307 (1842).

126. 7 Mo. 307 (1842).

127. 24 Mo. 273 (1857).

128. *Welton*, 7 Mo. at 310; *Arnold*, 24 Mo. at 273.

129. 28 Mo. 50 (1859).

130. *Id.* at 51

131. *Id.* at 52.

132. *Id.*

133. *Id.*

strong protection for individual property rights, yielding only to paramount public necessity. This analysis does not show judicial favoritism toward the milldam industry.

IV. DAMAGES

The consummate goal of adversarial parties in the judicial process is recovery or denial of damages. Horwitz' article focuses upon judicial subsidization of developing industry through adjustment of damages and replacement of common law strict liability with evolving concepts of negligence.¹³⁴ Accordingly, industry began anticipating and budgeting damage judgments as a cost of doing business.¹³⁵ One method for subsidizing industry was to remove damage assessment from jury determination, as Horwitz observed:

In short, there existed a major incentive for courts not only to change the theory of legal liability but also to reconsider the nature of legal injury. In an underdeveloped nation with little surplus capital, elimination or reduction of damage judgments created a new source of forced investment, as landowners whose property values were impaired without compensation in effect were compelled to underwrite a portion of economic development.¹³⁶

Other methods accomplishing these objectives included: 1) rendering damages trivial; 2) rendering damages excessive and subject to judicial control (remittitur); 3) replacing traditional damages with inclusive and exclusive statutory compensation; 4) designating claims noncompensable; 5) designating damages as remote or consequential; and 6) eliminating punitive damages, among others.¹³⁷

134. HORWITZ, *supra* note 2, at 97, 101.

135. See generally HORWITZ, *supra* note 2, at 67, 70 (citing evidence of this trend). Horwitz first noted that "[a]s early as 1795 the directors of the Western and Northern Inland Lock Navigation Companies reported that the problem of land valuations had caused the company 'serious embarrassment', apparently because of large damage judgments awarded by juries. . . ." *Id.* at 67. He then stated that "[a] similar concern for the cost of damage suits was evident in the building of the Erie Canal," and that "[t]he cry that ruinous judgments would be visited on transportation [sic] companies became especially strong on the eve of the great boom in railroads" *Id.* at 69. He then further maintained that "[b]y this time railroads also had begun to fear those damage judgments that resulted from personal injuries or from fires started by sparks from locomotives." *Id.* at 69-70. In addition, he noted that there were harmful results "[b]ecause of large damage judgments before 1830, for example, Pennsylvania was compelled to abandon various public works entirely before it finally took damage assessments away from juries." *Id.* at 70.

136. HORWITZ, *supra* note 2, at 70.

137. See HORWITZ, *supra* note 2, at 70-85.

Throughout this analysis, not one instance of remittitur was encountered.¹³⁸ Within that framework, inquiry into Missouri Supreme Court treatment and adjudication of damages is appropriate.

A. Punitive Damages

Horwitz argues vehemently that punitive damages are venal by nature and only satisfying to our emotional comfort.¹³⁹ While contending that evidence of malicious intent is admissible to show actual damages, Horwitz argues that malicious intent is “irrelevant in determining the measure of damages.”¹⁴⁰

“There would seem to be no reason why a plaintiff should receive greater damages from a defendant who has intentionally injured him, than from one who has injured him accidentally, his loss being the same in both cases. . . . [I]t would be difficult to show that a plaintiff ought to receive a compensation beyond his injury.” Nor would it be any less difficult to demonstrate on principles of law or ethics . . . that a defendant ought to pay more than the plaintiff ought to receive.¹⁴¹

Returning to nineteenth century Missouri law, two personal injury suits against railroads evinced strong sentiment against punitive damages and resulted in two plaintiffs’ jury verdicts being reversed. In *Kennedy v. North Missouri Railroad Co.*,¹⁴² plaintiff was injured when his horse drawn wagon was struck by defendant’s train at a private crossing constructed on plaintiff’s farm by the railroad company. Damages included \$200 for two horses killed, \$25 for damages to the wagon and personal injuries to the plaintiff. The wrongful death of plaintiff’s daughter was held noncompensable. Although the crossing was placed at a blind location selected by the plaintiff, plaintiff contended that an

138. *But see, e.g.,* *Hoyt v. Reed*, 16 Mo. 294 (1852); *Johnson v. Robertson*, 1 Mo. 615 (1822); *Carr v. Edwards*, 1 Mo. 137 (1821). The Missouri Supreme Court consistently utilized remittitur to correct the amount of judgments throughout this study, but never on a tort or related claim included in this Article. *See Hoyt*, 16 Mo. at 301. In *Hoyt* the Court stated:

by calculation, that the verdict must include an item for which the defendant was understood to be not liable to plaintiff, declared an intention to grant a new trial, unless the amount of that item was remitted by the plaintiff. It was remitted and the motion for a new trial was overruled. There was nothing wrong in this practice. This court has allowed a remittitur to be entered here to avoid a reversal of judgment below. . . .

Id.

139. HORWITZ, *supra* note 2, at 80-82.

140. HORWITZ, *supra* note 2, at 80-82.

141. HORWITZ, *supra* note 2, at 81-82 (quoting Theron Metcalf in 1830, later a Judge on the Massachusetts Supreme Court).

142. 36 Mo. 351 (1865).

overpass should have been built. A \$2,000 jury verdict and judgment was entered for plaintiff, but was reversed due to the punitive damage instruction. The jury was instructed that exemplary damages could be awarded only if the jury believed that the injury complained of was wilfully or recklessly done by the defendant, and it did not so find.¹⁴³ The court stated with firmness:

When there is any evidence to support the verdict, it will not be disturbed; but this court will interfere when there is no evidence, or when the court below gives an instruction which is not authorized by the evidence. . . . To authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness, must mingle in the controversy and form one of the chief ingredients. . . . In this case there is no evidence whatever of either recklessness, wantonness, or gross negligence, on the part of those conducting the railroad train, and consequently nothing on which to predicate the instruction.¹⁴⁴

In its reversal, the court also warned, "Courts should not state propositions of law hypothetically when there is no evidence in the case applicable to them. They are calculated to mislead the jury."¹⁴⁵

Likewise in *McKeon v. Citizens Railway Co.*,¹⁴⁶ the court reversed another plaintiff's judgment and jury verdict due to instructional error. The decedent, a passenger, attempted to get off the front end of defendant's moving train car. The railroad operator's actions, whether protective or perfidious, were disputed and controversial.¹⁴⁷ The jury was incorrectly instructed that defendant was relieved of liability for persons injured while departing or catching the car at the front end. The supreme court noted that without any evidence to support a punitive damage recovery, punitive damages should not be submitted to the jury. Without flinching, the supreme court reinforced recovery of punitive damages "in a civil case, only in cases where the injury is intentionally, willfully, and maliciously done."¹⁴⁸

Corroborating evidence of egregious conduct by a ship captain justified submission of punitive damages in *Stoneseifer v. Sheble*.¹⁴⁹ After being assured by the ship's clerk that adequate time remained for him to conduct business before the ship departed, plaintiff boarded the steamer *Sam Gaty* at Louisiana, Missouri, to arrange passage for a woman friend to St. Louis. While plaintiff still was conducting his business aboard the *Sam Gaty*, the steamer hurriedly departed, leaving the woman passenger's baggage ashore. Despite plaintiff's

143. *Id.* at 364.

144. *Id.* at 364-65.

145. *Id.*

146. 42 Mo. 79 (1867).

147. *Id.* at 85.

148. *Id.* at 87.

149. 31 Mo. 243 (1860).

continued "solicitation"¹⁵⁰ to be put ashore at any landing and offer to pay \$5 for the consideration, the defendant, master of the steamer, refused and did not release plaintiff until reaching Clarksville, Missouri. Defendant's recalcitrance continued despite plaintiff's pleas to be placed ashore to attend to an ill family member.

Whether this refusal was "wantonly wrong and unnecessarily offensive"¹⁵¹ was a jury issue. Proof was offered that the master demonstrated "a good deal of cool indifference to the remonstrance of the plaintiff, . . . not calculated to conciliate."¹⁵² These circumstances justified a jury verdict for \$300 and judgment, which was affirmed by the supreme court with these observations:

The damages given by the jury are large, larger perhaps than the circumstances in our judgment would warrant; but we have no power to supersede the estimate of the jury and substitute ours. There is nothing in the evidence or the result which would authorize an inference that the jury were actuated by any improper prejudice or passion. The conduct of the defendant, as it appeared in evidence, was not such as to unite the sympathy of the jury.¹⁵³

In affirming the judgment and deferring to the jury, the court concluded:

Under these circumstances, the incivility of the captain, described by all the witnesses who were present, was unjustifiable; and although the inconvenience to which plaintiff was subjected was slight, and did not in our judgment merit so large a penalty, yet we cannot say the verdict was beyond the province of the jury, or such a one as this court would be authorized, on the ground of excess alone, to set aside.¹⁵⁴

Significantly, this verdict was upheld against an individual defendant, not the company, business owner, industry, or steamer; the warning is clear that punitive damages are legally viable, at least against offending employees.

In summary, this Article disclosed no supreme court cases in which individual plaintiffs suing business interests either recovered punitive damages or were allowed to submit the punitive damage issue to a jury for determination, yet under rigid circumstances, punitive damages remained a viable remedy against industry.

150. *Id.* at 249.

151. *Id.*

152. *Id.* at 251.

153. *Id.* at 251.

154. *Id.* at 252.

B. Excessive Damages

Horwitz notes that nineteenth century courts set aside excessive verdicts and perceives the trend to be that damage was becoming an issue of law.¹⁵⁵ The issue of excessive damages was urged upon the Missouri Supreme Court in two railroad cases. In *Kennedy v. North Missouri Railroad Co.*, discussed at length in the previous Section, defendant contended that the \$2,000 verdict was excessive, but the supreme court responded that,

[t]he ground urged for a reversal, that the damages are too large, is not good here. There was evidence to go [to] the jury, and where that is the case it is their peculiar province, under proper instructions from the court, to determine the amount. Before we are at liberty to interfere with a verdict, it must appear at first blush that the damages are flagrantly excessive, or that the jury have been influenced by passion, prejudice or partiality.¹⁵⁶

In *Sawyer v. Hannibal & St. Joseph Railway Co.*,¹⁵⁷ the defendant contested a verdict for \$6,900. Plaintiff sustained soft tissue injuries to her arms and shoulders plus a severe scalp laceration. However, the court observed, she had not been made lame, was able to continue her career as a schoolteacher in Kansas, walked to school daily, and did not sustain any fractures. Comparison with other verdicts involving more serious injuries prompted the court to hold the verdict excessive. With strong conviction, the court pronounced:

We think the damages in this case are so exorbitantly excessive, when considered with reference to the actual injuries sustained, and the pain and anguish suffered, for which only the law undertakes to make pecuniary compensation by way of damages, as almost necessarily to imply some misconduct, undue feeling or prejudice, or some misapprehension of the proper measure and lawful object of damages in such cases. They are excessive enough to raise a strong conviction in our minds that the jury regarded more the terrible nature of the accident than the degree of carelessness which they could properly have attributed to the conductor of the train. . . .¹⁵⁸

Kennedy, an affirmation, and *Sawyer*, a reversal, demonstrate the balance of judicial fairness between individual and railroad industry interests.

155. HORWITZ, *supra* note 2, at 84.

156. *Kennedy v. North Mo. R.R. Co.*, 36 Mo. 351, 364 (1865).

157. 37 Mo. 240 (1866).

158. *Id.* at 265.

C. Trivial Damages

In this investigation, only twice did the court comment on the trivial, inconsequential or insignificant amounts of damages involved in a case. First, recalling *Hook v. Smith*, the case in which two competing landowners petitioned for permission to erect a milldam, the court granted permission to the petitioner whose dam would not cause any damages, as opposed to the proposed dam causing \$10 in damages.¹⁵⁹ With candor, the court conceded:

The damage assessed to Smith by the jury, on Hook's petition, is so very small, that had the court decided in Hook's favor, I should not have been disposed to disturb its judgment. But the court having decided in favor of Smith, by the erection of whose dam no injury is done to any body by inundation, I am of opinion that the decision of the court ought to be affirmed.¹⁶⁰

Similarly voicing disapproval of the trivial nature of the litigation, *Calvert v. Hannibal & St. Joseph Railroad Co.*¹⁶¹ recited, "With two direct decisions on the question, and where the judgment was only for the trifling sum of thirty-five dollars, the party must be absolutely in love with litigation in persisting in again bringing the case here."¹⁶² With emphasis and wit, the *Calvert* court concluded that "[t]he judgment is affirmed with *ten percent* damages."¹⁶³ Despite having some concerns, it would appear that the Missouri Supreme Court dutifully provided judicial services regardless of lucre. Further, judicial criticism of industry litigating "trivial damages" is scarcely preferential treatment.

159. *Hook v. Smith*, 6 Mo. 225, 227 (1840).

160. *Id.* at 229.

161. 38 Mo. 467 (1866) [hereinafter *Calvert II*]; *but see also* *Calvert v. Hannibal & St. Joseph R.R. Co.*, 34 Mo. 242, 244 (1863) [hereinafter *Calvert I*]. In the first *Calvert* decision, the court's patience was again strained due to the small amount in controversy, as evidenced in the opening language:

The petition in this case contains a clear and concise statement of the facts, imposing a common law liability upon the appellant for the alleged negligence of its agents. But this is not enough for the appellant, who insists that the petition is bad because it does not likewise aver the facts necessary to create a statutory liability, and for this cause moves in arrest of judgment. It is unjust to the public that the time of the courts should be occupied in the consideration of a question so utterly devoid of merit. There is nothing in the objection.

Id.

162. *Calvert II*, 38 Mo. at 469.

163. *Id.* (emphasis added).

D. Inclusive Damages

Legislative enactments which implemented statutory compensation in lieu of common law damages¹⁶⁴ became another method of reducing the outlay of industry capital spent on damage judgments.¹⁶⁵ Missouri's legislature followed that trend, but protected individual rights by maintaining existing remedies.¹⁶⁶ Statutory mandates were adopted and imposed upon the trial courts by the Missouri Supreme Court, especially in railroad cases.¹⁶⁷ In these areas, trial courts had little discretion.

In *Baker v. Hannibal & St. Joseph Railroad Co.*, defendant cut and removed timber from plaintiff's land to build its railroad on adjoining land. Even though legislative enactment authorized this railroad construction,¹⁶⁸ plaintiff sued in trespass pursuant to the "Act concerning trespasses" and prevailed.¹⁶⁹ The jury assessed damages of \$1,088.80 against the defendant and judgment was entered. On appeal, the supreme court reversed the judgment against the railroad, holding that the February 23, 1853 amendment to "An Act to incorporate the Hannibal and St. Joseph Railroad Company," provided specific modes of obtaining damages for wrongful appropriation of materials by a railroad, none of which plaintiff pursued.¹⁷⁰ The supreme court held that the statutory remedy in this case "is not merely cumulative upon the common law action, but an entire substitution for it, and must be exclusively pursued; and where either party, as in this case, may be the actor, neither can complain that the other did not first begin."¹⁷¹ Thus, the court further opined that "[t]he common law remedy is superseded by the statute, and the person injured must pursue the course pointed out by the act."¹⁷² Judgment was reversed and the cause remanded.

164. See, e.g., *Baker v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 543 (1865); *Soulard v. City of St. Louis*, 36 Mo. 546 (1865).

165. HORWITZ, *supra* note 2, at 71.

166. See, e.g., R.C. 1845, ch. 121, section 23 (allowing statutory damages for harm caused by the erection of milldams, while preserving existing actions). See also R.C. 1865, ch. 147, section 2 (allowing a damage award for wrongful death); R.C. 1855 (requiring the appointment of viewers to appraise land acquisitions by the railroad).

167. See, e.g., *Baker*, 36 Mo. at 545; *Soulard*, 36 Mo. at 552.

168. *Baker*, 36 Mo. at 543 (citing R.C. 1847, the original "Act to incorporate the Hannibal and St. Joseph R.R. Company," approved February 16, 1847, which gave them the power to take wood from adjoining lands for railroad construction).

169. *Id.* (citing R.C. 1855, p. 1552, the "Act concerning trespasses," which contemplates the commission of wilful trespasses done without lawful right).

170. *Id.* at 544 (The statute specifically refers to the permissible appropriation by the railroad of "earth, gravel, stone, wood, or other materials necessary for the construction and operation of said road.").

171. *Id.* at 545.

172. *Id.*

In *Clark v. Hannibal & St. Joseph Railroad Co.*,¹⁷³ the statutory remedy, being exclusive, was determinative. Plaintiff sued in numerous counts alleging that defendant trespassed upon decedent's farm to build the railroad, tore down and did not rebuild fences and, on several occasions, struck and killed plaintiff's cattle.¹⁷⁴ The jury returned a general verdict for \$1,564 without itemization.¹⁷⁵ The supreme court reversed the jury verdict, holding that the remedy for defendant's trespasses was included in the statutory condemnation proceeding:

Whatever damage resulted to the plaintiff from these acts, and all disadvantages thereby occasioned to his property, must be considered as included in the compensation awarded and paid; and any inconvenience, or diminution of value, or other injury to the plaintiff's property beyond this, must now be treated as *damnum absque injuria*.¹⁷⁶

Alternatively, plaintiff was permitted to pursue that count of his petition seeking remedy for the loss of his cattle.

Consistently, the Missouri Supreme Court deferred to jury awards. As this Part of the Article indicates, the cases are sparse in which the supreme court rejected the jury verdict and remanded the case for retrial. Punitive damages against industry defendants were recoverable upon strict proof of intentional and harmful conduct, placing industry at risk. This will become much clearer in the final Part of the Article regarding judicial perspectives.

Inclusive damages, reflecting the legislative will, were honored by the judiciary. Where legislative damages were inclusive and/or exclusive, as in the railroad cases, the supreme court deferred to the legislative will. Where the legislative damages were cumulative, as in the case of milldams, the judiciary respected statutory damages, but retained existing common law remedies. Claimants were uniformly given opportunities to present their evidence and secure an appropriate jury verdict. No judicial bias or preference for emerging industry is discernible from these damage cases.

V. MINING AND TIMBER INTERESTS

A. Minerals

Case law examination shows that natural resources were acquired, preserved and defended with tenacity in the nineteenth century as indicated in the seminal and solitary case of *Perry v. Block*.¹⁷⁷ In *Perry*, the justice of the

173. 36 Mo. 203 (1865).

174. *Id.* at 212.

175. *Id.* at 214.

176. *Id.* at 222 (defendant paid \$600 for right-of-way privileges pursuant to the condemnation statute).

177. *Perry v. Block*, 1 Mo. 484 (1824). This study failed to uncover any further

peace initially rendered judgment for plaintiff, who claimed that defendants were mining and removing ore from land leased to him. Apparently defendants Stimmer and Racine dug the ore and Block hauled it away. Only defendant Block appealed to the circuit court. A circuit court jury verdict favored defendants, and plaintiff appealed. The Missouri Supreme Court noted that legal technicalities prevented the circuit court from properly hearing Block's appeal if co-defendants Stimmer and Racine were not joined as parties on appeal. Nevertheless the supreme court reversed and remanded the cause to the circuit court, directing it to cure the deficiency by severing defendants Stimmer and Racine from defendant Block so that he might proceed. The court's action protected important ownership and possessory mineral interests against technicalities that otherwise might allow dishonest parties to defeat justice.

B. Timber

This investigation of Missouri case law also yields seven timber conversion cases, excluding cases with railroad litigants, since railroad litigation is discussed in a separate Part. Four of those cases attempted recovery of treble damages and distinguished between the action of trespass, for which only actual damages are recoverable, and the statutory action in debt, for which treble damages are recoverable. Plaintiff's poorly drawn petition in *Montague v. Papin*,¹⁷⁸ failed to clarify which action was being presented. The justice of the peace gave plaintiff judgment for treble damages, which the circuit court reversed, holding that the pleadings indicated an action for trespass, not debt. The supreme court reversed and remanded to the circuit court, presumably affording plaintiff an opportunity to refine his pleadings. In *Papin v. Ruelle*,¹⁷⁹ the court confirmed that treble damages were recoverable in debt, not trespass.

In *Emerson v. Beavaus*,¹⁸⁰ the court held that while the law might allow the jury to exonerate a trespasser from treble damages because he mistakenly believed he was cutting timber on his own land, that was not true if he mistakenly believed he was cutting on public land. Therefore the treble damage judgment in this case for \$24, first entered by the justice of the peace, was reinstated.

In *Labeaume v. Woolfolk*,¹⁸¹ plaintiff sued defendant in trespass for cutting and removing timber from plaintiff's land. The jury awarded general damages, but failed to itemize the value of the timber. Regardless, the circuit court trebled the damages. The Missouri Supreme Court reinstated the judgment for general

mining cases pertinent to this Article.

178. 1 Mo. 757 (1827).

179. 2 Mo. 28 (1828).

180. 12 Mo. 511, 512 (1849).

181. 18 Mo. 514, 515 (1853).

damages, but held that without knowing the value of the timber, the circuit court could not treble the damages.

In *Frissell v. Fickes*, the value of wood taken by a trespasser from the plaintiff arose again.¹⁸² Strict statutory compliance mandated that the arbitrator who would make the assessment be sworn. Failure to do so nullified the arbitrator's assessment of the value of the pine and oak timber removed from plaintiff's property and caused reversal of the judgment.

*James v. Snelson*¹⁸³ presented competing interests by trespassers in wood extracted from adjacent public land. James and Massey cut and corded wood for usage in their iron works operation. Snelson, an individual, later claimed, possessed, and defended his interest in the wood. Judicial discussion of ownership interests and possessory interests finally concluded that neither held true title, but the dispute was resolved in favor of James and Massey whose labor developed the resources. The supreme court rewarded effort, commenting:

The possession and property acquired by the (so styled) trespassers on public land are new in the law; are peculiar to the new States, and have not been known in the English courts. . . . Many of our most flourishing settlements are mostly or in great part on public lands. Rich mines are discovered and industriously wrought from day to day where not an inch of the soil had been parted with by the government, nor even a chain stretched towards the preparatory surveys which are deemed necessary to the proper disposition of the public domain. What would be the consequence if the produce of labor so circumstanced, the possession of mineral dug up, of crops cultivated, of wood cut and corded, &c. were left to be scrambled for and seized upon by the strong and cunning without the help of the law? It is manifest that a sort of predatory war would soon be waged throughout our frontier settlements.¹⁸⁴

An unusual variation to this theme developed from a sheriff's sale of cut and corded wood in *Garesche v. Boyce*.¹⁸⁵ Garesche produced evidence of title and a lease agreement with John Johnson and John Honiy, operators of a wood cutting business located at the confluence of the Missouri and Mississippi Rivers. Johnson and Honiy cut and sold wood to river-boating customers and customers in St. Louis. Judgment on debt was entered against one of the lease owners. Execution on that judgment attached the disputed wood, which was sold to Boyce at a sheriff's sale in St. Charles County in satisfaction of the judgment. Garesche sued Boyce for removing the disputed wood from his land. A jury verdict and judgment for defendant was affirmed by the supreme court. This affirmation upheld an individual's private property right to lease his land and an emerging wood-cutting business' right to operate the leasehold interest.

182. 27 Mo. 557, 559-60 (1858).

183. *James v. Snelson*, 3 Mo. 393 (1834).

184. *Id.* at 396.

185. *Garesche v. Boyce*, 8 Mo. 228 (1843).

Thus, commercial interests were assured that judgment liens, executions and attachments, including interests acquired at a judicial sheriff's sale, were legally protected and enforceable.

C. Soil

Mueller v. St. Louis & Iron Mountain Railroad Co.,¹⁸⁶ continued the supreme court's commitment to principles of law by affirming a jury verdict for damages against a defendant for trespass. In that case, the defendant trespassed upon plaintiff's land during construction, and removed some of plaintiff's soil. The plaintiff property owner complained about the measure of damages equaling only the value of the soil removed. The court responded vigorously and authoritatively, saying that "[i]f any inconvenience results to the company, from their liability to repeated actions, it is the result of their own neglect to have the land condemned, as they were authorized and required to do by their charter."¹⁸⁷ The court's irritation stemmed from its understanding that further trespass actions could be filed against the defendant, which would have been obviated if the plaintiff had condemned the land pursuant to its charter. Condemnation litigation would have concluded the litigation in one proceeding with a final assessment of damages. Later the court signaled approval that the plaintiff property owner intended to finalize the dispute by delivering a deed to the defendant trespasser at the conclusion of the proceedings.

Again, this Part demonstrates no subjugation of legal principles to industry interests.

VI. AFFIRMATIVE DEFENSES

Any discussion about denial of litigants' claims must include mention of the affirmative defenses which bar injured persons from recovery. The list includes contributory negligence, assumption of risk, and the fellow-servant doctrine in jurisprudence often referred to as the "three wicked sisters of the common law."¹⁸⁸ All three affirmative defenses thwarted claims by employees against their employers, resulting in harsh dispositions and eventual repudiation. Legislative movements against these three defenses culminated in Congress' adoption of the Federal Employer's Liability Act and state legislatures' adoption of workmen's compensation acts.¹⁸⁹

186. 31 Mo. 262 (1860).

187. *Id.* at 263.

188. *Ford v. Gouin*, 266 Cal. Rptr. 870, 874 (1990).

189. See HENRY WOODS, *COMPARATIVE FAULT—THE NEGLIGENCE CASES* 30 (1978). See also *Westgard v. Chicago M & S.T.P. Ry. Co.*, 187 N.W. 658, 660 (Wis. 1922).

The now well-settled contributory negligence rule established “that a plaintiff who by his own misconduct in conjunction with that of the defendant has brought harm upon himself, cannot recover damages.”¹⁹⁰ The affirmative defense of assumption of the risk arises when “the risks which did not lie within the scope of the specific obligations of the master were considered to be accepted by the servant as an incident of his employment, and the employer was under no duty to protect him against them.”¹⁹¹ The fellow-servant rule, first appearing in England in 1837, held that “the employer was not liable for injuries caused solely by the negligence of a fellow-servant.”¹⁹² The reasons were that “the plaintiff upon entering the employment assumed the risk of negligence on the part of his fellow servants, and the master did not undertake to protect him against it.”¹⁹³

Horwitz contends that contributory negligence surfaced in America around 1823 and that the first contributory negligence instruction was submitted to a jury in a collision case in 1833.¹⁹⁴ At that time, the contributory negligence inquiry merely presented a threshold issue, which, if answered in the negative, resulted in the application of strict liability.¹⁹⁵ Missouri steamboat collision cases initially followed that trend, first ascertaining contributory negligence, and then imposing strict liability. Although Horwitz declines to research judicial treatment of affirmative defenses, this Article will examine nineteenth century Missouri judicial treatment and disposition of affirmative defenses in tort litigation.¹⁹⁶

A. Contributory Negligence

Beginning with *Steamboat Western Belle*,¹⁹⁷ and continuing with the *Steamboat Dr. Franklin* case,¹⁹⁸ contributory negligence became the primary issue in steamboat collision cases and steamboat passenger cases.¹⁹⁹ Contributory negligence always was an issue in railroad litigation. For example in *Kennedy v. North Missouri Railroad Co.*,²⁰⁰ the contributory negligence issue was prominently presented for jury consideration. In *Kennedy*, discussed in the previous Part regarding damages, recall that plaintiff’s horse drawn wagon

190. Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908).

191. WILLIAM L. PROSSER, *THE LAW OF TORTS* 378 (2d ed. 1955).

192. *Id.* at 380.

193. *Id.*

194. HORWITZ, *supra* note 2, at 95.

195. HORWITZ, *supra* note 2, at 96.

196. HORWITZ, *supra* note 2, at 96.

197. *Steamboat Western Belle v. Wagner*, 11 Mo. 30 (1847).

198. *Atchison v. Steamboat Dr. Franklin*, 14 Mo. 63 (1851).

199. *See, e.g., Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380, 380 (1869).

200. 36 Mo. 351, 353 (1865).

collided with defendant's train at the private farm crossing installed by defendant. The location of the private farm crossing, described as "blind," was selected by plaintiff, but plaintiff still maintained that the railroad was negligent by not erecting an overpass.²⁰¹ Plaintiff entered the crossing aware that the train was due momentarily. The evidence showed that as the horses reached the crossing, they "stood immovable with terror"²⁰² while the train raced forward at fifteen to twenty miles per hour. Under these circumstances, contributory negligence was properly presented to the jury for consideration in reaching a verdict.²⁰³

Three additional 1869 railroad passenger cases also presented contributory negligence issues. In *Winters v. Hannibal & St. Joseph Railroad Co.*,²⁰⁴ the plaintiff, while riding inside defendant's train car, rested his head on his arm, which was itself resting on the window sill. Plaintiff was injured when the car in which he was riding sideswiped another train car left perilously close to the tracks. The jury returned a \$2,500 verdict for plaintiff which was later affirmed by the supreme court. The circuit court gave a contributory negligence instruction because plaintiff decided to rest his head in the window sill of the train, but the supreme court held as a matter of law that plaintiff was not contributorily negligent.

Other 1869 railroad passenger cases were *McKeon v. Citizen's Railway Co. II*²⁰⁵ and *Meyer v. Pacific Railroad Co. II*.²⁰⁶ In both cases, plaintiffs' jury verdicts in the first trials were reversed on appeal due to instructional error. Both plaintiffs prevailed again at second jury trials and the judgments were affirmed. In both cases, the injured persons' sobriety was questionable and contributory negligence instructions were given.

In *McKeon II*, the court responded to a jury inquiry during deliberations by giving an instruction which omitted any reference to plaintiff's contributory negligence.²⁰⁷ Nevertheless, plaintiff's jury verdict was affirmed because, as the court explained, the instructions must be considered in their "combination and entirety," not as singular or isolated instructions, and the jury was properly instructed on contributory negligence at trial. In *Meyer II*, the court reconciled plaintiff's condition of intoxication within the legal concept of contributory negligence. Importantly, however, this correlation clearly did not license the alleged tortfeasor to maim or injure an intoxicated person with impunity.²⁰⁸

201. *Id.* at 352, 355.

202. *Id.* at 354.

203. *Id.* at 357-58.

204. 39 Mo. 468 (1867).

205. *McKeon v. Citizen's R.R. Co.*, 42 Mo. 79 (1867) [hereinafter *McKeon I*]; *McKeon v. Citizen's R.R. Co.*, 43 Mo. 405 (1869) [hereinafter *McKeon II*].

206. *Meyer v. Pacific R.R. Co.*, 40 Mo. 151 (1867) [hereinafter *Meyer I*]; *Meyer v. Pacific R.R. Co.*, 45 Mo. 137 (1869) [hereinafter *Meyer II*].

207. *McKeon II*, 43 Mo. at 405

208. *Meyer II*, 45 Mo. at 156. The supreme court stated:

Under most unusual facts, the supreme court found contributory negligence as a matter of law in *Callahan v. Warne*, where the deceased, without permission, walked through the basement area of defendants' store and drank from a large jar containing poisonous potassium cyanate. Emphatically, the court reversed plaintiff's jury verdict below for the wrongful death of her husband; and observed that for the deceased to:

[s]elect the smaller jar marked with the signs of poison, lift the cover with the emblems of death upon it, dip out or somehow get at the nauseous, stinking liquid, and actually mistake cyanate of potassium for a wholesome drink, is so extraordinary and unaccountable as to be almost inconceivable.²⁰⁹

The court said that the conclusion would seem to be irresistible "that [decedent's] own carelessness and imprudence were the proximate and real cause of the accident, and that he fell a victim to his own folly."²¹⁰

Nevertheless, three wrongful death suits brought by surviving widows were successful,²¹¹ ending in jury verdicts and judgments which were affirmed in 1867, 1869, and 1870. In each case, the issues of defendant's negligence and decedent's contributory negligence were submitted to the jury.²¹² In memorable language, the supreme court refined, or perhaps relaxed, the rigid standards of negligence to be commensurate with the capacity of the injured party. For example, *Boland v. Missouri Railroad Co.*²¹³ involved the death of an unattended two-year-old child who ran in front of defendant's horse car and was killed. At the close of plaintiffs' evidence, the trial court entered a directed verdict which was sustained by the supreme court. As a matter of law, the court found that defendant's operator was not negligent, making the issue of contributory negligence moot. Interestingly, this memorable language which adjusted the standard of contributory negligence to the capacity of the minor was not dispositive in this case. Still the dicta in this case are often cited for the proposition that contributory negligence should be determined in accordance

[I]n our opinion, the court stated the law correctly. Unless Meyer's intoxication directly contributed to cause the injury, and in consequence thereof he did not exercise ordinary care and prudence, we do not see how it should be made to operate to the detriment of the plaintiff. The very proposition is monstrous, that because a man is drunk, although that is not the proximate cause of the injury, he is therefore placed beyond the pale of legal protection and may be killed with impunity.

Id. at 156.

209. *Callahan v. Warne*, 40 Mo. 131 (1867).

210. *Id.* at 140.

211. *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255 (1870); *Meyer v. People's Ry. Co.*, 43 Mo. 523 (1869); *Liddy v. St. Louis R.R. Co.*, 40 Mo. 506 (1867).

212. *Kennayde*, 45 Mo. at 257; *Meyer*, 43 Mo. at 523; *Liddy*, 40 Mo. at 511.

213. 36 Mo. 489 (1865).

with one's capacity. Eloquently, the Missouri Supreme Court said:

But we are not to apply the same rigid rule in determining what will be a bar to the maintenance of an action on the grounds of contributory negligence to an infant, an idiot, or a person *non compos mentis*, that we would to one who had arrived at the age to possess ordinary judgment and discretion. All that is necessary to give a right of action to the plaintiff for an injury inflicted by the negligence of the defendant, is, that he should have exercised care and prudence equal to his capacity. It would be palpably unjust to require of a child of small capacity and little discretion the same precaution and prudence which might reasonably be expected of a person of elder years.²¹⁴

In two other wrongful death cases in which decedents were minors, plaintiffs' representatives received jury verdicts. On appeal, one judgment was affirmed²¹⁵ and the other reversed.²¹⁶ In *O'Flaherty v. Union Railway Co.*, the verdict was affirmed. The court cited *Boland*, saying:

The young and the old, the lame and infirm, are entitled to the use of the streets, and more care must be exercised towards them by persons controlling or managing cars and vehicles than towards those who have better powers of motion. A child or young person cannot be expected to possess that vigilant foresight which would be exacted of a person of maturer years. But it does not thence follow that they are to be denied the privilege of going on the streets, and, if they do so go, they may be killed with impunity. In the case of a child two or three years old, no knowledge or foresight can be expected.²¹⁷

Additionally, the court noted:

To say that it is negligence to permit a child to go out to play unless it is accompanied by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy who are able to employ such attendants and would amount to a denial of these blessings to the poor.²¹⁸

On the other hand, in *Buel v. St. Louis Transfer Co.*, the contributory negligence instruction allowed recovery by the plaintiffs if the injury did not result from "any undue carelessness" by the parents or the deceased child.²¹⁹ Reversing the judgment for plaintiffs, the supreme court declared that the

214. *Id.* at 489-90.

215. *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70, 75 (1869).

216. *Buel v. St. Louis Transfer Co.*, 45 Mo. 562, 565 (1870).

217. *O'Flaherty*, 45 Mo. at 73-74.

218. *Id.* at 74-75.

219. *Buel*, 45 Mo. at 564.

“instruction on the subject of contributory negligence was unhappily phrased, and well calculated to confuse and mislead the jury.”²²⁰

In summary, the Missouri Supreme Court applied contributory negligence as a bar to recovery by injured persons, generally deferring to jury decisions as discussed in the Part dealing with judicial perspectives, *infra*. Most importantly, and hardly beneficial to industry litigants, the court also adjusted contributory negligence to the capacity of the injured person, though still complying with legislative limitations upon recovery. Certainly, the young, the old, and the infirm benefit by jurors judging their conduct against standards of negligence commensurate with their “capacity.”

B. Fellow-Servant Doctrine

The fellow-servant doctrine first barred recovery to an injured employee in Missouri in 1860 in the case of *McDermott v. Pacific Railroad Co.*²²¹ McDermott, a brakeman, sustained personal injuries when the train on which he was stationed ran off a trestle-work and into the Gasconade River. Co-workers’ negligence left the bridge in defective condition.²²² Plaintiff’s petition contained “no allegation that the company employed incompetent servants or agents, or that they failed to exercise ordinary care in their selection.”²²³ The Missouri Supreme Court held for the defendant, establishing the fellow-servant doctrine as a bar to recovery by injured employees against their employers. In the opinion, the court affirmed, asserting:

The principle of the common law, that a servant, who is injured by the negligence or misconduct of his fellow servant, can maintain no action against the master for such injury, seems to be established with great uniformity in England and by the current of authority in the United States. . . . In our judgment, public policy requires that this distinction be maintained.²²⁴

Five years later, in *Schultz v. Pacific Railroad Co.*, the widow of a railroad day worker who was struck and killed by a locomotive car negligently operated by co-workers, sued her husband’s employer for wrongful death pursuant to General Statute 1865, Chapter 147, Section 2, *An Act for the better security of life, property and character.*²²⁵ Defendant’s answer succinctly set forth specific elements of the fellow-servant doctrine. Nevertheless, plaintiff relied upon the first clause of Section 2 of the Act which authorized recovery “[w]henver any person shall die from any injury resulting from or occasioned by the negligence,

220. *Id.* at 564-65.

221. 30 Mo. 115 (1860).

222. *Id.* at 117.

223. *Id.*

224. *Id.* at 116-17.

225. 36 Mo. 13 (1865).

unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive car or train of cars.”²²⁶ Another clause in the same section of the Act allowed recovery “[w]hen any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof. . . .”²²⁷ After extended analysis, the court held:

We must conclude, then, that the true purport of the statute is, that whenever any person whatever, whether a passenger or an employee, a fellow-servant or a mere stranger, shall die from any injury which is occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing the engines and train, the employer who stands in the relation to them of master and servant, employer and employee, at the time of the injury, shall be liable, without more, to the representatives of the injured person in the liquidated sum of five thousand dollars damages, and no more.”²²⁸

Accordingly, the court reversed defendant’s judgment and verdict in *Schultz*, which was predicated upon the fellow-servant defense.²²⁹ The case was remanded to the trial court for retrial on the issue of defendant’s statutory liability. Effectively, this applied and extended *respondeat superior* principles to the employer with respect to anyone coming within the purview of this Act, regardless of common law rules.²³⁰ The court was careful to distinguish *McDermott*, while still recognizing the existence of the fellow-servant doctrine defense.²³¹ Even if the trend in *Schultz* caused concern, the *Schultz* court dutifully noted that, “[o]f the wisdom, justice or policy of the act we are not to judge; it is enough for us that it is so enacted, and it is our simple and plain duty to declare the law as we find it.”²³²

These words proved prophetic in *Rohback v. Pacific Railroad Co.* Charles Rohback sued his employer for two fractured legs and other personal injuries received when he was run over by a locomotive train negligently operated by his co-workers.²³³ Again, defendant’s answer asserted the fellow-servant doctrine.

226. *Id.* at 17.

227. *Id.*

228. *Id.* at 28.

229. *Id.*

230. *Schultz*, 36 Mo. at 28.

231. *Id.* at 29.

232. *Id.* at 28.

233. *Rohback v. Pacific R.R. Co.*, 43 Mo. 187 (1869).

The trial court entered judgment for the defendant based upon the *McDermott* holding, and the supreme court agreed. Following *McDermott* and distinguishing *Schultz*, the court commented upon the fellow-servant doctrine as follows:

[I]n many cases it produces the grossest injustice, and grants an immunity of exemption which shocks the moral feelings. But in view of the law being settled for many years in this State, and the great weight, respectability, and, I might add, uniformity of the authorities in the same way, I consider that we are bound to yield an assent, or at least acquiesce in the doctrine, however reluctant we may be to adopt it.²³⁴

As a final salve to its judicial conscience, the court in *Rohback* lamented that “this is a case of great hardship, but sympathy cannot be permitted to unsettle the law.”²³⁵

The saga of the fellow-servant doctrine continued in *Harper v. St. Louis & Indianapolis Railroad Co.*²³⁶ Harper, an underage minor working as a conductor, sustained injuries after being thrown from a train being operated by a fireman, not an engineer. Plaintiff’s action was not based upon the negligence of the fireman, but on defendant’s failure to hire a “suitable engineer.” Although the defendant railroad referenced the *McDermott* case, the court’s opinion omitted any reference to the fellow-servant doctrine. For other reasons, specifically a contributory negligence instruction given but unsupported by the evidence, defendant railroad company’s judgment was reversed and remanded.²³⁷ By adroit legal skills, the plaintiff, a minor, was not denied recovery due to the negligence of a fellow servant.

Essentially, judicial avoidance of the fellow-servant doctrine almost eliminated its impact on an injured employee’s recovery. In *Gibson v. Pacific Railroad Co.*,²³⁸ plaintiff, a brakeman, sued his employer for personal injuries received when he lost three fingers uncoupling a car. Plaintiff’s evidence established that his co-employees were skillful and competent, but that the equipment was defective. This evidence was persuasive and resulted in plaintiff’s jury verdict.²³⁹ After reviewing the history, rationale, and precedent applicable to the fellow-servant doctrine, the court affirmed plaintiff’s judgment.²⁴⁰ Again, as in *Harper*, adroit legal skills engineered plaintiff’s

234. *Id.* at 193.

235. *Id.* at 195.

236. *Harper v. St. Louis & Indianapolis R.R. Co.*, 44 Mo. 488 (1869).

237. *Id.* at 490 (plaintiff’s minority status not reflected in the improperly given contributory negligence instruction).

238. 46 Mo. 163 (1870).

239. *Id.* at 173.

240. *Id.* at 169. Recounting the reasons for the fellow-servant doctrine, the court noted that an employee comes to work knowing that he assumes the risk of injury from

recovery against his employer by blaming faulty equipment, thereby avoiding the harsh impact of the fellow-servant doctrine.

In summary, economic considerations appear to be missing from the supreme court's application of the fellow-servant doctrine. Despite two harsh earlier results, in which the fellow-servant doctrine was applied, three injured employees successfully maintained their actions by blaming the employer, not co-workers. Judicial interpretations and legislative enactments facilitated plaintiffs' recoveries. These cases demonstrated "keen concern" for victim welfare and support Schwartz' findings that industry was treated with "sternness."²⁴¹

C. Assumption of Risk

This survey of Missouri law uncovered just one case, *Sawyer v. Hannibal & St. Joseph Railroad Co.*, where defendants asserted the defense of assumption of risk to bar a railroad passenger from recovering for personal injuries received from a train wreck.²⁴² It also discovered three decisions that clearly reflected the hostile times, and the ravages of civil war and "public enemies."²⁴³ *Sawyer*²⁴⁴ best reflects those perilous times in northern Missouri during the fall of 1861. Unlike New Hampshire, California and New England, Missouri was very much a battleground. *Sawyer*, discussed in the previous Part on damages, deserves considerable mention for other reasons, including the defense of assumption of risk.

The incident in question in *Sawyer* occurred on September 3, 1861. Prior to that time, the western division of defendant's railroad had not experienced any hostilities. However, late on that September afternoon, "guerrillas" captured and burned down defendant's railroad bridge spanning the Platte River near St. Joseph, Missouri.²⁴⁵ After the destruction of the bridge, the "public enemies" prevented defendant's agents and employees from warning the advancing passenger train bearing plaintiff. The train reached the missing bridge about 11 p.m. and plummeted into the Platte River, killing five of the seven crew

negligent conduct by his co-workers, a factor over which the employer has no control. The Missouri Supreme Court noted, however, that "it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work." Justice and reason impose liability upon an employer who fails to provide suitable means with which to carry on his business. *Id.* at 169.

241. See Schwartz, *supra* note 6, at 1717-20.

242. *Sawyer v. Hannibal & St. Joseph Ry. Co.*, 37 Mo. 240 (1866).

243. See generally *Clark v. Pacific R.R. Co.*, 39 Mo. 184 (1866); *Sawyer v. Hannibal & St. Joseph Ry. Co.*, 37 Mo. 240 (1866); *Higgins v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 418 (1865).

244. *Sawyer*, 37 Mo. at 240.

245. *Id.* at 245.

members.²⁴⁶ Apparently word concerning hostilities along the road had been received by the train prior to its departure, as noted by language in the opinion:

Were the passengers deceived, or did they not understand the true state of affairs along the line of the road? That very train had been turned back not far from Palmyra in consequence of a bridge having been tampered with the day before so that it could not be crossed, and every passenger on it knew the fact.

The fact is *the passengers knew and understood the state of affairs along the line of the road as well as the agents and employees*, and they were willing to take their risks and stand their chances along with them without holding the appellant bound to carry them with *safety* as they would do in times of profound peace. They were certainly willing to take, and actually took, all risks to which a state of war necessarily exposed them.²⁴⁷

Clearly, the supreme court recognized that the passengers were aware of risks due to the existing state of insurrection; yet, despite those risks, the passengers, including this plaintiff, chose to proceed on the trip. Nonetheless, the supreme court dismissed the legal impact of the issue of assumption of risk, noting in rather curt fashion more substantial reasons to find for the defendant:

There was much evidence . . . touching the operations of the public enemy, the insurrectionary state . . . the military orders, . . . and the risks which passengers voluntarily undertook in the face of dangers known to them, and for which they were to be held alone responsible. This kind of evidence was not pertinent to the issue, and it should properly have been excluded.²⁴⁸

Sawyer's ultimate reversal specified other bases, including instructional error and an excessive jury verdict of \$6,900. Clearly, assumption of risk was presented, argued and considered by the supreme court, but was not accepted as a viable defense.

VII. RAILROAD CASES

Like the legendary "Wabash Cannonball,"²⁴⁹ the railroad industry roared through the judicial system according to Horwitz. Further, Horwitz argues that the judicial system tended to "change the theory of legal liability" and "reconsider the nature of legal injury" in response.²⁵⁰ Schwartz, analyzing the California tort cases and the New Hampshire textile cases, disagrees with

246. *Id.* at 245-46.

247. *Id.* at 254.

248. *Id.*

249. HORWITZ, *supra* note 2, at 69-70.

250. HORWITZ, *supra* note 2, at 70, 79, 88, 99.

Horwitz and concludes that the courts “sternly” held the railroads to strict standards.²⁵¹ This Article supports Schwartz’ conclusions.

A. Fire Cases

Horwitz claims that fear of fire damage judgments obsessed the railroad industry, resulting in reclassification of fire cases from nuisance-strict liability cases to negligence cases.²⁵² Schwartz disagrees, asserting that strict liability never applied to *accidentally* set fires at common law, but only to fires *within the control of the defendant*.²⁵³ Schwartz also points out that fire cases at common law were pled in trespass on the case, thereby accruing “negligence” attributes akin to collision cases.²⁵⁴ This, Schwartz contends, impugned the common law assessment of fire as a strict liability action.²⁵⁵ This Article’s investigation of railroad fire cases in Missouri supports Schwartz’ analysis and his review of New Hampshire and California cases,²⁵⁶ as Missouri courts ruled for the farmer in such cases on almost every occasion.

*Smith v. Hannibal & St. Joseph Railroad Co.*²⁵⁷ was decided in the absence of any statute. The parties were strangers. Plaintiff shouldered the burden of proof, including the requirement that “the fact of negligence must be proved.”²⁵⁸ Evidence in the case indicated that a train traveled by plaintiff’s field while two young boys burned corn stalks south of the field. Thereafter a wind arose from the south. Fire destroyed plaintiff’s crops and orchard field. No one saw defendant’s engine start the fire.²⁵⁹ The court declared on appeal, “[W]e cannot say that there was any evidence before the jury which tended to show actual negligence on the part of the defendant, and the plaintiff was not entitled to recover, unless the proposition [of negligence] can be maintained.”²⁶⁰ The court said that the outcome of the case depended upon the evidence, since an equal presumption existed that the destructive fire started when the south wind caught the fire tended by the two boys burning cornstalks. Consequently, the supreme court reversed and remanded, citing instructional error and improperly excluded exculpatory evidence on behalf of defendant. In dicta, the court also suggested that while the farmer’s failure to cut his grass did not constitute negligence, his inaction in permitting the wind to pile up dead grass and weeds against his

251. Schwartz, *supra* note 6, at 1742, 1746, 1720.

252. HORWITZ, *supra* note 2, at 69-70.

253. Schwartz, *supra* note 6, at 1724.

254. Schwartz, *supra* note 6, at 1724.

255. Schwartz, *supra* note 6, at 1724-25.

256. Schwartz, *supra* note 6, at 1746.

257. 37 Mo. 287 (1866).

258. *Id.* at 294-95.

259. *Id.* at 290-91.

260. *Id.* at 291.

orchard near the railroad line might have constituted negligence; thus the jury could have been asked to decide whether such negligence materially contributed to cause the damage.²⁶¹

The *Smith* dicta was subsequently challenged and clarified in *Fitch v. Pacific Railroad Co.*²⁶² In *Fitch*, the court affirmed plaintiff's verdict and judgment even though defendant's negligence and plaintiff's contributory negligence were once again contested issues. *Fitch* refined the *Smith* opinion, establishing the presumption that "[i]t is an inference of reason that fire should not . . . escape."²⁶³ Thereafter, courts took the position that, "when a farmer proves that the locomotive, a useful but dangerous instrument, scatters fire along its road, without explanation, a jury is warranted in inferring that there has been some neglect."²⁶⁴ The presumption is rebuttable; the defendant may rebut the inference with evidence of skill and technology, as in *Fitch*. In *Fitch*, the court determined that the accumulation of dead and dry grass in the farm field was not a direct cause of the destruction; engine sparks ignited and then caused the inferno.²⁶⁵ The court cautioned that "the language of Judge Holmes, in *Smith v. Hannibal & St. Joseph Railroad Co.*, is very strong, and liable to misconstruction unless compared with the case and the rest of the opinion."²⁶⁶

The court affirmed the *Fitch* holding in *Bedford v. Hannibal & St. Joseph Railroad Co.*²⁶⁷ There the court clearly declared, "[T]he fact the fire is set by a railroad engine is *prima facie* evidence of negligence by those who run it or who provide the engine with its contrivances, and throws the burden of exonerating them upon the railroad company."²⁶⁸

Here again, the Missouri Supreme Court abided by precedent and existing law before imposing liability upon railroads in fire cases. Despite the reversal of plaintiff's judgment in *Smith*, the court's decision displayed balanced and neutral adjudication of competing interests without favoritism toward railroads and without influence by economic considerations.

B. Killing or Injuring Stock

Missouri law departed conspicuously from common law, English law, and Spanish law standards for livestock management. Missouri, as a frontier state,

261. *Id.* at 298.

262. 45 Mo. 322 (1870).

263. *Id.* at 327.

264. *Id.*

265. *Id.* at 328-29.

266. *Id.* at 326.

267. *Bedford v. Hannibal & St. Joseph R.R. Co.*, 45 Mo. 456 (1870).

268. *Id.* at 458. The court even noted, "It is difficult to see what objection there could be to these instructions." *Id.* at 458.

adopted an open range legal system, allowing livestock to range at will.²⁶⁹ At common law and in nineteenth century England, the duty of inclosure²⁷⁰ rested upon the owner of livestock.²⁷¹ The Spanish influence “inclosed” livestock within the town, leaving open farm areas as “common.”²⁷² Therefore, railroads by statute, bore the legal responsibility to “inclose” the railroad line or be liable for injury and damages inflicted upon livestock by locomotives.²⁷³

269. *Gorman v. Pacific Railroad*, 26 Mo. 441, 445 (1858). The *Gorman* court noted:

It has always been the understanding as to the law in this state that our statute concerning inclosures entirely abrogated that principle of the common law which exempted the proprietor of land from the obligation of fencing it, and imposed on the owner of animals the duty of confining them to his own premises. No conviction has more thoroughly occupied the public mind than this, and nothing would sooner arouse the attention of the community than an apprehension that the old rule of the common law was to any extent to be revived.

Id.

270. In English law, inclosure is the “[a]ct of freeing land from rights of common, commonable rights, and generally all rights which obstruct cultivation and the productive employment of labor on the soil.” *BLACK’S LAW DICTIONARY* 712 (6th ed. 1990).

271. *McPheeters v. Hannibal & St. Joseph R.R. Co.*, 45 Mo. 22, 25-26 (1869) (“It is the law in England, and in some of the densely populated States in this Union, that the owners of cattle shall keep them inclosed, and if they stray therefrom they are trespassers, and the owners are guilty of negligence. But such is not, and never was, the common law in Missouri.”). See also *Clark v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 202, 220 (1865) (“At common law, it was the duty of every landowner to keep his cattle within his own enclosures, and the liability of one owner to another for damages done by the straying cattle, turned much upon this principle; but this rule has been considerably modified by operation of the statutes of this State.”).

272. *Clark*, 36 Mo. at 221 (1865) (“In Spanish times here in Missouri, the custom sometimes was to inclose the cattle within the towns and commons, and to fence the cultivated fields out; but the habit has been in modern times to inclose the fields, fencing the cattle out, with free range upon the prairie or the highway.”).

273. *Id.* at 220-21. The court stated:

Aside from the statute, the railroad company would not be bound to fence their road against stray cattle, nor would they be liable for killing such cattle upon their tracks without proof of negligence on their part; on the contrary, the owners of cattle might be liable for damages done to the railroad, or to trains and passengers by reason of such cattle being negligently allowed to stray upon the railroad. The statutes so far change all this as to relieve the owners from the obligation to keep their cattle within enclosures, and to make the railroad corporation liable for killing cattle upon the track, without proof of negligence on their part, unless they fence in the railroad where it runs through enclosed fields”

Id.

*Gorman v. Pacific Railroad Co.*²⁷⁴ is the seminal case regarding killing or injuring livestock. *Gorman* allowed recovery under either statutory liability or common law liability based upon negligence.²⁷⁵ As discussed earlier, *Gorman* sued for damages when defendant's locomotive killed three cattle along unfenced track running through an "inclosed field." Legislative enactments compelled railroads to erect and maintain fences along the sides of its roadbeds passing through inclosed fields, and to construct cattle-guards at road crossings, or suffer liability for horses, cattle or stock injured or killed by defendants' engines.²⁷⁶ Deciding against a constitutional challenge, the court held that the railroad company, although previously chartered by the legislature, was subject to reasonable police regulations as any private citizen would be.²⁷⁷ Noting Missouri's open range law permitted livestock to wander and imposed the obligation to "inclose" upon crop farmers, the court declared that cattle owners had no duty to fence in livestock,²⁷⁸ as existed at common law.²⁷⁹ The statutory obligation to fence and construct cattle-guards protected the railroad, its passengers, cargo and crew, as well as livestock.²⁸⁰ Acknowledging both the usefulness and danger of the locomotive, the court imposed a duty of care commensurate with the danger, saying, "The steam engine, whilst it is very useful, is at the same time a very dangerous agent, and he who undertakes to use it must, in order to avoid doing injuries to others, employ a skill and diligence proportionate to its dangerous nature."²⁸¹ Furthermore, it said that, as a common carrier for hire, the railroad had as "its first duty . . . the preservation of the passengers and freight, yet, consistent with that duty, in order to avoid injury, it is required to use the care and diligence of a prudent man, knowing that he is using a powerful and dangerous agent."²⁸²

The supreme court recognized that the railroad industry, while important, was not dominant over all creation. With that, the railroad law of Missouri was written.²⁸³ Also, the jury verdict and judgment for *Gorman* were affirmed.

274. 26 Mo. 441 (1858).

275. *Id.* at 449. The *Gorman* court stated:

[A] railroad company, though not subject to an action in the nature of trespass *vi et armis* for an injury done by its servants with a steam engine unless by its command or with its assent, is yet liable to a suit in the nature of an action on the case for injuries done by its servants resulting from their negligence.

Id.

276. *Id.* at 449-52.

277. *Id.* at 450.

278. *Id.* at 445-46.

279. *Gorman*, 26 Mo. at 446.

280. *Id.* at 450.

281. *Id.* at 447.

282. *Id.*

283. See generally *id.* *Gorman* is cited as authority in numerous subsequent opinions by the Missouri Supreme Court.

Twenty-one of twenty-two plaintiffs prevailed at trial against railroads and recovered damages for livestock being injured or killed by railroad locomotives. Only once, in *Lafferty v. Hannibal & St. Joseph Railroad Co.*,²⁸⁴ did the railroad company prevail. In *Lafferty*, the trial court sustained defendant's demurrer since the injury to frightened horses did not involve any contact. The supreme court agreed, interpreting the railroad compensation provision to require actual contact between the livestock and the engine; so it upheld the demurrer.²⁸⁵

Of the twenty-one judgments won by plaintiffs at the trial level, twelve were affirmed on appeal,²⁸⁶ nine were reversed and remanded to the trial court for further proceedings, five were reversed and remanded for insufficiency of the pleadings,²⁸⁷ and three were reversed for insufficient proof.²⁸⁸ *Clark v. Hannibal & St. Joseph Railroad Co.*²⁸⁹ was reversed and remanded on both instructional error and a general verdict for damages on multiple claims.

Close analysis of the foregoing decisions discloses the court's adherence to statutory law and precedent. When legislative enactments changed the obligations of the railroad companies from fencing within inclosed fields and installing cattle-guards at road crossings to fencing throughout the prairie,²⁹⁰ the supreme court adjusted its rulings to conform to the shifting legislative mandate. Nowhere do we find judicial preference for the railroad industry. In fact, in the *Calvert* opinion,²⁹¹ the Missouri Supreme Court assisted plaintiff by suggesting that counsel amend plaintiff's petition. The second opinion confirmed that the petition was amended and affirmed plaintiff's judgment. In that case, Hannibal & St. Joseph Railroad Company sued Patrick S. Kenney, an individual.²⁹²

284. 44 Mo. 291 (1869).

285. *Id.* at 294.

286. *Iba v. Hannibal & St. Joseph R.R. Co.*, 45 Mo. 469 (1870); *McPheeters v. Hannibal & St. Joseph R.R. Co.*, 45 Mo. 22 (1869); *Tarwater v. Hannibal & St. Joseph R.R. Co.*, 42 Mo. 193 (1868); *Vickers v. Hannibal & St. Joseph R.R. Co.*, 42 Mo. 198 (1868); *Calvert II*, 38 Mo. 467 (1866); *Powell v. Hannibal & St. Joseph R.R. Co.*, 35 Mo. 457 (1865); *Trice v. Hannibal & St. Joseph R.R. Co.*, 35 Mo. 418 (1865); *Trice v. Hannibal & St. Joseph R.R. Co.*, 35 Mo. 416 (1865); *Trice v. Hannibal & St. Joseph R.R. Co.*, 35 Mo. 188 (1864); *Garner v. Hannibal & St. Joseph R.R. Co.*, 34 Mo. 235 (1863); *Burton v. North Mo. R.R.*, 30 Mo. 372 (1860); *Gorman v. Pacific R.R. Co.*, 26 Mo. 441 (1858).

287. *Hansberger v. Pacific R.R. Co.*, 43 Mo. 196 (1869); *Dyer v. Pacific R.R. Co.*, 34 Mo. 127 (1863); *West v. Hannibal & St. Joseph R.R. Co.*, 34 Mo. 177 (1863); *Miles v. Hannibal & St. Joseph R.R. Co.*, 34 Mo. 407 (1861); *Quick v. Hannibal & St. Joseph R.R. Co.*, 31 Mo. 399 (1861).

288. *Meyer v. North Mo. R.R. Co.*, 35 Mo. 352 (1864); *Brown v. Hannibal & St. Joseph R.R. Co.*, 33 Mo. 309 (1863); *Calvert I*, 34 Mo. 242 (1863).

289. *Clark v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 203 (1865).

290. *Id.* at 219, 221.

291. *See Calvert II*, 38 Mo. 467 (1866) (allowing plaintiff to amend its petition affirming plaintiff's judgment).

292. *Hannibal & St. Joseph R.R. Co. v. Kenney*, 41 Mo. 271 (1867).

Plaintiff requested \$20,000 in damages because Kenney permitted his mules to stray upon plaintiff's railroad tracks causing damage to the locomotive train and road. The trial court sustained defendant's demurrer. The supreme court affirmed, preserving the open range law.²⁹³

The *Calvert* and *Kenney* cases, along with other remands and reversals, suggest the supreme court's "keen concern" for "victims," at the expense of the railroad industry. Certainly, no economic benefits accrued to the railroad industry from these decisions.

C. Eminent Domain, Land Acquisitions, and Conversions

According to Horwitz, legislative enactments limited damages for canal company land acquisitions by eliminating juries, appointing appraisers, and including all damages in a single award.²⁹⁴ Schwartz limited his investigation to other tort cases.²⁹⁵ Still, natural resources were coveted in the nineteenth century, as indicated in Part VII on mining and timber interests. Legislative authority empowered railroads to use whatever resources were available to construct and maintain the railroad line, and Horwitz espoused this as support for his theory. This Section reviews and analyzes the Missouri cases.

In *Lindell v. Hannibal & St. Joseph Railroad Co.*, plaintiff sued the defendant railroad for trespass, seeking the statutory remedy of treble damages.²⁹⁶ Plaintiff pursued the action despite the fact that by statutory incorporation, Hannibal & St. Joseph Railroad Company had been given legislative authority to take and utilize available resources in constructing the railroad line.²⁹⁷ Plaintiff sought treble damages. Defendant contacted a justice of the peace who appointed "three disinterested freeholders; they assessed plaintiff's damages at \$1,100." The railroad's legislative charter authorized appropriation of available resources to construct rail lines. In this case, the court assessed actual damages, not treble damages, reserving this statutory penalty for "willful trespasses."²⁹⁸

Although the legal procedure was available, Hannibal & St. Joseph Railroad Company did not initiate the adopted condemnation process, but still appropriated the necessary resources.²⁹⁹ Under these unauthorized circumstances, an action in trespass succeeded. The court relentlessly protected individual property owners against unauthorized railroad trespasses. The

293. *Id.*

294. HORWITZ, *supra* note 2, at 76-84. Horwitz referred to this treatment as the "inclusivity" of damages into the award.

295. Schwartz, *supra* note 6, at 1719.

296. *Lindell v. Hannibal & St. Joseph R.R. Co.*, 25 Mo. 550 (1857).

297. See R.C. 1853 (act to amend an act, entitled: "An act to Incorporate the Hannibal & St. Joseph Railroad Company").

298. *Lindell*, 25 Mo. at 551-52.

299. *Mueller v. St. Louis & Iron Mountain R.R. Co.*, 31 Mo. 262 (1860).

supreme court, addressing a similar railroad trespass,³⁰⁰ reversed the trial court's dismissal on the basis of improper venue, holding that trespass actions are personal and may be brought in any county.

The Missouri Supreme Court consistently abided by statutory directives as indicated by cases during the 1855 to 1865 railroad construction boom. Examples include, first, holding that an assessment of damages by "three discreet, disinterested men, citizens of the county," was final; second, upholding the legislative denial of jurisdiction to justices of the peace for assessment of damages caused by railroad construction,³⁰¹ third, upholding a railroad's authority to appropriate natural materials from nearby land for use in railroad construction; and fourth, holding that the enabling railroad statute provided the exclusive remedy to assess damages.

In *Clark v. Hannibal & St. Joseph Railroad Co.*,³⁰² the court emphatically denied any additional recovery for damages accruing to the land after receipt of the statutory compensation. Plaintiff had granted Hannibal & St. Joseph Railroad Company a right-of-way, for which he received compensation. During construction and usage of the right-of-way, defendant inflicted serious damage to plaintiff's fences, land, terrain, and natural drainage, which resulted in stock coming through the gaps in fencing and trampling crops. Plaintiff sued for damages but died while the case was pending. The court determined that, in the absence of negligent construction, all the property damages "[m]ust be considered as the natural and necessary consequence of what the corporation had acquired the lawful right to do; and such damages must be taken to have been included in the compensation assessed"³⁰³

Without hesitation, the supreme court followed established legal principles in deciding land disputes involving Hannibal & St. Joseph Railroad Company as plaintiff. Pursuant to a federal grant, the railroad purchased Missouri land occupied by defendant Jeremiah P. Moore. The railroad company sued in ejectment, but the trial court refused to receive the railroad's evidence of title. The trial court's judgment was reversed and remanded as "clearly erroneous."³⁰⁴

Again, deference to the statutory law and precedent guided the court's decisions. Without any suggestion of partiality to industry or consideration of economic influences, the Missouri Supreme Court maintained its judicial commitment to established legal principles and ecumenical fair treatment.

300. *Hannibal & St. Joseph R.R. Co. v. Mahoney*, 42 Mo. 467 (1868).

301. *Fatchell v. St. Louis & Iron Mountain R.R. Co.*, 28 Mo. 178 (1859).

302. 36 Mo. 202 (1865).

303. *Id.* at 222-24.

304. *Hannibal & St. Joseph R.R. Co. v. Moore*, 37 Mo. 341, 342 (1866).

D. Collisions and Mishaps Involving Strangers, Other Vehicles, Employees, Pedestrians and Passengers

1. Strangers

Judicial treatment of railroad liability resulting from collisions and mishaps can be analyzed by examining the personal injury and death claims generated by the locomotive, affectionately referred to as “useful,” but respectfully referred to as a “dangerous agent.”³⁰⁵ Recognizing both “useful” and “dangerous” aspects, the supreme court established the legal duty toward strangers in *Gorman*, holding as follows:

Although the duty of the company as a carrier extends only to the passengers and freight on the trains, and the law of carriers is only applicable to it as the transporter of passengers and freight, yet as regards the persons and things to which it does not stand in that relation it is under that law which enjoins on it the duty of so using the things over which it has control as not to do harm to others, and which exacts of it a caution and prudence commensurate to the dangerous nature of the means which it employs. Whilst its first duty is the preservation of the passengers and freight, yet, consistent with that duty, in order to avoid injury, it is required to use the care and diligence of a prudent man, knowing that he is using a powerful and dangerous agent.³⁰⁶

2. Collisions with Other Vehicles

Plaintiffs prevailed at the trial court in both reported cases involving a locomotive colliding with another vehicle. Plaintiffs, driving horse drawn wagons, presented evidence in both cases that the defendant railroad train failed to signal its approach to the crossings. The *Kennedy* collision occurred at a private crossing on plaintiff’s farm; *Kennedy* was reversed.³⁰⁷ The *Tabor* collision occurred at a blind public crossing. The supreme court affirmed *Tabor*.³⁰⁸

305. *Gorman v. Pacific R.R. Co.*, 26 Mo. 441, 447 (1858).

306. *Id.*

307. *Kennedy v. North Mo. R.R. Co.*, 36 Mo. 351, 365 (1865). The supreme court reversed because the trial court submitted a punitive damage instruction to the jury without any evidentiary support. Emphatically, the court held that giving the punitive damage instruction was designed to mislead the jury. *Id.*

308. *See Tabor v. Missouri Valley R.R. Co.*, 46 Mo. 353, 354 (1870). *See also Kennedy*, 36 Mo. at 355, 356. Both cases recite the railroad’s obligation to blow a whistle or ring a bell when approaching a public crossing. The public crossing in *Kennedy* was approximately one mile from the private crossing. *Id.*

Driving his horse-drawn wagon, Tabor entered the blind public crossing. Not seeing or hearing an approaching train, plaintiff should have been able to assume

[t]hat there is no car sufficiently near to make the crossing dangerous; that he had a right to presume that in handling their cars the railroad companies will act with appropriate care and the usual signals of approach will be seasonably given, and the managers of the train will be attentive and vigilant.³⁰⁹

In *Kennedy*, the court placed a high duty of care upon the railroad company, but carefully conditioned recovery upon plaintiff's freedom from contributory negligence:

[R]ailroad companies, owing to the dangerous character of the machinery and vehicles they operate, will be held to the greatest caution and skill in the management of their business: but this will not exonerate others who are wanting in prudence, or guilty of negligence.³¹⁰

Neither case suggests any partiality or consideration of economic protection for the railroad by the supreme court, rather each case displays respect for statutory direction and established precedent.

3. Employees

In the discussion of the fellow-servant doctrine above, this Article presented a detailed discussion of the master-servant cases. All those cases involved railroads and, therefore, are relevant here. To the cases discussed *supra* we must add *Higgins v. Hannibal & St. Joseph Railroad Co.*³¹¹ Plaintiff brought a wrongful death action for the death of her father, a brakeman for defendant. Civil war in Missouri forced defendant to discontinue operating the train on which decedent served. Rains and swollen streams washed out the track, resulting in a train accident in which decedent was thrown from the train and killed.³¹² Decedent's status as passenger or employee and the propriety of warning notices were vigorously disputed.³¹³ Decedent suffered fatal injuries on September 16, 1861, approximately two weeks after his train stopped running due to guerrilla activity.

309. *Tabor*, 46 Mo. at 356.

310. *Kennedy*, 36 Mo. at 351.

311. *Higgins v. Hannibal & St. Joseph R.R. Co.*, 35 Mo. 418 (1865).

312. *Higgins*, 35 Mo. at 418.

313. *Id.* at 418, 419. Disclaimer notices were allegedly posted in the passenger cars warning passengers that riding in the baggage car was prohibited. *Id.*

As in *Schultz*,³¹⁴ plaintiff's recovery rested upon R.C. 1855, the contention being maintained that decedent was a passenger and not an employee. Plaintiff did not seek benefits under the *Schultz* holding, which allowed recovery to "any person," but instead directly claimed benefits as a passenger under the second clause of the Act.³¹⁵ Decedent's status stirred much controversy given his employment record, his actions, and the company's rules and regulations. Ultimately, however, the court held that the Act applied only to passengers, stating that "the evidence tended to prove that he was an employee, and not a passenger, within the purview of the act."³¹⁶ The court went on to say that even if decedent was a passenger, he could not recover, because riding in the baggage car could be considered negligence contributing to his own injury.³¹⁷ Therefore, the court held that plaintiff's jury verdict must be reversed and the cause remanded with directions to allow the jury to consider evidence on these issues.

Analysis of *Higgins* fortifies the earlier conclusion based upon the fellow-servant cases: the Missouri Supreme Court resolved issues on legal principles, not economic influences or favoritism toward industry. The rules remained intact and judicial determinations framed the issues for retrial upon remand to the trial court.

4. Pedestrians

Six reported cases involved pedestrians killed or injured by railroad companies.³¹⁸ Three involved children.³¹⁹ Excepting *Boland*,³²⁰ the plaintiffs prevailed, winning all judgments at the trial level. Only in *Buel*³²¹ was plaintiff's judgment reversed. Even then, the court reversed, not on the facts of the case, but because the trial court injected the words "undue carelessness" in the contributory negligence instruction.³²²

Significantly, in child-pedestrian cases, the court relaxed contributory negligence standards according to the injured person's capacity, thereby adjusting the standard of care required of a child, an idiot or a person *non compos mentis* away from the "ordinary careful person" standard.³²³

314. *Id.*

315. *See* R.C. 1855 (clause 2).

316. *Higgins*, 35 Mo. at 433.

317. *Id.* at 436.

318. *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255 (1870); *Buel v. St. Louis Transfer Co.*, 45 Mo. 562 (1870); *Meyer v. People's Ry. Co.*, 43 Mo. 523 (1869); *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70 (1869); *Liddy v. St. Louis R.R. Co.*, 40 Mo. 506 (1867); *Boland v. Missouri R.R. Co.*, 36 Mo. 484, 484 (1865).

319. *Buel*, 45 Mo. at 562; *O'Flaherty*, 45 Mo. at 70; *Boland*, 36 Mo. at 484.

320. *Boland*, 36 Mo. at 484.

321. *Buel*, 45 Mo. at 565.

322. *Id.* at 564, 565.

323. *Boland*, 36 Mo. at 489, 490.

Nevertheless, defendant's judgment in *Boland* was extreme. The trial court granted a directed verdict for defendant at the end of the evidence, which was affirmed on appeal.³²⁴ The directed verdict made the court's discussion on contributory negligence mere dicta.³²⁵

Dicta or not, *O'Flaherty* followed the *Boland* rule on contributory negligence for minors,³²⁶ affirming the jury verdict for the death of a young girl under three years of age.³²⁷ Both *Buel* and *Boland* scrupulously assessed the care, attention, and diligence with which defendants' cars were being operated. Although reversed, *Buel* was remanded for retrial and jury decision with directions for proper instructions.

In *Kennayde, Liddy and Meyer*,³²⁸ wrongful death cases involving adult pedestrians sans evidence of alcohol involvement, the supreme court approved plaintiffs' jury verdicts. The supreme court examined the instructions on negligence and contributory negligence issues and left the decisions to the juries. In *Meyer*, the supreme court concluded that the instructions were correct statements of law: "[T]here is no error in the action of the court, and the judgment must be affirmed."³²⁹ Despite reservations about the *Meyer* jury verdict, the supreme court accepted the decision, hardly an indication of favoritism or economic protectionism.

In *Kennayde*, defendant's train, operating without lights, signals or flagmen warning of its presence, ran down and killed Michael Kennayde. The supreme court affirmed, saying, "[T]he whole case was well submitted to the jury. They found Kennayde blameless, and the company negligent. Let the judgment be affirmed."³³⁰

Again, in *Liddy*, Michael Liddy was crossing the street when he was run down and killed by defendant's railway car. The night was cloudy, dark and foggy, but defendant's horses had bells on. The supreme court confirmed that the jury had been properly instructed, and then stated:

[I]t was a question of fact for the jury, whether the rate of speed of the car at the time of the occurrence was within the limit fixed by the city ordinances or not. . . . The duty of defendant's servants and agents to keep a vigilant lookout for vehicles and persons on foot, taking into consideration all the attending circumstances, was also a proper question for the consideration of the jury. Taking the instructions all together, and considering them as a

324. *Id.* at 492.

325. *Id.* ("Now, by reference to the evidence, we think it clear there was no negligence shown by defendants or their agents.")

326. *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70, 73 (1869).

327. *Id.* at 75.

328. *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255 (1870).

329. *Meyer v. People's Ry. Co.*, 43 Mo. 523, 527 (1869).

330. *Kennayde*, 45 Mo. at 262.

whole, we think they were sufficiently warranted by the evidence, and presented the law of the case fairly to the jury.³³¹

Analysis of these pedestrian cases reveals no bias or partiality of the judiciary. Certainly, leaving decisions to the jury seems fair and consistent with the jury function, not partial or protective of the emerging railroad industry.

5. Passengers

The Missouri Supreme Court decided eight railroad-passenger cases from 1863 to 1869. Plaintiffs won jury verdicts in all eight cases at the trial level, three of which were retrials.³³² Railroad company appeals were successful in three instances, with railroads obtaining reversals due to instructional error.³³³ Upon remand, all three plaintiffs again successfully prosecuted their claims, receiving jury verdicts and judgments which were upheld by the supreme court.

In *Sawyer*³³⁴ and *Winters*,³³⁵ contributory negligence was not an issue. In fact, in *Winters*, the supreme court adamantly insisted that the trial court correctly refused defendant's contributory negligence instruction because the passenger could not have been negligent.³³⁶ In the court's words, "[T]he evidence did not warrant the giving of such instructions; there was nothing in it which could properly be said to show any negligence that produced or contributed to produce the accident and injury."³³⁷ The court's "enthusiasm"³³⁸ for Nathan A. Winters, was lacking for Amanda Sawyer, who lost her jury verdict for \$6,900 because it was excessive. At length, the *Sawyer* court discussed the activities of the "public enemy" who precipitated the casualty, declining that defense.³³⁹

331. *Liddy v. St. Louis R.R. Co.*, 40 Mo. 506 (1867).

332. *McKeon II*, 43 Mo. 405 (1869); *McKeon I*, 42 Mo. 79 (1867); *Meyer II*, 45 Mo. 137 (1869); *Meyer I*, 40 Mo. 151 (1867); *Winters v. Hannibal & St. Joseph R.R. Co.*, 39 Mo. 468 (1867); *Huelsenkamp v. Citizens' Ry. Co.*, 37 Mo. 538 (1866) [hereinafter *Huelsenkamp II*]; *Huelsenkamp v. Citizens' Ry. Co.*, 34 Mo. 45 (1863) [hereinafter *Huelsenkamp I*]; *Sawyer v. Hannibal & St. Joseph R.R. Co.*, 37 Mo. 240 (1866).

333. *McKeon I*, 42 Mo. at 86, 88; *Meyer I*, 40 Mo. at 154; *Huelsenkamp I*, 34 Mo. at 54.

334. *Sawyer*, 37 Mo. at 240.

335. *Winters*, 39 Mo. at 468.

336. *Id.* at 475.

337. *Id.*

338. *See Winters*, 39 Mo. at 475, 476 (concluding that the number of plaintiff's children was competent evidence because it showed plaintiff's situation in life and "enabled" the jury to better assess his damages).

339. *See Sawyer*, 37 Mo. at 240 (which is not the only claim for injuries or damages against the railroad industry due to hostile forces causing casualties). *See also* Clark v.

McKeon, *Meyer* and *Huelsenkamp* joined issues of the railroads' negligence and the passengers' contributory negligence for jury decision. The supreme court accepted the verdicts, but expressed disapproval of the *Meyer* verdict.³⁴⁰ Strong evidence of the passenger's intoxication complicated recovery in both the *McKeon* and *Meyer* cases.³⁴¹ Both plaintiffs received jury verdicts in their first trials, only to suffer reversals on appeal. But both plaintiffs prevailed again in second jury trials, and this time the supreme court affirmed both judgments and verdicts as questions for jury decision sans judicial intrusion.

In *Huelsenkamp*, plaintiff sued for the wrongful death of her husband who was crushed between two railway cars.³⁴² The decedent, a passenger on a crowded railway car, was standing on the step, holding on with his hands, with his body leaning out at the moment of impact. As in *Meyer* and *McKeon*, plaintiff lost her first jury verdict and judgment on appeal, but again prevailed with the second jury verdict. The supreme court affirmed the second judgment.³⁴³

A thorough examination of these cases discloses that the supreme court closely scrutinized the evidence, adhered to principles of law, and insisted that given instructions correctly reflect the law and evidence presented at trial. In *McKeon*, the court found there was no evidence justifying a punitive damage instruction; in *Meyer*, the court found that the entire question of negligence was improperly withdrawn from jury decision because the instruction directed a verdict for plaintiff. In *Huelsenkamp I*, the court found instructional error because the jury was precluded from considering plaintiff's contributory negligence, despite evidence that plaintiff voluntarily selected and occupied an evidently dangerous position on the train. By allowing jury determination of both plaintiffs' and defendants' negligence, the court preserved judicial fairness. These cases scarcely support any notion of judicial protection of the railroad industry. In fact, *Winters* suggests judicial protection of the individual.

Pacific R.R. Co., 39 Mo. 184 (1867). The train conductor placed train cars containing plaintiff's goods on a side track. Overnight, hostile forces burned the train. The supreme court denied recovery holding that the conductor was unaware of the hostile forces, and, further the delay in the Jefferson City rail yards was a "remote" cause of loss and not a proximate cause. *Id.* See also *Higgins v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 418 (1865).

340. *Meyer II*, 45 Mo. 137 (1869).

341. *McKeon I*, 42 Mo. 79, 85 (1867); *Meyer I*, 40 Mo. 151 (1867).

342. *Huelsenkamp I*, 34 Mo. 45 (1863).

343. *Id.*

VIII. JUDICIAL PERSPECTIVES

Professor Horwitz suggests in his study that judicial intrusions into jury functions³⁴⁴ and legislative decisions³⁴⁵ subsidized emerging industries from 1795 through 1860.³⁴⁶ This Part studies the influences of the jury, industry, and economic considerations in judicial resolutions, as well as the institutional role of the judiciary in government.

A. *Judicial Function of the Jury as Fact Finder*

This research consistently indicates that the Missouri Supreme Court adamantly respected the jury's decision-making role in litigation. In *Chouteau v. Steamboat St. Anthony*,³⁴⁷ the court reversed the trial court's directed verdict which favored the steamboat *St. Anthony*, holding, "[W]e think the instructions of the court should have left it to the jury to decide, from the evidence before them, whether boats were or were not in the habit of carrying such packages as freight or for hire."³⁴⁸

*Brown v. Hannibal & St. Joseph Railroad Co.*³⁴⁹ held that unless they waive their rights, citizens are "entitled to a jury of twelve men as a matter of constitutional right." Likewise, in *Meyer v. Pacific Railroad Co. I*, the supreme court continued to recognize the jury's vital role in the justice system, eloquently reminding the citizenry, "The constitution and laws of the country have imposed upon juries peculiar duties, and, unless they grossly abuse their trust, this tribunal is not to invade their province and revise their work."³⁵⁰ The court said that the reason for this jury deference was plain: The jury's "opportunities for judging of the capacity, integrity and credibility of witnesses by seeing them face to face, and observing the manner of giving their testimony, make them possess advantages which we are deprived of."³⁵¹ Insisting that its respect for jury verdicts was well established, the court asserted:

The doctrine is so well established it is hardly necessary to repeat it, that this court will not disturb a verdict because it is against the weight of evidence. Where there is a complete and total failure of evidence, and it has no tendency

344. HORWITZ, *supra* note 2, at 81.

345. HORWITZ, *supra* note 2, at 99, 101.

346. HORWITZ, *supra* note 2, at 95.

347. 12 Mo. 389, 393 (1849).

348. *Id.*

349. *Brown v. Hannibal & St. Joseph R.R. Co.*, 37 Mo. 298 (1866).

350. *Meyer I*, 40 Mo. 151, 154 (Mo. 1867). This was the trial from the first case brought by the widow over the death of her husband who fell from the train. His sobriety was questionable, but plaintiff still was favored with the jury verdict in the circuit court. Reversed and remanded on appeal, plaintiff also prevailed in the second trial.

351. *Id.*

to prove the issue, the court will be warranted in determining the whole case as a question of law; but where there is any evidence conducing to support the issue, or prove the allegations made by the pleadings, it is for the jury to say what weight shall be attached to it.³⁵²

Two juries ultimately decided in favor of Meyer's widow despite Meyer's intoxicated condition. The supreme court squarely addressed the appropriateness of this disposition in its second opinion and also cast the supreme court's consequential role in deferring to such decisions. Upon retrial, another jury considered and decided both the negligence of defendant's employees and decedent's contributory negligence. The court commented that the "evidence was conflicting, but it is not for this court to say that the jury erred."³⁵³

The supreme court was so strongly pledged to honoring jury decisions that judicial respect extended even to cases in which evidence was presented only by one party, but totally disregarded by the jury.³⁵⁴ *Steamboat City of Memphis v. Matthews*³⁵⁵ resolutely held:

All the testimony was on one side, but the jury disregarded it, and the circuit court, who heard the witnesses, sanctioned the verdict of the jury. We must infer from this that the circuit court was satisfied with the course of the jury. The credit due to witnesses is a matter peculiarly for a jury, and any control over the finding of a jury in this respect could hardly be judiciously exercised by this court, which possesses no means of forming a correct opinion, and must be guided altogether by what appears on the face of the record.³⁵⁶

Further expressing its belief in the process, the court concluded with the observation that "the circuit judge would not of course permit a verdict to stand against his own instructions, and as that court has virtually certified to us that the verdict was right, we can not interfere."³⁵⁷

Supreme court respect for legal precedent, legislative enactments and jury decisions fostered support for the trial court. *Keating v. Bradford*³⁵⁸ summed up the court's position on granting new trials, holding:

It can scarcely be necessary to repeat that this court, by a long course of precedents, has refused to interfere with the verdicts of juries on the ground that they are against the weight of evidence, after the judge who heard the

352. *Id.*

353. Meyer II, 45 Mo. 137, 137-38 (1869).

354. *Steamboat City of Memphis v. Matthews*, 28 Mo. 248, 248-49 (1859).

355. *Id.*

356. *Id.*

357. *Id.* at 249.

358. *Keating v. Bradford*, 25 Mo. 86 (1857).

evidence has sanctioned the verdict by a refusal to grant a new trial. Jurors try the facts and the judges determine the law.³⁵⁹

The jury's duty to decide fact issues, particularly negligence, was convincingly imprinted upon Missouri jurisprudence, as demonstrated by opinions in steamboat and railroad cases involving citizens, patrons, passengers, pedestrians, destruction by fire and the killing of livestock.³⁶⁰ For instance, in *Huelsenkamp v. Citizens Railroad Co. I* and *Huelsenkamp v. Citizens Railroad Co. II*,³⁶¹ the court opined that "[n]egligence and unskillfulness are matters of fact, and their existence is a question for the jury." A court cannot direct a jury that "such or such supposed facts show negligence, or that such other supposed facts do not show negligence."³⁶² Further, the court held that "the question of negligence was for the jury, and was properly submitted to them under instructions which fairly and correctly presented the true issue in the case and the law arising thereon."³⁶³

In *Kennayde v. Pacific Railroad Co.*,³⁶⁴ the plaintiff, a widow whose sober pedestrian husband was run over by defendant's train, received a judgment. The judgment was affirmed by the court with the comment, "Whether the facts constituted such negligence as to render the company responsible, was a matter exclusively for the jury to determine, and if the court did not mislead them by giving erroneous instructions, the judgment must be affirmed."³⁶⁵

The supreme court resolved to submit negligence issues for jury decision. This commitment is manifest in unmistakable language in *Meyer I, McPheeters v. Hannibal & St. Joseph Railroad Co.*,³⁶⁶ and *Boland v. Missouri Railroad Co.*³⁶⁷ *Meyer* and *Boland* already have been analyzed and discussed at length. In *McPheeters*, Joseph H. McPheeters' "milch" cow was killed by defendant's locomotive at a public crossing in Palmyra, Missouri. The supreme court affirmed plaintiff's jury verdict and judgment, proclaiming: "[T]he question of negligence is peculiarly and exclusively for the jury to determine, and it is hardly

359. *Id.* at 87.

360. *See, e.g.*, *Fitch v. Pacific R.R. Co.*, 45 Mo. 322, 325 (1870); *Tabor v. Missouri Valley R.R. Co.*, 46 Mo. 353, 353 (1870); *Liddy v. St. Louis R.R. Co.*, 40 Mo. 506, 519-20 (1867); *Huelsenkamp I*, 34 Mo. 45, 54 (1865).

361. *Huelsenkamp I*, 34 Mo. at 45; *Huelsenkamp II*, 37 Mo. 537, 554 (1866) (wrongful death suit brought by wife of passenger who was killed while standing on the train car's platform).

362. *Huelsenkamp I*, 34 Mo. at 54.

363. *Huelsenkamp II*, 37 Mo. at 554.

364. *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255, 257 (1870).

365. *Id.* at 258.

366. *McPheeters v. Hannibal & St. Joseph R.R. Co.*, 45 Mo. 22, 24 (1870).

367. *Boland v. Missouri R.R. Co.*, 36 Mo. 484, 491 (1865) ("What is reasonable skill, proper care, caution, prudence or diligence, or what constitutes negligence, is strictly a matter of fact, and can only be determined by a jury.")

necessary to again repeat what has been so often held by this court, that if there is any evidence to sustain the verdict we will not interfere."³⁶⁸

Both fire cases and contributory negligence cases contained supreme court direction that negligence issues necessitate jury submission and verdict.³⁶⁹ Even when dissatisfied with the jury verdict,³⁷⁰ the supreme court remained steadfast in its support of jury verdicts, as indicated in its affirmance of *Bartlett v. Steamboat Philadelphia*.³⁷¹

Supreme court deference to the fact finder extended to trial judges as well.³⁷² Observing that the evidence was presented without any exception being taken at trial, the court commented, "This case, therefore, presents to this court nothing, except the finding of the court below on the evidence, and we are called on to review that finding."³⁷³ Without hesitation or explanation, the *Leith* court held with conviction that "[i]t has long been the practice of this court to refuse to interfere in such cases, and we see no reason now to depart from it. . . . the judgment below is affirmed."³⁷⁴

In summary, although the nineteenth century Missouri Supreme Court enforced proper instruction on the law, the court clearly left fact resolution for jury determination. Hardly any economic advantage can be claimed or argued from this fact.

B. Supreme Court Criticisms of Industry Legal Positions

Although Missouri Supreme Court opinions were generally noncommittal regarding the conduct or legal positions of parties or counsel, exceptional circumstances reveal situations in which judicial patience wore thin.³⁷⁵ The impact of the court's criticisms must be assessed in light of the disposition the court imposed in each case. For instance, as discussed earlier, in the context of *Calvert I*, the court stated, "It is unjust to the public that the time of the courts should be occupied in the consideration of a question so utterly devoid of merit.

368. *McPheeters*, 45 Mo. at 24.

369. *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255, 258 (1870); *Meyer II*, 45 Mo. 137, 137-38 (1869); *Meyer I*, 40 Mo. 151, 154 (1867); *Liddy v. St. Louis R.R. Co.*, 40 Mo. 506, 519-20 (1867); *McKeon I*, 42 Mo. 79, 84 (1867).

370. *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256, 259 (1862) (Judge Bates lamented that "whilst I am not satisfied with the verdict, there is no such error apparent in the record as will authorize a reversal of the judgment.").

371. *Id.*

372. *Leith v. Steamboat Pride of the West*, 16 Mo. 181, 181 (1852).

373. *Id.*

374. *Id.*

375. *See, e.g.*, *Calvert II*, 38 Mo. 467, 468 (1866); *Calvert I*, 34 Mo. 242, 244 (1863); *Gorman v. Pacific R.R. Co.*, 26 Mo. 441, 448 (1858); *Chouteau v. Steamboat St. Anthony*, 20 Mo. 519, 521 (1855).

There is nothing in the objection. The judgment, however, must be reversed."³⁷⁶ Such criticism was surely of little concern since the court overturned plaintiff's verdict and remanded the case in accordance with the railroad company's appeal. In *Calvert II*,³⁷⁷ the court's criticism carried an economic impact on the defendant railroad because plaintiff's jury verdict was upheld and the railroad company's appeal was denied. Relentless appeals in *Chouteau* triggered stinging criticism, but the steamboat *St. Anthony* weathered the criticism by prevailing on appeal.

Judicial criticism is less acceptable when combined with an unsuccessful appeal, as in *Gorman v. Pacific Railroad Co.* *Gorman* affirmed plaintiff's jury verdict and judgment, denied defendant's appeal, and suggested that the railroad company was "selfish":

Although railroad corporations are organized for the public benefit, [these] are matters in which the state takes a deep interest and regards as of public concern; although they may be looked upon as bodies endowed with capacities for the promotion of the public good and for the diffusion of advantages to the state, yet it must not be overlooked that such corporations are entirely managed by private individuals over whose selection the state has no control, and that their pecuniary profits belong exclusively to the companies and their stockholders. Here there is a motive to selfishness.³⁷⁸

In *Mueller v. St. Louis & Iron Mountain Railroad Co.*,³⁷⁹ discussed earlier, the railroad failed to initiate condemnation proceedings as authorized by its charter, incurring the wrath of the court. After taking and damaging plaintiff Mueller's land, the railroad faced repeated common law trespass actions, creating the specter of a multiplicity of lawsuits for trespass. Although the law abhors multiple actions,³⁸⁰ the supreme court displayed little judicial compassion, affirming plaintiff's judgment and trespass verdict and voicing disapproval of defendant's inaction: "If any inconvenience results to the company, from their liability to repeated actions, it is the result of their own neglect to have the land condemned, as they were authorized and required to do by their charter."³⁸¹

In *Morrissey v. Wiggins Ferry Co.*,³⁸² the supreme court's disapproval was more gentle. Still the court voiced unhappiness with the erroneous instructions offered by defendant and given by the trial court. Noting that plaintiff's tendered

376. *Calvert I*, 34 Mo. at 244.

377. *Calvert II*, 38 Mo. at 469.

378. *Gorman*, 26 Mo. at 448.

379. *Mueller v. St. Louis & Iron Mountain R.R. Co.*, 31 Mo. 262, 263 (1860).

380. *Id.*

381. *Id.*

382. *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380, 384 (1869).

instructions correctly stated the applicable law, the court added curtly, “[N]othing can be clearer.”³⁸³

The court’s most critical commentary impugning railroad industry motives appeared in *Kennayde v. Pacific Railroad Co.*³⁸⁴ The court said:

In the case at bar, the defendant not only misled the deceased, by omitting all the usual and customary precautions to notify persons of the pending danger, but it acted in open and flagrant violation of the statute made for the protection of the public. The consequence of the omission was to put the victim off his guard, to disarm his vigilance, and lull him into a false sense of security. When the laws are broken and defied, and homicides are recklessly committed, it is no part of the business of courts to hunt up excuses or seize upon technicalities for the purpose of shielding the wrongdoers.³⁸⁵

This criticism led to adverse results when the supreme court affirmed plaintiff’s judgment and denied the railroad’s appeal. The supreme court did not reproach claimants for similar conduct.

Any contention that the supreme court shielded the railroad industry from criticism must fail after *Kennayde* and *Gorman*. *Chouteau*³⁸⁶ and *Morrissey* evoke judicial displeasure with steamboat litigants, but not in the same strident tone as *Gorman* and *Kennayde*. Nonetheless, none of these opinions shields the steamboat or railroad industry from judicial rebuke.

C. Economic Pronouncements

Infrequently, the court references economic considerations in its opinions. As already discussed, *O’Fallon v. Daggett*³⁸⁷ balanced private property rights against the needs of the navigation industry without demonstrating any partiality or favoritism. Similarly, in both *Hook v. Smith*³⁸⁸ and *Willoughby v. Shipman*,³⁸⁹ the court considered public interests in granting permission to construct a milldam, again without favoritism or partiality.

383. *Id.*

384. *Kennayde v. Pacific R.R. Co.*, 45 Mo. 255 (1870). As previously discussed, plaintiff, a widow, sued defendant for the death of her husband, a pedestrian who was run over and killed by defendant. Evidence showed that defendant’s employees failed to sound warnings of the approach of the locomotive as required by statute. Decedent’s sobriety was emphasized. *Id.*

385. *Id.* at 262.

386. See *Chouteau v. Steamboat St. Anthony*, 20 Mo. 519, 521 (1855).

387. *O’Fallon v. Dagget*, 4 Mo. 209, 212 (1836).

388. *Hook v. Smith*, 6 Mo. 225, 228 (1840).

389. *Willoughby v. Shipman*, 28 Mo. 50, 52 (1859).

Western Union's liability for negligent transmission of an order for salt was litigated in *Wann v. Western Union Telegraph Co.*³⁹⁰ The company transposed "sail" for "rail" as the mode of delivery in transmitting the telegraphic message. The court overturned plaintiff's jury verdict for \$1,085.44 and imposed only limited liability on the company pursuant to principles of statutory interpretation of the "Act concerning telegraph companies."³⁹¹

The supreme court's most significant opinion weighing public responsibility against economic benefits from an emerging industry was pronounced in *Gorman v. Pacific Railroad Co.*³⁹² The supreme court eloquently addressed the conflicting interests:

The other interests in the state are not all to be made subservient to the railroad interest. That interest enters into competition with other pursuits with the advantages and privileges the law confers upon it, but there is nothing in it of so overshadowing a character that all other pursuits must yield to it. There are none who are not impressed with the importance of railroads, and their great utility as the medium of intercourse and commerce. No state that will keep pace with the age but must build and encourage them. But we should be cautious how we clothe them with privileges and immunities, at the cost of the rest of the community, which may enkindle a spirit hostile to their existence and seeking its gratification in their destruction.³⁹³

Strong as they are, none of these pronouncements indicates any judicial favoritism for emerging industry or contemporary economic interests at the sacrifice or subjugation of private interests.

D. Judicial Function and Policy Decisions

Horwitz suggests that the nineteenth century judicial role expanded into jury and legislative roles by determining damages and imposing taxes, respectively.³⁹⁴ Missouri's Supreme Court promulgated judicial deference to the legislature as its perceived role in the American body politic.³⁹⁵ By abrogating the fellow-servant doctrine through judicial interpretation of "an Act for the

390. *Wann v. Western Union Tel. Co.*, 37 Mo. 472 (1866); *but see Reed v. Western Union Tel. Co.*, 37 S.W. 904 (Mo. 1896).

391. *Wann*, 37 Mo. at 483 (citing R.C. 1855, ch. 156, sections 5-6, p. 1521). The court stated that "this description of liability comes within the intention of the regulations provided for in the statute." *Id.*

392. *Gorman v. Pacific R.R. Co.*, 26 Mo. 441 (1858).

393. *Id.* at 446-47. Plaintiff, a farmer, sued over the destruction of three cattle by defendant's railroad locomotive. The opinion restates and affirms Missouri's open range policy for livestock which is contrary to common law. *Id.*

394. HORWITZ, *supra* note 2, at 99, 101.

395. *Schultz v. Pacific R.R. Co.*, 36 Mo. 9, 15 (1865).

better security of life, property and character,"³⁹⁶ the supreme court manifested its intent to abide by the legislative will, not traditional common law doctrines.³⁹⁷ It eloquently designated its judicial role with this statement: "[O]f the wisdom, justice or policy of the act we are not to judge; it is enough for us that it is so enacted, and it is our simple and plain duty to declare the law as we find it."³⁹⁸

In *Smith v. Hannibal & St. Joseph Railroad Co.*, the debate over the merits of this Missouri statute, versus legislation in other jurisdictions, met with concise rejection by the court: "[U]ntil the Legislature sees fit to change the law on the subject, we must be guided by the established principles governing the case."³⁹⁹

The court's policy of deference to the legislature continued in *Kennayde v. Pacific Railroad Co.* with the pronouncement: "[W]hen the laws are broken and defied, and homicides are recklessly committed, it is no part of the business of courts to hunt up excuses or seize upon technicalities for the purpose of shielding the wrong-doers."⁴⁰⁰

The court held firm to this principle in *O'Flaherty v. Union Railway Co.*, resisting the impulse to upset a jury verdict for the death of a two-year, eight-month-old child.⁴⁰¹ The court stated emphatically: "That verdict can only be disturbed by attempting to withdraw this case from the operation of the established law of this State, and we do not feel particularly called upon to invent new rules for the purpose of screening and protecting wrong-doers."⁴⁰² The *O'Flaherty* court reasoned as it had earlier in *Morrissey v. Wiggins Ferry Co.*, emphasizing adherence to established law. In *Morrissey*, the court said,

The instructions asserted correct propositions of law, and should have been given. They tell the jury that if the deceased only remotely contributed to the accident, and if the agents and employees of the defendant were the direct and immediate cause, and might have prevented it by the exercise of prudence and care, the defendant is liable. Nothing can be clearer.⁴⁰³

The Missouri Supreme Court exercised judicial restraint and deference to both legislative will and established precedent in reaching its decisions. Economic influences and developing industries were not favored and were subjected to the same rules as ordinary citizens.

396. *Id.* at 15 (citing R.C. 1855, section 2, p. 647).

397. *Id.*

398. *Id.* at 18.

399. *Smith v. Hannibal & St. Joseph R.R. Co.*, 37 Mo. 287 (1866).

400. *Id.* at 262.

401. *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70, 75 (1869).

402. *Id.* at 75.

403. *Morrissey*, 43 Mo. at 384.

IX. CONCLUSION

In *O'Fallon v. Daggett*, the first case cited, the Missouri Supreme Court announced its direction with the maxim, "[E]very one should so use his rights as not to injure or molest others in the enjoyment of theirs." Fifty years later, in *Bedford v. Hannibal & St. Joseph Railroad Co.*, the last case cited, the Missouri Supreme Court repeated the maxim, "[E]very one should so use his rights as not to injure or molest others in the enjoyment of theirs."

Such consistency truly reflects the character of the Missouri Supreme Court which, this Article concludes, adjudicated fairly, respected legal precedent, and practiced judicial restraint. Individual interests often clashed with emerging industry interests, but received fair treatment from both the Missouri judiciary and juries. This exhaustive study of cases adjudicating industry interests rebuts any label designating Missouri courtrooms "chambers of commerce." The in-depth analysis of Missouri cases from statehood to 1870 reveals judicial respect and deference to *stare decisis*, the jury institution, and the legislative branch of government.

This Article demonstrates that the supreme court relentlessly yielded judicial control by remanding cases to the trial court for jury trial and final disposition. Close examination of even those decisions clearly favoring industry litigants reveals that the supreme court established dispute resolution guidelines incorporating juries⁴⁰⁴ and legislative enactments,⁴⁰⁵ and enforcing well-established procedural rules⁴⁰⁶ and private contracts.⁴⁰⁷ Four cases⁴⁰⁸ concluded

404. *Hannibal & St. Joseph R.R. Co. v. Kenney*, 41 Mo. 271, 274 (1867). The trial court sustained defendant's demurrer to the petition, but was reversed because "there may arise a state of circumstances showing that [defendant] was guilty of such wilfulness or negligence in regard to his animals as would prevent a recovery of damages for their destruction; and for the same reason we think he might be liable to the company for the damage done by him."

405. *Baker v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 544, 545 (1865). Plaintiff's default judgment was reversed because the court construed the "Act concerning trespasses" inapplicable, thereby eliminating the jurisdictional basis (subject matter) for the suit; *Hannibal & St. Joseph R.R. Co. v. Mahoney*, 42 Mo. 467, 471 (1868). Defendant's judgment was reversed because the court construed the authorizing statute inapplicable to trespass actions.

406. *Hansberger v. Pacific R.R. Co.*, 43 Mo. 196, 200 (1869); *Miles v. Hannibal & St. Joseph R.R. Co.*, 31 Mo. 407, 408-09 (1861); *Quick v. Hannibal & St. Joseph R.R. Co.*, 31 Mo. 399, 400 (1861); *Syme v. Steamboat Indiana*, 28 Mo. 535 (1859). In these cases, the supreme court reversed and remanded plaintiffs' judgments, finding profound deficiencies in plaintiffs' pleadings.

407. *Sturgess v. Steamboat Columbus*, 23 Mo. 230 (1864). The written terms of the parties' private contract were enforced by the court.

408. *Lafferty v. Hannibal & St. Joseph R.R. Co.*, 44 Mo. 291 (1869); *Boland v. Missouri Pacific R.R. Co.*, 36 Mo. 484 (1865); *McDermott v. Pacific R.R. Co.*, 30 Mo. 115, 117 (1860); *Whitmore v. Steamboat Caroline*, 20 Mo. 513, 518 (1855).

in the supreme court were not remanded and stand out as exceptions to this thesis. None of these four cases benefitted from trial on the merits or jury decision. In *Boland*⁴⁰⁹ and *Whitmore*,⁴¹⁰ directed verdicts by the trial courts were affirmed, thus concluding the litigation in favor of defendants Missouri Pacific Railroad Company and steamboat *Caroline*.

In *Lafferty*⁴¹¹ and *McDermott*,⁴¹² pronouncements of law terminated the litigation in favor of defendants Hannibal & St. Joseph Railroad Company and Pacific Railroad Company. Although remanded, *Callahan*⁴¹³ convincingly imposed a judicial solution in favor of individual defendants Warne, Cheever and Burchard, finding that each defendant was not negligent⁴¹⁴ and that decedent was contributorily negligent as a matter of law.⁴¹⁵

The *Whitmore* decision can be reconciled by acknowledging the precedent of *Chouteau*.⁴¹⁶ *Lafferty* can be reconciled by attributing the decision to legislative intent requiring "physical contact."⁴¹⁷ *McDermott* can be explained by judicial precedent and adherence to the fellow-servant doctrine.⁴¹⁸ *Boland*, however, resists explanation and remains the singular⁴¹⁹ example of Missouri

409. *Boland*, 36 Mo. at 489. At the close of plaintiffs' evidence, the trial court instructed the jury "that on the evidence in this cause, the plaintiffs cannot recover." Plaintiffs thereupon took a nonsuit and the matter reached the supreme court on a writ of error.

410. *Whitmore*, 20 Mo. at 515. The trial court instructed the jury at the close of plaintiffs' evidence that "they could not recover in this action." Plaintiffs submitted to a nonsuit and the case was appealed to the supreme court on a writ of error.

411. *Id.* at 292, 293. The circuit court sustained defendant's demurrer to plaintiff's petition. Judge Wagner held:

[I]t seems to me plain that a direct or actual collision was contemplated; that where the agents of the road ran the locomotives or cars against any animal, and thereby injured it, or in any other manner it was hurt by actual contact or touch, then the company should be responsible for the penalty; otherwise not.

Id.

412. *McDermott*, 30 Mo. at 117. Plaintiff received judgment by default on her petition and damages were assessed, followed by this appeal. Further, the court held that the facts of the case fell within the fellow-servant doctrine which should be maintained for policy reasons.

413. *Callahan v. Warne*, 40 Mo. 131 (1867). At the close of plaintiff's evidence, defendants, merchants operating a house-furnishing store, demurred. The trial court refused to direct a verdict for defendants and the jury returned a verdict for plaintiffs. Defendants appealed. *Id.* at 133-34.

414. *Id.* at 139.

415. *Id.* at 140.

416. *Whitmore*, 20 Mo. at 517.

417. *Lafferty*, 40 Mo. at 294.

418. *McDermott*, 30 Mo. at 116-17.

419. *Callahan* was remanded to the trial court for final disposition, and the final result is unknown.

judicial favoritism for industry. After *McDermott*, and excepting *Callahan*, this Article concludes that such harsh affirmative defenses as the fellow-servant doctrine and contributory negligence were cushioned by jury verdicts, legislation, and judicial interpretation. Further analysis discloses that judicial pronouncements supporting emerging industry were infrequent and staunchly protective of individual rights.

Theories about nineteenth century state court deference to industry interests and subjugation of individual rights collapse in Missouri under the weight of this study. That long-tenured and universally honored maxim, "You can't judge a book by its cover," substantiates the theme of this Article. This Article is the result of a thorough reading of the book of torts on nineteenth century Missouri jurisprudence. This inclusive and careful examination of fifty years of Missouri cases supports Schwartz' exhaustive study in California and New Hampshire, which concludes that "the nineteenth century negligence system was applied with impressive sternness to major industries and that tort law exhibited a keen concern for victim welfare." Even acknowledging *Boland*, this Article's findings disprove the existence of nineteenth century judicial maneuvering by Missouri courts to protect the capital wealth of emerging industry.

The evidence is received, deliberations are concluded, the verdict is unanimous, and appeal is without merit: Missouri's nineteenth century supreme court constituted a chamber of justice.