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EXPANSION OF PERMISSIVE JOINDER OF DEFENDANTS IN MISSOURI

I. INTRODUCTION

Identification of all persons who may properly be joined as parties defendant is one of the first tasks of the plaintiff's attorney. The plaintiff may at his option join any or all of those so identified because the trial court is without discretion to refuse joinder if the requirements of the permissive joinder rule are met. The attorney's confidence in his determination of which persons are proper parties will vary according to two factors: the clarity of judicial interpretations of the rule and his understanding of the influence that the policy considerations underlying the rule will have upon the manner in which the court will apply the interpretations to the facts of his case.

From 1953, when the Missouri Supreme Court decided State ex rel. Campbell v. James, until recently, the interpretation of the language of this rule was clear. Unfortunately, that interpretation was also narrow and inconsistent with the free joinder policy of the Federal Rules of Civil Procedure from which the rule's language was derived. In 1975, State ex rel. Farmers Insurance Co., Inc. v. Murphy expressly overruled the Campbell interpretation. The court adopted a construction of the rule which is more in harmony with the liberal joinder policies of the federal courts, but which lacks the clarity of Campbell. In Hager v. McGlynn the Kansas City District of the Missouri Court of Appeals also recognized and endorsed this liberal joinder policy while construing a different portion of the rule's language. However, the interpretation announced by the court may not be justified by the language of the rule even in light

1. Mo. Sup. Ct. R. 52.05 (a) provides:

   ... All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrences or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Although the rule as adopted is phrased “transaction, occurrences . . . ,” the supreme court clearly demonstrated its view that this deviation from the wording of federal rule 20 (a) is a typographical error by its use of “[sic]” following the reprint of the rule in the Farmers opinion. For clarity, “occurrences” has been changed to “occurrence” in the remainder of this comment where appropriate.

2. 263 S.W.2d 402 (Mo. En Banc 1953).
3. See pt. II of this comment, infra.
5. 518 S.W.2d 655 (Mo. En Banc 1975).
6. See pt. III of this comment, infra.
of this policy and seems to be inconsistent with other established policies underlying venue, consolidation, and personal jurisdiction.\(^8\)

The purpose of this comment is to identify the critical factual criteria for permissive joinder common to these recent decisions and to examine their impact on permissive joinder in Missouri. References to the construction of federal rule 20 (a) by the federal courts has expressly been made relevant to this inquiry by both courts and will be made where appropriate. The interaction of venue and personal jurisdiction with joinder, which was not examined by the \textit{Hager} court, will also be explored and contrasted with the court's analysis.

\section*{II. Background}

The "same transaction" and common question requirements for joinder of parties originated in England in 1896\(^9\) while American courts were struggling with the then widely accepted Field Code provisions.\(^{10}\) The English courts, emphasizing the underlying policy reflected by the provisions for free joinder of claims, have liberally interpreted the "same transaction" language and avoided the conclusion that the joinder of parties provisions are restricted by the previous "same form of action" or "same subject of action" requirements.\(^{11}\) When very similar provisions were adopted in New York, however, the New York Court of Appeals reached the opposite conclusion.\(^{12}\) This interpretation has been strenuously criticized by the commentators\(^{13}\) as overly restrictive, but was still accepted in New York when the Federal Rules of Civil Procedure were drafted. Professor Charles Wright, as noted by the court in \textit{Farmers}, has stated flatly that it should be clear that the purpose of the Advisory Committee in adding the word "occurrence" to the rule was not to add a new concept but to prevent such narrow interpretations of the transaction language.\(^{14}\)

\begin{itemize}
  \item \textit{See} pt. IV of this comment, \textit{infra}.
  \item English Rules Under the Judicature Act of 1896, o. 16, rr. 1, 4, 5 [now o. 15, r. 4].
  \item 7 C. Wright & A. Miller, \textit{Federal Practice and Procedure: Civil} § 1651 (1972).
\end{itemize}
Missouri adopted the General Code of Civil Procedure which contained joinder provisions identical to the federal rules in 1943.\textsuperscript{15} In 1949, in *Cantrell v. City of Caruthersville*\textsuperscript{16} the supreme court interpreted the compulsory counterclaim provisions of the new code, which also contained the "same transaction" language found in the joinder sections. The supreme court specifically noted the origin of the language in the federal rules and cited federal authority\textsuperscript{17} for the proposition that "same transaction or occurrence" must be given a liberal interpretation. However, in 1953 the court decided *State ex rel. Campbell v. James*\textsuperscript{18} which commentators have described as an unnecessarily strict interpretation of the "same transaction" language of the joinder rule.\textsuperscript{19}

In *Campbell* the plaintiffs owned property which was allegedly damaged by explosions. Suit was first brought against the alleged tortfeasors. The plaintiff's insurance companies, whose policies covered the property in question, intervened, but the suits were dropped. Plaintiffs then brought an action which joined the tortfeasors and the insurance companies. The supreme court found that the parties were improperly joined. The court based its interpretation on a strict reading of the rule without reference to the history of the language. Although *Cantrell* was cited for the proposition that "transaction" had been given a broad meaning in this state,\textsuperscript{20} the court flatly stated that "transaction" and "occurrence" were not synonymous or interchangeable. Joinder was held to be improper because the action against the tortfeasors was in trespass, or an "occurrence," whereas the action against the insurance companies was in contract, or a "transaction." Because the statute treated "transaction" and "occurrence" in the disjunctive, the court reasoned that both causes of action must arise from a single transaction or a single occurrence. That each cause of action arose from the same event—i.e., the explosion, and presented common questions of law and fact (coincidentally, accord-
ing to the court) was found not to be controlling because each cause of action "arises out of a separate legal right, neither of which is dependent upon the other for its existence." The source of the requirement of identity of legal rights invaded was not apparent in the decision. Because the statute is phrased in terms of "transactions" or "occurrences" rather than rights, this appears to have been a holdover from common law or code pleading rather than any statutory requirement. This narrow construction of the statute was continued by the supreme court and court of appeals until the decision in Farmers.

III. STATE EX REL. FARMERS INS. CO. v. MURPHY

A. The Case

Richard Allen, driving south on a divided highway, was struck by a northbound car driven by White which had crossed the concrete median divider. Johnson, also traveling south, then struck Allen's car from the rear. The suit in the circuit court contained three counts, two by Richard Allen for personal injuries and one by Allen's wife for loss of consortium. In addition to White and Johnson, plaintiffs named as a defendant Farmers Insurance Company which insured the plaintiffs' car. The petition alleged that one of the contributing causes of White's crossing the median was the act of an unknown driver who had suddenly cut in front of White and into his lane of travel; that plaintiffs were insured under their policy for all sums (up to specified limits) which they were legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle; and that under the policy definition the driver who cut in front of defendant White was an uninsured motorist. Defendant Farmers Insurance filed a motion to dismiss on the basis of a misjoinder. The motion stated that one of the contributing causes of White's crossing the median was the act of an unknown driver who had suddenly cut in front of White and into his lane of travel; that plaintiffs were insured under their policy for all sums (up to specified limits) which they were legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle; and that under the policy definition the driver who cut in front of defendant White was an uninsured motorist. Defendant Farmers Insurance filed a motion to dismiss on the basis of a misjoinder. The motion stated that the suit against the insurer was based on contract, whereas the claims against defendants White and Johnson were in tort, and that the two types of claims could not be joined in a single action. The motion apparently asserted a misjoinder of claims, but cited Missouri Supreme Court Rule 52.05 (hereinafter referred to as rule) which deals with joinder of parties. The motion was overruled and Farmers applied for a writ of prohibition.

B. The Court's Analysis

The supreme court considered the motion to be an assertion of both misjoinder of claims and misjoinder of parties. The court held that joinder

21. Id. at 408.
23. 518 S.W.2d 655 (Mo. En Banc 1975).
24. See rule quoted note 1 supra.
of claims was governed by rule 55.06 (a).\(^{25}\) Noting the broad language of that rule and the Committee on Rules' explanation of its background,\(^{26}\) the court held that contract and tort claims may be joined in the same petition under its provisions.\(^{27}\)

Considering the assertion of misjoinder of parties, the court found that rule 52.05 (a)\(^{28}\) was applicable. In discarding its previous narrow interpretations of rule 52.05 (a), the court first turned to the pre-\textit{Campbell} authority for a liberal construction, citing \textit{Cantrell v. City of Caruthersville}.\(^{29}\) That case had recognized the origin of the language and cited United States Supreme Court and federal appellate court decisions supporting the liberal policy of joinder embodied in federal rule 20 (a).\(^{30}\) \textit{Cantrell} further quoted from earlier Missouri authority to the same effect.\(^{31}\) The court noted that \textit{Cantrell}, which was not followed in \textit{Campbell}, was more in harmony with the intent of the draftsmen of the federal rules.\(^{32}\) Their intent was explained in a law review article by Professor Wright,\(^{33}\) which was quoted extensively by the majority in the \textit{Farmers} opinion.

Aside from the actual intent of the draftsmen and the history of the rule, the court found another of Professor Wright's arguments persuasive. This argument is a logical comparison of the provisions for relation back of amendments and for supplemental pleadings with the permissive joinder and compulsory counterclaim requirements. The former provisions are phrased in terms of "conduct, transaction or occurrence" and "transactions, occurrences, or events." If "transaction" is intended to mean something less when coupled with "occurrence" than when standing alone, then "transaction or occurrence" should mean something narrower when coupled with "conduct" or "events." However, as Wright notes, no one has ever attempted to state when a claim may be said to arise out of the "conduct" or "event" relied on in another claim but not out of the "transaction or occurrence." The real purpose in adding the extra

\(^{25}\) Mo. Sup. Cr. R. 55.06 (a) provides:
A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

\(^{26}\) 518 S.W.2d at 657-58.

\(^{27}\) Id. at 658. The opinion does not state specifically whether this rule was cited as direct support for the decision or as an analogy. Because the provision by its own terms is limited to joinder of claims against a single party, a matter not presented by this case, its usefulness in this case is limited to a demonstration of the liberal policy underlying joinder.

\(^{28}\) See rule quoted note 1 supra.

\(^{29}\) 359 Mo. 282, 221 S.W.2d 471 (1949).

\(^{30}\) See cases cited note 17 supra.

\(^{31}\) Grue v. Hensley, 357 Mo. 592, 210 S.W.2d 7 (1948); Ritchie v. Hayward, 71 Mo. 560 (1880).

\(^{32}\) 518 S.W.2d at 660.

language in each of these rules, he concludes, was to guard against a narrow construction of "transaction," rather than to restrict it.\textsuperscript{34}

Finally, the court pointed out that Farmers' arguments against allowing joinder would lead to the illogical conclusion that the propriety of joinder of an insurance carrier turns upon the carrier's initiative. Prior Missouri cases held intervention by the insurer proper, thereby giving the insurer the same rights as an original party, including the possibility of securing a verdict in its favor.\textsuperscript{35} The court noted that the claims in such case arise from a transaction and an occurrence. Thus, under Farmers' urged interpretation, a claim arising from a transaction and a claim arising from an occurrence would be properly litigated in the same suit at the carrier's initiative through intervention, but not at the plaintiff's initiative through joinder.

The court noted that its decision does not allow joinder of a tortfeasor and his insurer prior to obtaining judgment against the tortfeasor because such direct action is prohibited by statute in Missouri.\textsuperscript{36} In the absence of statute, however, there is federal authority for the propriety of such joinder.\textsuperscript{37}

C. Implications

The court has announced that it will consider federal authority very persuasive in interpretation of the Missouri rules drawn from the federal rules. It is also clear that the court will accord the joinder provisions a liberal construction in order to give full effect to the broad policy of liberal joinder urged by the advisory committees for both the federal and Missouri rules. However, the precise basis for allowing joinder in Farmers was never clearly enunciated. The words of the rule were never applied to the facts.

From the court's discussion it appears that joinder was proper because the claims arose from the "same transaction."\textsuperscript{38} The court cited with approval a definition of "transaction" from its 1948 opinion in \textit{Grue v. Hensley}.\textsuperscript{39} \textit{Grue} indicated that "transaction" should be construed broadly to include "all the circumstances which constitute the foundation for a claim"\textsuperscript{40} or "all the facts and circumstances out of which the injury

\textsuperscript{34} Id. at 450 n.125.
\textsuperscript{35} Wells v. Hartford Accident & Indemnity Co., 459 S.W.2d 253 (Mo. En Banc 1970); Beard v. Jackson, 502 S.W.2d 416 (Mo. App., D. St. L. 1973); State ex rel. State Farm Mutual Automobile Ins. Co. v. Craig, 364 S.W.2d 348 (Spr. Mo. App. 1963).
\textsuperscript{36} § 379.200, RSMo 1969. See State ex rel. Anderson v. Dinwiddie, 359 Mo. 980, 224 S.W.2d 985 (En Banc 1949).
\textsuperscript{37} Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705 (5th Cir. 1967). See also Shingleton v. Bussey, 223 So. 2d 713 ( Fla. 1969), where such joinder was permitted under the rule-making power of the court.
\textsuperscript{38} 518 S.W.2d at 659-61.
\textsuperscript{39} 357 Mo. 592, 210 S.W.2d 7 (1948).
\textsuperscript{40} Id. at 597, 210 S.W.2d at 10.
complained of . . . arose.”41 What is not clear from the opinion is the court’s treatment of the words “arising out of” and “same” which appear in the language of the rule.42

Must the facts which constitute the foundation for the claim against one party include all the facts constituting the foundations for the claims against all other parties before the latter claims may be said to “arise out of” the “same” transaction upon which the first claim is based? This question was not presented in Farmers and consequently was not addressed in the opinion. The claim against Farmers was founded upon the contract plus the accident and damages. The claim against the tortfeasors was based entirely upon the accident and damages. Because the foundation of the claim against Farmers included the facts constituting the claim against the other defendants, they clearly arose out of the same transaction no matter how this question is answered. It is clear, however, that the court’s interpretation of this crucial language will be of great concern to the practicing attorney in his determination of proper parties. While a definite statement of the court’s position cannot be drawn from the opinion, some observations on the most likely interpretation may be helpful.

The court placed great emphasis on the source of the joinder provisions. As noted earlier, rule 52.05 is identical with federal rule 20. While the interpretation of federal rule 20 by the federal courts was not specifically held to be controlling, the court cited federal authority to support its construction of the word “transaction.”43 One problem that arises when using the federal cases even as persuasive authority, however, is that the federal opinions are often phrased in the conclusory terms of the rule and rarely articulate the factual basis supporting the result.44 A recital of the facts alleged in the petition and a statement that the claims arise out of the same transaction sheds little light on what the transaction is and how much concurrence of facts is required for the claims to “arise out of” the “same” transaction.

If an insurer commences a declaratory judgment action against the insured and another insurer to determine which exclusive policy covers the damages, is joinder based on the same transaction? Both contracts of insurance must be alleged and proved; yet it would seem that a single transaction could not include both contracts. If the insured claimed against

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41. Id. This language was drawn from Ritchie v. Hayward, 71 Mo. 560, 562 (1880).
42. See rule quoted note 1 supra.
each insurer separately, in each suit he would prove only one contract plus his damages. Joinder has been allowed on similar facts in the federal courts based on the "same transaction" provision, yet the facts which constituted the foundation for the claim were not articulated. Allowing joinder here would seem to support the position that the facts constituting the foundation for one claim need not include all the facts upon which the other claims are based. If this is true then the limits should be defined.

How much factual concurrence is necessary to make the claims "arise out of" the "same" transaction? Analysis of federal cases interpreting the rule leads to the conclusion that the transaction upon which one claim is based must include at least some of the factual basis for the other claim before the claims will be held to arise out of the "same" transaction. This common factual basis probably must be an essential or material part of the claim, although again the courts generally have not articulated the factual basis found to be persuasive.

Support for an "essential or material part" test is also found in the origin of the federal rules. In equity, all persons interested in a controversy could be made parties so that the entire matter could be settled in one action. This privilege was subject originally to the defense of multifariousness, yet the court exercised discretion which eventually became so broad that it erased the defense. The report of the Committee


46. See Mosley v. General Motors Corp., 497 F.2d 1330 (8th Cir. 1974), which interpreted rule 20 to permit "all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary." Id. at 1333. See also Levey v. Roosevelt Federal Sav. and Loan Ass'n of St. Louis, 504 S.W.2d 241 (Mo. App., D. St. L. 1973).

This concept is recognized by implication in Lumberman's Mutual Casualty Co. v. Borden Co., 241 F. Supp. 683 (S.D.N.Y. 1965), where the court said: "The controversy between plaintiff and Affiliated [Insurance Co.] had a common source and occurrence, namely, the occurrence forming the basis of Borden's claims. . . ." Id. at 694 (emphasis added).

Support for this contention is also found in Eastern Fireproofing Co., Inc. v. United States Gypsum Co., 160 F. Supp. 580 (D. Mass. 1958):

There are singularly few cases discussing what constitutes an identity of transactions or occurrences. Obviously some additional elements or matters may be included, or it would not be possible to join even actions against an agent and a principal, since more evidence is needed to establish liability against the latter than the former. I believe there can be no hard and fast rule, and that the approach must be the general one of whether there are enough ultimate factual concurrences that it would be fair to the parties to require them to defend jointly against them—at least to some extent. . . .

Id. at 581 (emphasis added) (citations omitted). See also Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705 (5th Cir. 1967).

47. For a thorough discussion of the origin of the federal rule, see 3A J. MOORE, FEDERAL PRACTICE § 20.02 (2d ed. 1948); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1651 (1972).
on Rules in 1937 specifically made reference to equity practice in recommending adoption of the language drawn from the English rules which were clearly based on the same principle. Convenience of the court through prevention of multiple litigation of the same matters was stressed and tempered only by proper regard for inconvenience to the parties. Thus the liberal interpretation of the rule urged by the draftsmen would seem to require only that the transaction upon which one claim is based include the factual basis of a material part of the claim against the defendants to be joined. If there is no concurrence in the facts constituting the foundations of the claims, the other parties are not interested in the same controversy. If the concurrence is not an essential or material part of the foundation for the claims, it is unlikely to contribute substantially to the convenience of the court, and it is likely to be inconvenient to the parties.

The primary advantage to be gained from such an interpretation is that it would encourage the courts to articulate the factual basis for allowance or denial of joinder. The current practice leads to uncertainty and needless litigation because the holdings are couched in conclusory terms. That the court in Farmers found it necessary to devote a nine page opinion to the meaning of the term "transaction" (which was inconclusive at best) is ample evidence that a mere statement that these claims did or did not arise out of the same transaction is highly undesirable and likely to continue to produce litigation. The extent to which facts forming the foundations of the claims against each defendant must coincide must also be articulated. A requirement that the common facts and circumstances be a material or essential part of each claim seems workable and consistent with the liberal policy announced by the court. The relative ease with which this standard could be applied by the plaintiff's attorney should result in fewer court determinations and less inconvenience to the parties (the committee's articulated rationale for the rule itself).

The Farmers decision has already been followed by the supreme court, but the opinion failed to clarify what constitutes the "same transaction." The court was satisfied to state that it would not follow a narrower construction than that announced in Farmers, but declined to comment on just what that construction was.

IV. HAGER v. MCGLYNN

A. The Case

Plaintiff Howard Hager was injured when his automobile collided
with defendant McGlynn's automobile on January 12, 1969. On May 12, 1969, while on duty as a police officer, Hager was riding a motorcycle when he was struck from the rear by defendant Tuttle's automobile. Hager suffered injuries including aggravation of a previous knee injury from the prior accident. Plaintiff filed his petition in two counts, one against each defendant, and prayed damages separately against each defendant. Each defendant moved for a separate trial and such motions were overruled. The jury found for the plaintiff against each defendant. Defendant McGlynn appealed the denial of his motion for a separate trial. The decision of the trial court was affirmed.

B. The Court's Analysis

Although an objection to joint trials may be made without objection to joinder, the court of appeals understood the defendant's assignment of error to be the allowance of joinder rather than abuse of the trial court's discretion to conduct a joint trial where parties are properly joined. The court noted that the case was one of first impression in Missouri insofar as it presented the question of permissive joinder of two defendants who collided with the plaintiff at different times with no allegation of joint liability. The court distinguished cases involving liability of the original tortfeasor for subsequent medical malpractice in treatment of injuries and joint liability of several tortfeasors acting independently and at different times to produce a single indivisible injury. In this case, each tortfeasor was alleged to be liable only for the injuries produced by his own act.

On the strength of an earlier decision that consolidation was proper under similar facts, the court reasoned that the common question requirement of the permissive joinder rule was satisfied. The court then quoted extensively from an opinion of the Supreme Court of Ohio, where the joinder provisions are identical with those of Missouri, in a case with very similar facts. The Ohio court, in holding that joinder is permissible under such circumstances, relied on the language "series of occurrences" found in the rule and emphasized the underlying policy of allowing simplified pleading in order to prevent court congestion, multi-

52. Mo. Sup. Ct. R. 52.05 (b) provides:
The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

See also Mo. Sup. Ct. R. 66.02.
plicity of suits, and unjustified awards of damages. The court also found persuasive the reasoning in a California case with similar facts. The California Supreme Court stressed the enhanced difficulty of proof in separate trials and the more just awards to be expected when one jury decides the damages to be apportioned to each party. The court of appeals also declared that its decision had the support of the federal courts passing upon this question. The court flatly rejected an Illinois appellate decision taking the opposite view on similar facts, because the Illinois court failed to make an analysis or address the merits of the problem.

The court of appeals seemed to be most concerned with the overall policy of liberal construction of procedural rules and the basic unfairness of allowing each defendant to claim that the other caused the greater part of the injury in a separate trial. The court expressed concern that denial of joinder could lead to totally inadequate or totally outrageous aggregate verdicts and would offer no greater protection to the rights of the parties than would be afforded if joinder was allowed.

C. Implications

*Hager* is potentially much broader in scope and effect than *Farmers*. The court's deference to the policy of liberal construction of the joinder rule appears to be unchecked by the language of either of the rule's requirements. If followed, this decision could well lead to an unwarranted expansion of the joinder rule and conflict with the established policies and requirements of venue, consolidation, and personal jurisdiction.

The common question requirement of the rule was deemed satisfied by the court on the basis of its decision in *State ex rel. Allen v. Yeaman* that consolidation was proper on similar facts. Consolidation in Missouri is governed by rule 66.01(b) which gives the trial court discretion

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58. Poster v. Central Gulf Steamship Corp., 25 F.R.D. 18 (E.D. Pa. 1960), was the only federal case cited by the court of appeals as support for this conclusion. Actually, the court in *Poster* allowed joinder on the basis of the original tortfeasor's possible liability for the aggravation and therefore termed the entire matter to be a single occurrence. The court of appeals' approach does not appear to be supported by federal authority, although joinder has been allowed on similar facts using the *Poster* rationale. Lucas v. City of Juneau, 15 Alas. 413, 127 F. Supp. 730 (D. Alas. 1955); Forbes v. American Tobacco Co., 37 F.R.D. 530 (E.D. Wis. 1965). See also Watts v. Smith, 375 Mich. 120, 134 N.W.2d 194 (1965).
60. 518 S.W.2d at 177.
62. Mo. Sup. Cr. R. 66.01(b) provides:

When civil actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the civil actions; it may order all the civil actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(Emphasis added).
to join actions pending before it for hearing or trial although the parties to
one action do not thereby become parties to the other. The sole re-
requirement of the rule is a common question of law or fact (which is
identical to the first requirement of the permissive joinder rule), although
the presence of a common question does not require that the motion for
consolidation be granted.

The common question as defined by the court in Allen was, "to
what extent did [plaintiff's] injuries result from the first accident and to
what extent from the second." If the rule is read literally, this would
not necessarily appear to be a common question—i.e., a question which
will be decided in each suit if it were tried as separate actions. In the suit
against the earlier tortfeasor, the plaintiff would likely be obliged to
introduce evidence in the form of expert testimony of his physical con-
dition following the first accident. The jury would not be required nor
necessarily disposed to make a finding concerning injury in the second
accident either formally or implicitly. In his suit against the second
tortfeasor, the plaintiff may prove his present condition and introduce
evidence of his condition prior to the second accident. Even this approach
often does not yield a question common to the actions because the
implicit finding of the jury necessary to decide the question is the
plaintiff's condition prior to the second accident and not the plaintiff's
condition after the first. Bodily injuries are not necessarily permanent.
Some healing may be expected to occur, particularly in a case such as
the one most heavily relied upon by the court in Allen where there was
a time lapse of three years between accidents! Of course, as a practical
matter there may be a common question if the first injury is permanent
or the time lapse between accidents is short. However, as will be discussed
later, the allowance of joinder has implications not presented by a
motion for consolidation. When joinder rather than consolidation is
before the court, a more critical inquiry into the common question
requirement may be appropriate.

Even if the common question requirement of the rule is conceded to
be satisfied, the "same . . . series of occurrences" requirement of rule
52.05 (a) is clearly not met by the facts in Hager. By the court's reasoning,
the successive occurrences of injury to the plaintiff's knee constituted a
series of occurrences. If this is so, then what is not a series of occurrences?
Is it any less a series of occurrences if the injuries are to the plaintiff
generally rather than to his knee? If viewed strictly from the plaintiff's
point of view, all injuries received during his lifetime, no matter how

63. Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933); 9 C. Wright &
64. 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2382
at 260 (1971); 5 J. Moore, Federal Practice § 42.02 (2d ed. 1948).
65. 440 S.W.2d at 145.
67. See rule quoted note 1 supra.
unrelated, can be said to be no less a series of occurrences than the separate injuries to his knee. Yet should the plaintiff be permitted to join in one suit all who injure him? It seems clear that to read the rule from the plaintiff's point of view is to read the requirement of a series of occurrences completely out of the rule and make the requirement for joinder and consolidation the same—i.e., a common question of law or fact.

The confusion in *Hager* which makes it seem to be a close case arises from the court's failure to distinguish between a common factual basis and a common question of fact. As discussed earlier in this comment, the essence of the "same transaction, occurrence or series of transactions or occurrences" requirement is a common factual basis—i.e., events, which must be alleged as an essential or material part of the claim against each defendant. The court in *Hager* deemed the "same . . . series of occurrences" requirement to be satisfied by the successive injuries to the knee. However, the first defendant's liability was predicated solely upon the first accident, and the second defendant's liability was based solely on the second. Because the liability of neither defendant is based upon a series of occurrences or events, it could not possibly be based upon the same series. While the extent of injury to the knee caused by each defendant is arguably a common question of fact, it is in no sense an event which is common to the claim against each.

It appears that both requirements of rule 52.05 (a) can have meaning and be properly applied only if they are read in terms of the relationship between the defendants. As is the case with several occurrences being considered as one transaction, the liability of at least one defendant must be based upon more than one event—i.e., a series of occurrences. The liability of all other defendants must arise out of at least one of the occurrences in this series. This provides the necessary relationship between the defendants which justifies their joinder in one suit. This interpretation of the rule is supported by the principle of equity joinder, from which it was derived. In equity, joinder was based upon the premise that all persons who were concerned with or involved in the controversy should be present so that the entire matter could be settled in one suit. If the plaintiff in his suit against defendant A based upon occurrences X, Y, and Z also had a complaint against defendant B based upon occurrence Z, then the matter should be settled in one action and A and B should be joined. B has no reason to complain because he involved

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68. *Id.*
69. *See* pt. III (c) of this comment, *supra*.
70. *Id.*
71. Multifariousness as to parties consists of joining in the same suit, either as complainants or defendants, parties who are without a common interest in the subject of the litigation and have no connection with each other.
Meyer v. Mulligan, 175 S.W.2d 924, 929 (St. L. Mo. App. 1943) (emphasis added).
72. *See* pt. III (c) of this comment and notes 47-49 *supra*.
himself in occurrence Z. He is further protected under rule 52.05 (b) because a separate trial of X and Y may be ordered if B would be unduly prejudiced. The Hager pleadings, however, clearly do not fall under this principle because the plaintiff's complaint against defendant A arose solely out of occurrence X and his complaint against defendant B arose solely out of occurrence Y. Defendant B's objection is justified because he has nothing to do with (and has probably never heard of) defendant A or occurrence X. The federal cases cited as authority in Hager do follow this principle because those cases were brought on a theory that the first defendant may be jointly and severally liable for the damages in the second accident.

The above discussion is not intended to imply that the facts of Hager cannot support joinder in the proper circumstances. If the complaint against the first defendant alleged that the first defendant had caused the knee to be in such condition that it was more seriously injured in the second accident than it would have been but for the first accident, the plaintiff would satisfy the above test because the liability of the first defendant is now based on a series of occurrences—i.e., two accidents, and because the liability of the second defendant is based on one of those accidents, they arise from the same series of occurrences. While it is clear that not all situations similar to Hager will be susceptible of such an allegation, the distinction between this allegation and that made in Hager highlights the potential scope of the Hager decision which is discussed below.

As noted above, the court's interpretation of the rule, together with the emphasis on the totally separate allegations of liability of the individual defendants for each accident, leads to the conclusion that joinder is proper whenever consolidation is proper. The effect of the decision upon venue and personal jurisdiction was not considered by the court, however, and this effect clearly indicates the impropriety of erasing the distinction between joinder and consolidation requirements. Consolidation is governed by rule 66.01. While the rule's major justifications are convenience of the court and avoidance of inconsistent adjudications, there is one major limitation. Both suits to be consolidated must be pending before the court entertaining the motion. The issues of venue and personal jurisdiction are already settled in each suit before the motion and are unaffected if the suits are consolidated for trial.

The context in which the determination of proper permissive joinder arises is entirely different from that of consolidation. The issues of venue and personal jurisdiction are still unresolved and are often contingent upon proper joinder. The Missouri venue statute makes venue

73. See rule quoted note 52 supra.
74. See note 58 supra.
75. See rule quoted note 62 supra.
76. Id.
for all defendants proper in the county of residence of any defendant.77 This has been clearly interpreted to mean that "the question of venue is to be resolved by the determination of whether or not the defendant . . . was properly joined . . ."78 It is also clear from ample Missouri case law that proper venue is necessary before service of process will confer jurisdiction over the person of a defendant.79 While this is in the nature of a personal right and may be waived,80 absence of personal jurisdiction may not be remedied by the unilateral action of the court or the plaintiff. The plaintiff may obtain a writ of prohibition in defense of his right in advance of the trial on the merits.81 While no doubt the state has the power to require its residents to appear in any county, the clear scheme of the venue provisions requires some relationship of the defendant, established by his own conduct, to the place of trial or the other defendant. This relationship can be assured only by reading the first requirement of the joinder rule from the perspective of the defendants.

The potentially broad effect of Hager should now be clear. Allowance of joinder based solely on a common question of law or fact would greatly expand the jurisdiction of the courts over the persons of defendants who have no relationship to the forum aside from the unhappy circumstance that their suits involve a question of law or fact common to a suit pending in that jurisdiction. On its facts, the Hager decision does not seem to reach an onerous or objectionable result. However, the effect of granting the plaintiff a right to extend the jurisdiction of the court over a defendant from a foreign county based solely upon a common question is indeed objectionable. As noted earlier, if the first defendant is somehow responsible for part of plaintiff's injuries in the second accident, joinder appears to be proper. The first defendant should not complain because he has, by his own conduct, caused injury to a plaintiff of such character as to make the plaintiff more susceptible to the second injury. The second defendant's conduct can have no bearing on the propriety of joinder. Because joinder of the second defendant may force him to defend where venue and jurisdiction would otherwise not be proper, a more critical inquiry into the common question requirement may be appropriate for his protection.

77. Section 508.010, RSMo 1969, provides:
Suits instituted by summons shall, except as otherwise provided by law, be brought:

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county.

79. State ex rel. Carney v. Higgins, 352 S.W.2d 35 (Mo. En Banc 1961); State ex rel. Bartlett v. McQueen, 361 Mo. 1029, 238 S.W.2d 393 (En Banc 1951); State ex rel. Rhine v. Montgomery, 422 S.W.2d 661 (Spr. Mo. App. 1967).
80. State ex rel. Lambert v. Flynn, 348 Mo. 525, 154 S.W.2d 52 (En Banc 1941).
V. Conclusion

The policy of liberal construction of the Missouri Supreme Court Rules relating to joinder announced by the court in Farmers is amply supported by the history of the rules and sound reasoning. It is a welcome and substantial step toward full implementation of modern pleading reforms. The holding that an action in tort against one party may be joined with an action in contract against another brings Missouri into harmony with the majority of jurisdictions with similar provisions and with most, if not all, commentators in the field. However, a clear interpretation of the "same transaction" requirement is essential to application of the rule by the practicing bar and to prevention of unnecessary litigation over what is or is not the "same transaction." The "same transaction" requirement should be interpreted to mean simply that the factual basis of the claim against one party must include the factual basis of an essential or material part of the claims against all other parties. This construction would serve as an authoritative and straightforward test which could easily be applied. It is also the most liberal construction of the language of the rule which can be supported by its historical development.

The Hager decision should be disapproved because it would lead to the elimination of the first requirement of the rule. Because all events in the plaintiff's life are a "series of occurrences" from his perspective, the requirement would be satisfied in every case. The requirements for joinder and consolidation would then be the same. The legislative decision that the relationship between defendants is sufficient to justify venue and personal jurisdiction in the county of either defendant only when the dual requirements of joinder are met should lead the courts to question seriously any construction which would eliminate one of these requirements. Such an expansion of venue and personal jurisdiction seems unnecessary and unwarranted. The history of the rule clearly indicates that it applies to the relationship between the defendants and should be interpreted from their perspective. Such an interpretation would certainly be in harmony with the decision of the supreme court in Farmers.

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