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Judgments against Joint Tort-Feasors--Problems Arising on Appeal by Only One Defendant

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Comment

JUDGMENTS AGAINST JOINT TORT-FEASORS—PROBLEMS ARISING ON APPEAL BY ONLY ONE DEFENDANT

I. Introduction

A judgment rendered against joint tort-feasors is an entirety, and the amount of damages assessed against them in a single action must be in a single amount.[1] When one joint tort-feasor appeals from a judgment against him, but his co-defendant does not appeal, the unity of the single judgment is challenged. Any change in the judgment against the defendant who appeals may result in different damage verdicts against the joint tort-feasors.

In this comment a defendant who perfects an appeal will be called the "active defendant." A defendant who does not appeal, who does not respond to an appeal by plaintiff, or who fails to perfect an appeal which he has begun will be referred to as an "inert defendant."

There are only four general types of cases in which the inert defendant creates a problem:

1. In the first type of case plaintiff is successful against only one defendant. The unsuccessful defendant appeals, and plaintiff appeals from the judgment in favor of the successful defendant, who does not respond. The first situation is typified by *Roark v. Gunter*.[2]

2. The second type of case is slightly different. Here plaintiff appeals from a judgment in favor of the active defendant. The other defendant was unsuccessful below, and he remains inert. An example of this type of case is *Gardner v. Simmons*.[3]

3. A third situation arises when both defendants are successful in the trial court, but only one of them responds to an appeal by plaintiff. Examples of this situation are rare. However, an appeal which results in affirmance has the same final result as no appeal at all, with respect to the form of the original judgment. Thus the third situation is analogous to a case in which both defendants respond, but only one of them is successful on appeal. The problem on appeal is much the same as it would be if the unsuccessful defendant had remained inert. *Cox v. Wrinkle*[4] is such a case.

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1. Roark v. Gunter, 391 S.W.2d 258, 259 (Mo. 1965); Gardner v. Simmons, 370 S.W.2d 359, 366 (Mo. 1963); Cox v. Wrinkle, 267 S.W.2d 648, 653 (Mo. 1954); Snyder v. Hedges, 381 S.W.2d 376, 382 (Spr. Mo. App. 1964); Davison v. Farr, 273 S.W.2d 500, 505 (Spr. Mo. App. 1954).
2. *Supra* note 1.
3. *Supra* note 1.
4. *Supra* note 1.

4. The most common of the four types is the case in which both defendants are unsuccessful in the trial court, but only one defendant perfects an appeal.[5]

II. Disposition on Appeal

A. *The Common Law Rule*

On an appeal by only one defendant, the practice at common law was to reverse the judgment and order a new trial for all issues.[6] Both the active and inert defendants were included in the new trial order. There were two reasons for this sort of disposition:

1. On a venire facias de novo no notice was taken of the record of the first trial of the action. If a new trial was granted to one defendant, there would be nothing left in the record to sustain a judgment against the inert defendant. Only by including the inert defendant in the order could he be kept in the record on a venire facias de novo.[7]

2. At common law the judgment was regarded as an entirety in a very strict sense. It could not be split into issues of liability and damages, nor could it be split between parties. When final judgment was rendered it had to be in the same amount against all the parties found liable.

Under the common law rule the inert defendant could have a new trial of the action if an active defendant was successful on an appeal. If plaintiff's judgment against the active defendant was reversed, plaintiff also lost his judgment against defendants against whom no error had been committed or who had not perfected an appeal.[8]

B. *The Modern Rule*

The common law rule has been largely abandoned. Since the liability of joint tort-feasors is both joint and several,[9] plaintiff initially has a choice of bringing suit against any or all possible defendants. Plaintiff can dismiss the action against any defendant and, after judgment has been rendered, has the choice of enforcing the judgment against any or all of the defendants found liable. Plaintiff may even sue the joint tort-feasors separately, although he is entitled to but one satisfaction.[10] In an action against two joint tort-feasors error in the judgment against one defendant should not deprive plaintiff of a judgment against a co-defendant who could have been sued alone. Since the inert defendant could have been sued separately, there is no reason to give him the benefit of his co-defendant's appeal.[11]

The modern cases allow a plaintiff to hold the parts of his judgment which

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5. Yarrington v. Lininger, 327 S.W.2d 104 (Mo. 1959); Rosenkoetter v. Fleer, 155 S.W.2d 157 (Mo. 1941); Snyder v. Hedges, *supra* note 1; Bauman v. Conrad, 342 S.W.2d 284 (St. L. Mo. App. 1961); Davison v. Farr, *supra* note 1.

6. Annot., 143 A.L.R. 7 (1943).

7. *Id.* at 8; 39 Am. Jur. *New Trial* § 25 (1942).

8. *Supra* note 6, at 9; 5 Am. Jur. 2d *Appeal and Error* § 949 (1962).

9. 52 Am. Jur. *Torts* §§ 110, 119 (1944).

10. 52 Am. Jur. *Torts* §§ 127, 128 (1944). See, Payne v. Bertman, 224 Mo. App. 402, 27 S.W.2d 28 (K.C. Ct. App. 1930).

11. See 5 Am. Jur. 2d *Appeal and Error* § 951 (1962).

are neither attacked nor erroneous. In most cases there is no distinction between an inert defendant and an active defendant against whom no error was committed.[12] Insofar as the disposition on appeal is concerned there is little justification for distinguishing the reasons for defendant's failure on appeal. He is bound by the original judgment whether it is affirmed because not erroneous or whether it remains effective because not attacked.

The modern cases do recognize some circumstances which can deprive a plaintiff of part of his judgment against an inert defendant. Although there is no set rule for every case, some of these circumstances are definite enough to be classified. In one class of cases it is evident that the mere presence of one of the defendants in the lawsuit had an influence on the verdict.

When the wealth or the insurance of one defendant is made known to the jury, there is a strong possibility that the jury may consider that particular defendant's ability to pay in arriving at a damage verdict. The presumption that a jury followed the damage instructions is not based on fact in such a case. "[I]t cannot be assumed that they attempted to make the 'punishment fit the crime,' rather than the offenders . . . ."[13] If one defendant is a large and well-known corporation, the jury cannot be presumed to be ignorant of its ability to pay. In their deliberations over the amount of damages they might well be expected to decide on a higher figure than if an individual co-defendant had been sued alone. If the affluent defendant appeals and is granted a new trial, his success on the new trial may well leave the inert defendant liable for a larger verdict than would have resulted from a separate trial.[14] In such a case the better practice would be to reverse the damage judgment and order a trial de novo to all parties on that issue.

Other instances of influence by presence are not unusual. When punitive damages are in issue, the success of the active defendant in obtaining a new trial may require a new trial on the damage question for the inert defendant.[15] One defendant may affect the verdict by making only a pretense of defending the case.[16] Inflammatory remarks made about the active defendant during the trial may influence the jury in assessing the money liability of both defendants. If such remarks are likely to have so influenced the jury, a new trial on damages should be granted to both defendants.[17]

In another class of cases the interdependence of the joint tortfeasors qualifies the modern rule. If the joint tort-feasors are master and servant, their interdependence may necessitate a complete trial de novo to avoid an incongruous final

12. Annot., 143 A.L.R. 7, 50 (1943).
13. Schloss v. Silverman, 172 Md. 632, 644, 192 Atl. 343, 348 (1937).
14. Washington Gas Light Co. v. Landsden, 172 U.S. 534 (1899), is a leading case on this point. See, *e.g.*, Harrington v. H. D. Lee Mercantile Co., 97 Mont. 40, 33 P.2d 553 (1934), and cases in Annot., 143 A.L.R. 7, 31 (1943) and Annot., 34 A.L.R.2d 989, 994 (1954).
15. Landseidel v. Culeman, 47 N.D. 275, 181 N.W. 593 (1921); Schloss v. Silverman, *supra* note 13.
16. Szpyrka v. International R.R., 213 App. Div. 390, 210 N.Y. Supp. 553 (1925).
17. Collins v. Hastings, 283 Ill. App. 304 (1936).

judgment.[18] For example, the master may be granted a new trial because of error in the issue of the inert defendant's negligence. If the inert servant-defendant is not also granted a new trial, he may be found to have committed no tort (if the active master-defendant is successful on the new trial) and yet be liable in tort in the same action.[19] If the primary issue in both trials is the negligence of the inert defendant, a final judgment against the inert defendant and for the active defendant is inconsistent, being based on finding one defendant to be both negligent and not negligent in the same cause of action. If the new trial includes the question of scope of employment, a general verdict may mask any incongruity of the final judgment. Judgment for the master in this case would not require a finding that the servant was not negligent.

If the servant is the active defendant, reversing and remanding the cause for him alone leaves the way open to several problems. If the servant is successful on his new trial, the master would remain liable on the principle of *respondeat superior* as a result of the first trial. But, as a result of the second trial, the servant would not be liable. A judgment for the servant and against the master in the same action is clearly illogical. The illogical result would raise a further question of whether the master can be indemnified by the servant for the loss caused by the servant's negligence, when the judgment is based on finding the servant to be both negligent and not negligent in the same cause of action. The problems can be avoided by ordering a new trial for both defendants.[20]

The modern rule may also be limited by interdependence of the defendants because of rights to indemnity or contribution. If the active defendant would be bound to indemnify the inert defendant, both defendants should be granted a new trial to avoid the possibility of an inconsistent judgment.[21] Rights of indemnity or contribution make it necessary that the final judgment against both defendants be in a single amount.[22] If the active defendant is granted a new trial on the damage issue, the inert defendant should be granted a new trial on this issue.

Error throughout the case may make it necessary to reverse the entire judgment and grant a new trial for all parties. It has been held that an error which affects the entire case may necessitate a reversal for an inert defendant who was successful in the first trial.[23] However, it has also been held that the inert defendant is entitled to hold a verdict in his favor, if the plaintiff does not appeal from the judgment for that defendant, even though error running through the

18. See 5 AM. JUR. 2D *Appeal and Error* § 950 (1962).

19. The end result would be a judgment for plaintiff against the servant based on a jury finding that the servant was negligent, and a judgment for the master based on a finding that the servant was not negligent in the same action.

20. See Bishop v. Superior Court, 59 Cal. App. 46, 209 Pac. 1012 (1922). *But see* Angell v. Chicago, R. I. & P. Ry., 98 Kan. 268, 157 Pac. 1196 (1916).

21. The alternative permits the possibilitly of an indemnity action in which both parties would be able to plead the same judgment as res judicata against the other.

22. *E.g.*, Miller v. United R.R., 155 Mo. App. 528, 134 S.W. 1045 (St. L. Ct. App. 1911); Mulderig v. St. Louis K. C. & C. R.R., 116 Mo. App. 655, 94 S.W. 801 (St. L. Ct. App. 1906). There is a right of contribution among joint tortfeasors held liable under the same judgment. See § 537.060, RSMo 1959.

23. McGovern v. Oliver, 177 App. Div. 167, 163 N.Y. Supp. 275 (1917).

entire case requires reversal for the active defendant.[24] Reversal of a judgment in favor of the inert defendant when the plaintiff has not appealed is an extreme remedy, and cases in this area are rare.

One other situation may involve reversal and a new trial for the inert defendant. Occasionally cases arise in which the active defendant raises questions on appeal which were not fully developed in the first trial. If the appellate court orders a new trial to develop such issues more clearly, a new trial for the inert defendant may be required. Questions of agency and scope of employment should include both the principal and the agent in a new trial, regardless of the failure of one of them to appeal. Questions of excessive damage verdicts may be made clearer by a new trial. In *Neal v. Curtis & Co. Mfg. Co.*[25] the Missouri Supreme Court reversed and remanded the damage issue for both defendants to clarify the excessive verdict question. Since one factor in the damage verdict was the alleged permanence of injury, a new trial some time after the first trial would develop the evidence on this point much better than it could have been developed in the first trial.

C. *Missouri Cases*

The Missouri courts have used the modern rule, but have not followed the same procedure used by most courts adopting this rule. In most other jurisdictions cases involving an inert defendant are handled by reversal for the active defendant and affirmance for the inert defendant. The Missouri practice is somewhat unusual in that those parts of the judgment which are not reversed are held in abeyance pending the new trial on the other issues.[26] *Hoelzel v. Chicago, R. I. & P. Ry.*[27] is a leading case on this practice.

> If . . . the verdict of liability was permitted to stand against one defendant because it was free from error, by the same token, if the verdict as to the amount of damages was free from error, it likewise should have been permitted to stand against that defendant. Two judgments in the same case could have been prevented by reversing the judgment and remanding the cause with directions to hold in abeyance the verdict as to both liability and amount of damages as to the defendant against which no error was committed, until the cause was finally disposed of as to the liability of the other defendant, then enter judgment for the amount of the verdict held in abeyance against all defendants finally held liable.[28]

This practice enables plaintiff to hold his judgment while insuring that the final judgment will be in a single amount.

Hoelzel acknowledged that no set rule could be laid down for every case. The court used four criteria to determine whether a particular issue may be separated to become the subject of a new trial:

1. Error in the first trial of the case does not affect the defendants jointly.

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24. Brady v. Black & White Cab. Co., 357 S.W.2d 720 (K.C. Mo. App. 1962).
25. 328 Mo. 389, 41 S.W.2d 543 (1931).
26. See Annot., 143 A.L.R. 7, 50 (1943).
27. 337 Mo. 61, 85 S.W.2d 126 (1935). In *Hoelzel* all defendants appealed, but there was no error committed against two of them. The disposition would have been the same if they had not appealed.
28. *Id.* at 77, 134.

2. The error was not calculated to affect the parties jointly. In other words, error as to one defendant was not intended to affect the other joint tort-feasors present in the same trial.

3. The error does not affect other issues in the trial. For example, *Hoelzel* held that error in the verdict-directing instruction for one defendant's liability did not affect the damage issue.

4. It is presumed that the jury followed the instructions which were given.[29]

The last principle mentioned may conflict with some of the other principles. It is difficult to assume that the jury followed instructions strictly and disregarded error which was calculated to affect both defendants. Although knowledge of the wealth or insurance of one defendant may not affect the other defendant directly, such knowledge may affect the amount of the damage verdict returned against both defendants, regardless of the instructions. By mechanically separating the defendants from each other and from any error committed against one of them, the presumption can be justified. If the presumption that the jury followed instructions is disregarded, the effect would be equivalent to abandoning the modern rule in many cases. The cases in which the mere presence of one defendant in the trial is held to have influenced the verdict are all based on the assumption that the jury did not follow instructions.[30] If the presumption is abandoned entirely, all cases of this type should be reversed for both the active defendant and the inert defendant.

The Missouri cases before and after *Hoelzel* have used the presumption, explicitly or implicitly, that the jury followed instructions. No Missouri cases have been found in which a new trial was granted the inert defendant because the jury might have deviated from instructions and considered the individual defendants in arriving at a damage verdict.

The cases vary on the question of ordering a new trial on damages for the inert defendant. Under the reasoning of *Hoelzel,* error in the damage issue should result in a trial de novo of that issue for all defendants. If there is no error in the damage issue, or if the question is not raised on appeal, *Hoelzel* indicates that the damage judgment should be held in abeyance pending a new trial of those issues in which error was involved.[31] In the absence of special circumstances the same result should follow under section 512.160, RSMo 1959.[32] However, some Missouri cases have ordered a new trial on damages for all defendants in the absence of a finding of error. The reason given for granting a new trial on damages is preservation of the entirety of the judgment.[33] When the active defendant or

29. *Id.* at 76-77, 134.
30. See discussion II B. *infra.*
31. *Supra* note 28.
32. "Unless justice requires otherwise the court shall dispose of the case on appeal and no new trial shall be ordered as to issues in which no error appears." § 512.160, RSMo 1959.
33. *Compare, e.g.,* Rosenkoetter v. Fleer, *supra* note 5, and Yarrington v. Lininger, *supra* note 1, with Gardner v. Simmons, *supra* note 1, Davison v. Farr, *supra* note 1, and Cox v. Wrinkle, *supra* note 1. In all of the above cases a new trial on damages was ordered for all defendants, although there was no specific finding of error in the damage issue. In the *Davison* and *Gardner* cases there was

plaintiff contests the amount of the damage verdict, it might be possible to justify a new trial by the reasoning in *Neal v. Curtis & Co. Mfg. Co.*[34] In *Neal* a new trial was ordered so the damage issue might be decided with the benefit of any new evidence on permanent injuries which would have come to light since the first trial. But the Supreme Court in *Hoelzel* disapproved of *Neal* on this very point.[35] The argument that a new trial on damages would put into the record additional evidence of the insufficiency or excessiveness of the verdict has had little support in Missouri since *Hoelzel* was decided in 1935. If there are other reasons for granting a new trial on damages to both defendants, the reasons are not discussed in the cases.[36]

Hoelzel and section 512.160, RSMo 1959 indicate that a new trial should not be granted on issues in which there was no error in the original trial. It might be expected that when there is no damage issue raised on appeal, that issue will be handled by holding the damage judgment in abeyance until final disposition of the case. *Roark v. Gunter* and other cases have been disposed of in this manner.[37] In *Roark v. Gunter,* plaintiff and the active defendant failed to raise the damage issue until oral argument before the Missouri Supreme Court. Plaintiff's judgment in the first trial was for less than the jurisdictional amount. The supreme court transferred the case to the Kansas City Court of Appeals, stating that the amount of damages would be held in abeyance pending whatever disposition was finally made.[38]

However, at least one Missouri case has resulted in a new trial on damages for all parties when the damage issue was apparently not raised on appeal.[39] This would indicate that in the twenty years since *Hoelzel* the common law rule has not completely disappeared.

III. Satisfaction of the Judgment by the Inert Defendant

After judgment is rendered in the first trial of the action the inert defendant can create two rather unusual problems. The inert defendant can satisfy the judgment voluntarily, in which case the active defendant's appeal may be in danger of dismissal as a moot question. If the inert defendant does not satisfy the judgment voluntarily, plaintiff may sue out execution against him while the active defendant's appeal is pending. The inert defendant may hope that his co-defendant's appeal will result in a new trial for him on some issue. He may thus wish to stay the execution.

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an agency question which might have justified the new trial order. In *Davison* and *Cox* there was error running throughout the trial which might have justified a new trial order. However, neither question was discussed by the court as a reason for making the order.

34. *Supra* note 25.

35. Hoelzel v. Chicago, R.I. & P. Ry., *supra* note 27.

36. *Supra* note 33.

37. Roark v. Gunter, *supra* note 1; Lambert v. Jones, 339 Mo. 677, 98 S.W.2d 752 (1936); McCombs v. Ellsberry, 337 Mo. 491, 85 S.W.2d 135 (1935).

38. Roark v. Gunter, *supra* note 1.

39. Snyder v. Hedges, *supra* note 1. See Polkowski v. St. Louis Public Serv. Co., 229 Mo. App. 24, 68 S.W.2d 884 (St. L. Ct. App. 1934), decided before *Hoelzel.*

A. *Voluntary Satisfaction*

Cases of voluntary satisfaction by an inert defendant are somewhat less than abundant. The inert defendant will not often wish to pay voluntarily. If he failed to appeal for financial reasons, he may be unable to make a voluntary satisfaction. He may have good reason to believe that plaintiff intends to enforce the judgment only against the active defendant who, in most cases, is the wealthier of the two. If the inert defendant should satisfy the judgment, the active defendant may voluntarily dismiss his appeal. In any of these cases the appellate court would never face the question of the effect of the inert defendant's payment on an appeal by the other parties.

1. The Active Defendant's Problem

If the active defendant continues to press his appeal after the inert defendant has satisfied the judgment, one line of reasoning indicates the appeal should be dismissed as presenting only moot questions.[40] The original cause of action involved plaintiff and both defendants. Plaintiff is entitled to only one recovery from either or both of them. Once plaintiff's judgment is satisfied, there is no more cause of action involving the active defendant and plaintiff. Any questions raised by the active defendant are moot. If a new trial is granted to the active defendant, other problems would arise. Plaintiff now has his money and has no incentive to litigate the cause again against the active defendant. If the inert defendant has not raised a question of indemnity or contribution, the active defendant would be the only party really interested in a new trial. In such a case the new trial would be little more than a waste of the trial court's time.

It appears that the Kansas courts would dismiss the appeal on the basis of acquiescence.[41] Anything that smacks of acquiescence in the satisfaction would be grounds for dismissal, since the court is not disposed to answer questions which have become abstract.

In some cases, however, courts have refused to dismiss an appeal by the active defendant even though the judgment has been satisfied. The inert defendant should not be able to deprive the active defendant of his right to appeal, especially where rights of contribution[42] or indemnity[43] are involved. If the active defendant may be liable to the inert defendant for all or part of the amount paid by the inert defendant, the inert defendant should not be able to cut off his right to appeal.

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40. Employers' Fin. Co. v. Lathram, 369 S.W.2d 927 (Tex. 1963). See, *e.g.*, Annot., 39 A.L.R.2d 153, 157 at nn. 18, 19 (1955); Keener v. King Hardware Co., 215 Ga. 577, 111 S.E.2d 215 (1959); Voorhies Elec. Contracting, Inc. v. Town of Bunkie, 136 So.2d 141 (La. App. 1961).

41. See Carr v. Diamond, 192 Kan. 336, 388 P.2d 589 (1964), continued at 192 Kan. 377, 388 P.2d 591 (1964); Anderson v. Carder, 159 Kan. 1, 150 P.2d 754 (1944); Paulsen v. McCormack, 133 Kan. 523, 1 P.2d 259 (1931); Foster v. Capital Gas & Elec. Co., 126 Kan. 440, 268 Pac. 738 (1928).

42. See Mon Wai v. Parks, 43 Wash.2d 562, 262 P.2d 196 (1953).

43. See Lesmark, Inc. v. Pryce, 334 F.2d 942 (D.C. Cir. 1964). Appeal by indemnitor-defendant dismissed after satisfaction by inert indemnitee-defendant. The court found that there was no error in the first trial before dismissing the appeal.

Even though plaintiff may have no financial interest in a new trial, the issue of contribution or indemnity between the defendants presents a real controversy.

The active defendant can also be allowed to continue his appeal on the theory that an erroneous judgment is an injury per se.[44] Even when the active defendant could secure no relief other than reversal of the record judgment against him, he may be permitted to continue his appeal. The judgment remains as a matter of public record. It will have res judicata and collateral estoppel effect in other proceedings involving the same parties. Even in the absence of financial injury, the erroneous tort judgment may be an injury to reputation. While the injury to reputation is not always so serious as injury resulting from an erroneous criminal conviction, the active defendant has been found "guilty," in some sense, of causing plaintiff's injury. If the judgment is erroneous, and was satisfied by the inert defendant without the consent of the active defendant, the satisfaction should not deprive the active defendant of his right to appeal.[45] In addition to injury to reputation, the judgment may affect the active defendant's position before administrative agencies. For example, a fraud judgment can adversely affect the active defendant in an administrative proceeding involving his realtor's license. In this situation the appeal should not be dismissed.[46]

2. The Inert Defendant's Problem

The inert defendant who wants to pay his share of the damages and have nothing more to do with the case is faced with a problem. Plaintiff may wish to avoid accepting any sort of satisfaction from him before disposition of the active defendant's appeal. If he accepts payment from the inert defendant, he is inviting the active defendant to move to dismiss any appeal by plaintiff on the ground that the judgment has been satisfied. In the event that a trial de novo on damages is ordered for all parties, there is a possibility of additional litigation if plaintiff recovers a lesser amount in the second trial than he has already collected from the inert defendant.

The problem of partial satisfaction of a judgment by the inert defendant is not insuperable. In *Markwell v. Local 978, Bhd. of Carpenters & Joiners*[47] an agreement of partial satisfaction of the judgment was filed by one of three defendants. The terms of the agreement evidenced an intent to settle and adjust the judgment only as it affected the particular defendant involved. The court held that the agreement constituted a partial satisfaction and not a release or discharge. Plaintiff's appeal was not dismissed. Since plaintiff would have the opportunity to enforce the judgment against all of the joint tort-feasors, he would have the option of enforcing part of his judgment against each of them. There is no

44. See, *e.g.*, Brown v. Detroit Trust Co., 193 F. 626 (6th Cir. 1912); Warner Bros. Co. v. Freud, 131 Cal. 639, 63 Pac. 1017 (1901); Hartke v. Abbott, 106 Cal. App. 388, 289 Pac. 206 (1930); Beacon Home Equip. Co. v. Paulsen, 343 Ill. App. 468, 99 N.E.2d 586 (1951).

45. *Supra* note 44.

46. Metcalf v. Drew, 75 Cal. App.2d 711, 171 P.2d 488 (1946).

47. 215 F. Supp. 792 (W.D. Mo. 1963). The agreement is set out at page 800 in the report.

inherent reason why a plaintiff should not be able to arrange a partial satisfaction with an inert defendant without jeopardizing his appeal against other defendants.

B. *Execution Against the Inert Defendant*

Cases involving execution against an inert defendant are very rare. There are almost no reported cases on the question whether an inert defendant may be granted a stay of execution because the active defendant's appeal is pending.

On a theoretical level it would seem that very few cases would arise in which the question would reach an appellate court. The inert defendant can appeal only if he is an "aggrieved party" under statutes such as section 512.020, RSMo 1959.[48] Since the inert defendant failed to perfect an appeal from the original tort judgment within the statutory period, he is not aggrieved by the sole fact of execution against him under that judgment. If the active defendant is unsuccessful on appeal, the original judgment against both defendants will remain in effect. Any question of the propriety of execution while the appeal is pending will become moot on affirmance of the judgment.

If the active defendant is successful on appeal and secures an outright reversal, the inert defendant is bound by the first judgment as he was before the appeal was taken. Any questions raised by execution against him before the reversal are moot, since the inert defendant remains liable for the full amount of the judgment whether or not his co-defendant is also liable.

If the appellate court orders that damages remain fixed pending a new trial of the active defendant's liability, the same result will follow with one variation. While the damage verdict is held in abeyance pending a new trial of another issue, the proceedings under the judgment rendered after the first trial should be stopped until final disposition of the case when judgment will be entered against all parties finally held liable.[49] The proceedings are stopped because of the order to hold the judgment in abeyance. The new trial for the active defendant should not be a sufficient reason for a stay of execution against the inert defendant.

There may be no execution against the inert defendant for practical reasons. The active defendant is more often in a better position to satisfy the judgment and, for both financial and personal reasons, plaintiff may prefer to enforce the judgment against him. If the active defendant does not post an appeal bond plaintiff may levy against him. If he does furnish bond, plaintiff has reasonable assurance that the judgment will eventually be satisfied if it is valid.[50] If the inert defendant is insolvent or otherwise judgment-proof, plaintiff would almost certainly look to the active defendant alone for satisfaction.

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48. "Any party to a suit aggrieved by any judgment of any trial court in any civil cause . . . may take his appeal to a court having appellate jurisdiction . . . from any final judgment in the case . . . ." § 512.020, RSMo 1959. See Robson v. Superior Court, 171 Cal. 588, 154 Pac. 8 (1915). The inert defendant is not an "aggrieved party."

49. Hoelzel v. Chicago R.I. & P. Ry., *supra* notes 27, 28.

50. "1. Appeals shall stay the execution in the following cases: . . . (2) When the appellant, at or prior to the time of filing notice of appeal presents to the court for its approval a supersedeas bond . . . . such appeal bond, approved by

A final practical consideration is that many joint tort-feasors here treated as inert have not been completely inactive. In many cases the inert defendant has filed notice of appeal and has furnished bond, but has failed to perfect his appeal for some other reason. In such cases the bond is effective to stay the execution initially. When the appeal fails because the inert defendant failed to perfect it, the question of satisfaction of the judgment will then involve the terms and conditions of the appeal bond.[51] The particular question of execution against the inert defendant would probably become moot on the disposition of the active defendant's appeal before it would be raised on a motion to stay the execution.

The only area in the inert defendant cases which could present a question to an appellate court is that where a new trial on damages is ordered for both defendants. It would be possible for plaintiff to recover, by execution under the first judgment, an amount greater than the amount of the new trial damage verdict. If this should happen the inert defendant is clearly entitled to restitution of the excess,[52] but he will not be able to recover for damages caused by execution under the erroneous first judgment.[53] A stay of execution while the appeal is pending would protect the inert defendant from such damage. In such a case the question whether a stay should have been granted because the appeal was pending would not become moot.

The argument for a stay of execution against the inert defendant hangs by a slender thread of possibilities:

1. If the appeal is not dismissed either voluntarily or as moot (because the judgment is satisfied by execution against the inert defendant); *and*

2. if the active defendant is successful on appeal; *and*

3. if a new trial on damages is ordered for all defendants; *and*

4. if the inert defendant's property is sold before the new trial order and the order to hold the judgment in abeyance; *and*

5. if the amount recovered by plaintiff under the first judgment is in excess of the damage judgment rendered on the new trial; *and*

6. if the inert defendant sustains damages for which he would not be entitled to restitution as a result of the levy; then the inert defendant should be granted a stay of execution pending the appeal by the active defendant. The occurrence of all these events in a single case is very unlikely.

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the court or clerk . . . shall have the effect to stay the execution thereafter. If any execution shall have been taken prior to the time of filing of the bond as so approved by the court or clerk, the same shall be released.

"2. The bond shall be conditioned for the satisfaction of the judgment in full . . . if for any reason the appeal is dismissed or if the judgment is affirmed . . . ." § 512.080, RSMo 1959.

51. See, *e.g.,* Robinson v. Sussman, 253 S.W. 186 (St. L. Mo. App. 1923); Maryland Cas. Co. v. Lucky Budge Mining Co., 192 Mo. App. 337, 180 S.W. 1011 (Spr. Ct. App. 1915); Arkansas Valley Trust Co. v. Corbin, 192 Mo. App. 153, 179 S.W. 484 (K.C. Ct. App. 1915).

52. DeMayo v. Lyons, 360 Mo. 512, 228 S.W.2d 691 (1950).

53. See Annot., 156 A.L.R. 905 (1945); DeLeve, *General Executions,* in MISSOURI CREDITORS' REMEDIES, § 2.5, 22 (Missouri Bar Association 1962).

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The reasons for permitting the execution to proceed are much more compelling. The same reasons which support the modern rule of reversing only part of the case on appeal also support the plaintiff. Plaintiff could have sued the inert defendant alone, in which case he could not object on the basis of an appeal by another tort-feasor in a separate case. Since the judgment is joint and several, plaintiff should have the option of enforcing it against the defendant who has failed to appeal. Plaintiff is entitled to make sure that the inert defendant does not dispose of his assets before the case is finally settled. Since the inert defendant did not pursue his remedy by appeal, he is in no position to argue that another defendant's appeal should protect him. The absence of reported cases on this point is some indication that the inert defendant's position on this point is regarded as so weak that an appeal would be futile.[54]

IV. Conclusion

Both legislative and judicial policy support the avoidance of repeated trial of issues which have been litigated.[55] Since the inert defendant has had his day in court and has not sought a new trial, his opponent should be entitled to hold to his judgment against a defendant who does not appeal. While there can be no set rule for every case, the inert defendant should not be given a new trial in the absence of some special circumstances. The Missouri practice of reversal and abeyance insures against multiple or different recoveries in the same case while avoiding retrial of every issue. If a new trial is ordered on any issue in which there was no finding of error, the reasons for the order should be clear. However, some of the Missouri decisions since *Hoelzel* give little indication of the basis for ordering a new trial on damages.[56]

Cases of satisfaction of the judgment by an inert defendant are rare. The inert defendant may satisfy the judgment voluntarily, but he will not always be able to cut off the active defendant's right to appeal. Whatever right the inert defendant may have to contribution under the first judgment may well be cut off by a successful appeal by his co-defendant. If he does not wish to satisfy the judgment voluntarily, the inert defendant has little protection from execution while the active defendant's appeal is pending. If the inert defendant's position is less secure than that of his co-defendant, the resonsibility for his predicament is his own.

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54. The leading case, and perhaps the only base is Nichols v. Dunphy, 58 Cal. 605 (1881). *Nichols v. Dunphy* is discussed in Fowden v. Pacific Coast S.S. Co., 149 Cal. 151, 86 Pac. 178 (1906), Grundel v. United Iron Works, 127 Cal. 438, 59 Pac. 826 (1900), and Robson v. Superior Court, *supra* note 48.

55. See § 512.160, RSMo 1959 *supra* note 32; Hoelzel v. Chicago, R.I. & P. Ry., *supra* note 27; Annot. 34 A.L.R.2d 988 (1954); Annot. 143 A.L.R. 7 (1943).

56. See cases *supra* notes 33, 39.