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Comments

EVIDENCE—CURATIVE ADMISSIBILITY IN MISSOURI

I. Introduction

Curative admissibility[1] has been used in Missouri courts since before the turn of the century,[2] although its recognition by the judiciary as a doctrine is relatively modern.[3] Surprisingly however, a recent Missouri opinion expressed uncertainty regarding the theory and scope of the doctrine,[4] and a survey of the cases reveals much conflict of opinion in this state. This confusion may be attributable to a similar uncertainty or unfamiliarity with the doctrine among the members of the bar. It is the purpose of this article to (1) isolate the doctrine, (2) attempt to state the Missouri Rule, and (3) analyze its theory, development, and role in trial practice.

Curative admissibility is not a doctrine, but rather a set of doctrines competing for recognition in American courts.[5] These various views respond to the following question: Does one inadmissibility justify or excuse another?[6] Or, to state the problem more completely: If one party offers inadmissible evidence which is received, may the opponent afterwards offer similar evidence whose only claim to admission is that it negates or counter-balances the prior inadmissible evidence? For example:

> An action arose out of a three car collision which occurred as follows: Plaintiff was guest passenger in a southbound automobile driven by defendant. Another auto overtook this car just below the crest of a hill. A northbound auto appeared over the hill, and in an effort to avoid a collision, the overtaking car pulled back into the southbound lane early, striking the car in which plaintiff and defendant were riding, causing it to go out of control. Simultaneously, the northbound vehicle, unable to get off the right side of the road in time, struck the overtaking car on its left side as it returned to the southbound lane. At trial plaintiff named the driver of the car he was riding in as defendant. No other driver was present since the oncoming driver was dead and the passing driver was beyond service of process.
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> The investigating officer appeared as a witness for plaintiff. He testified without objection that the passing driver said that he was forced to

1. The origin of the term is unknown. It is not a modern one, however, inasmuch as it appears in 1 Wigmore, Evidence § 15 (1st ed. 1904).
2. Mason v. Fourteen Min. Co., 82 Mo. App. 367, 371 (K.C. Ct. App. 1899).
3. Biener v. St. Louis Pub. Serv. Co., 160 S.W.2d 780, 786 (St. L. Mo. App. 1942) is the first Missouri case to use the term.
4. Young v. Dueringer, 401 S.W.2d 165, 168 (St. L. Mo. App. 1966).
5. 1 Wigmore, Evidence § 15 (3rd ed. 1940).
6. The language is Wigmore's. *Id.* at 304.

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> pass when the defendant slowed down without warning. On cross-examination, defendant asked the officer what the oncoming driver had said about the cause of the accident. Plaintiff objected claiming this called for hearsay testimony.[7]

Should the court allow the evidence? The hearsay statement of the oncoming driver was offered to negate or counter the similar statement attributed to the passing driver by the already admitted testimony of the officer. Clearly, if defendant had duly objected to the officer's testimony regarding the passing driver's statement, and was erroneously overruled, he cannot claim a right to present similar inadmissible evidence, because his objection, in theory, would save him on appeal,[8] and he needs no other protection. However, if he did not object, as here, to the admission of the first evidence, through inadvertence or design, he has no such protection. Thus the question: *Can he protect himself by retorting in kind?*

II. Curative Admissibility

The foregoing question presents a multitude of complex problems to which American courts respond in one of three ways: a minority say absolutely not, a majority say yes, and an intermediate group, following the so called Massachusetts Rule, say sometimes.[9]

A. *The Minority Rule*

In minority rule courts the doctrine is non-existant since the admission of incompetent evidence without objection never justifies a rebuttal in kind. These courts say simply there can be no equation of errors.[10] In these opinions, emphasis is placed on the opposing party's failure to object, reasoning that he has waived his right to object and preserve his appeal,[11] or that parties may not create a right to present incompetent evidence by silence or consent,[12] or that public interest demands that trials not be prolonged by the consideration of irrelevant issues.[13]

B. *The Majority Rule*

At the other extreme, the majority view declares that the opponent may re-

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7. The trial court overruled plaintiff's objection and allowed the evidence. This was affirmed on appeal. Sigman v. Kopp, 378 S.W.2d 544 (Mo. 1964).

8. This protection is often more apparent than real, however, since the court may decide on appeal the erroneous ruling was not sufficiently harmful to warrant reversal and a new trial. *See* Buck v. St. Louis Union Trust Co., 267 Mo. 644, 666, 185 S.W. 208, 214 (1916).

9. The names used to designate the three views are taken from Wigmore, *op. cit. supra* note 5, at 304-307.

10. Laursen v. Tidewater Assoc. Oil Co., 123 Cal. App.2d 813, 268 P.2d 104 (1954); Hall v. Smedley Co., 112 Conn. 115, 151 Atl. 321 (1930); Stapleton v. Monroe, 111 Ga. 848, 36 S.E. 428 (1900); Baltimore & S.R.R. v. Woodruff, 4 Md. 242 (1853); Burnett v. Rutledge, 284 S.W.2d 944 (Tex. Civ. App. 1955).

11. Wickenkamp v. Wickenkamp, 77 Ill. 92 (1875).

12. Maxwell v. Durkin, 185 Ill. 546, 57 N.E. 433 (1900).

13. *Ibid.*

sort to similar inadmissible evidence.[14] Here emphasis is placed on the original party's introduction of improper evidence, the rationale being that he having "opened the door"[15] is estopped from objecting to his opponent's response in kind,[16] or that having used similar evidence in his own case he has vouched for its validity and is now in no position to complain.[17] These opinions appear to grant the use of curative evidence as a matter of right.

C. *The Massachusetts Rule*

In courts adhering to this view, the opponent may reply with similar evidence whenever it is needed for removing unfair prejudice which might otherwise prevail, but in no other case. This rule is supported by ample authority,[18] and represents the position of the Federal courts as well.[19] In these jurisdictions, the factors considered in determining whether or not sufficient prejudice existed to warrant the curative evidence vary widely from case to case with no apparent logic or pattern. The Massachusetts Rule is clearly the most sophisticated approach to the problem, but its borders are ill defined rendering application uncertain.

D. *A Related Problem Distinguished*

Before going further, a collateral problem closely related to curative admissibility must be distinguished. When a part of a conversation or transaction which is competent is in evidence, the court will often allow the balance of the conversation or transaction into evidence[20] even though it be, for example, hearsay.[21]

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14. Smith v. Rice, 178 Iowa 673, 160 N.W. 6 (1916); Spaulding v. Chicago, St. P. & K. C. Ry. Co., 98 Iowa 205, 67 N.W. 227 (1896); Caldwell v. Miller, 313 S.W.2d 862 (Ky. 1958); McNab v. Jeppesen, 258 Minn. 15, 102 N.W.2d 709 (1960); Wright v. Englebert, 193 Minn. 509, 259 N.W. 75 (1935).

15. Canfield Lumber Co. v. Kint Lumber Co., 148 Iowa 207, 127 N.W. 70 (1910); Marts v. Powell, 176 Mo. App. 124, 161 S.W. 871 (Spr. Ct. App. 1913).

16. Larabee Flour Mills v. West Plains Comm'n Co., 216 Mo. App. 257, 262 S.W. 389 (Spr. Ct. App. 1924); Mason v. Fourteen Min. Co., *supra* note 2.

17. Terry v. Woodmen Acc. Co., 231 Mo. App. 72, 34 S.W.2d 163 (K.C. Ct. App. 1931); Robertson v. Western Union Tel. Co., 186 Mo. App. 281, 172 S.W. 60 (Spr. Ct. App. 1914); Enyeart v. Peterson, 184 Mo. App. 519, 170 S.W. 458 (Spr. Ct. App. 1914).

18. Mowry v. Smith, 9 Atl. 67 (Mass. 1864); Brown v. Perkins, 1 Atl. 89 (Mass. 1861); Medina v. People, 133 Colo. 67, 291 P.2d 1061 (1956); Denver City Trust Co. v. Hills, 50 Colo. 328, 116 Pac. 125 (1911); Roy v. Com., 191 Va. 722, 62 S.E.2d 902 (1951); Graham v. Com., 127 Va. 808, 103 S.E. 565 (1920); Gillett v. Lydon, 40 Wash.2d 915, 246 P.2d 1104 (1952).

19. Teague v. United States, 268 F.2d 925 (9th Cir. 1959); Crawford v. United States, 198 F.2d 976 (D. C. Cir. 1952); Meyers v. United States, 147 F.2d 663 (9th Cir. 1945); Brink v. United States, 60 F.2d 231 (6th Cir. 1932); Gin Bock Sing v. United States, 8 F.2d 976 (9th Cir. 1925); Carver v. United States, 164 U.S. 694 (1897); *But cf.* United States v. Beno, 324 F.2d 582 (2nd Cir. 1963).

20. Waterous v. Columbian Nat. Life Ins. Co., 353 Mo. 1093, 1107, 186 S.W.2d 456, 461 (1945) (recognizes the rule but refuses to apply it since more than a single transaction was involved); Aly v. Terminal R.R. Ass'n. of St. Louis, 336 Mo. 340, 352, 78 S.W.2d 851, 856 (1934); Barton County Rock Asphalt Co. v.

Such evidence is permitted only insofar as it will eliminate confusion or facilitate the jury's evaluation of the competent portion. In these cases, the latter evidence derives its admissibility from what has gone before, but strictly speaking, is not a response in kind to inadmissible evidence in the first instance. Missouri courts often fail to make this distinction, however, validating such action at trial under the banner of curative admissibility, or citing these cases in support of their ruling in a pure curative admissibility situation.[22] These cases are a product of and contribute to the confusion in this state and should be regarded as a separate and distinct problem.

III. The Doctrine in Missouri

A. *History and Development*

It is impossible to trace a logical development of the doctrine through the Missouri cases. Because of the many variables which enter into the fact situations giving rise to use of the doctrine,[23] and the varying bodies of law in the United States to which Missouri courts have been referred over the years, this state has embraced, at various times, each of the three predominant views on curative admissibility.

The earliest cases reflect a consistent trial court practice of admitting the proffered curative evidence,[24] and appellate courts consistently affirmed these rulings.[25] These opinions do not focus squarely on the issue, however, and deal with the alleged error in very general language, stating that appellant's right to complain was foreclosed by his having adduced similar evidence;[26] or that appellant was as much responsible for the alleged error as his opponent;[27] or that

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City of Fayette, 236 Mo. App. 505, 509, 155 S.W.2d 771, 772 (K.C. Ct. App. 1941); Meinhardt v. White, 341 Mo. 446, 453, 107 S.W.2d 1061, 1065 (1937); Miller v. Smith, 275 S.W. 769, 772 (K.C. Mo. App. 1925).

21. Peterman v. Crowley, 226 S.W. 944, 946 (Mo. 1920); Kelley v. Hudson, 407 S.W.2d 553, 556 (Spr. Mo. App. 1966); Schnurr v. Perlmutter, 71 S.W.2d 63, 67 (St. L. Mo. App. 1934); Rodgers v. Schroeder, 220 Mo. App. 575, 582, 287 S.W. 861, 864 (St. L. Ct. App. 1926).

22. Kelley v. Hudson, *supra* note 21, at 557 citing Young v. Dueringer, 401 S.W.2d 165 (St. L. Mo. App. 1966) and Dorn v. St. Louis Pub. Ser. Co., 250 S.W.2d 859 (St. L. Mo. App. 1952).

23. The author was unable to discern any pattern developing around the existence or non-existence of a single variable in the cases; *e.g.* whether or not there had been an objection to the original evidence, whether or not the trial court allowed the curative evidence, how the curative evidence related to the issues in the case.

24. Carpenter v. Kansas City Southern Ry. Co., 189 Mo. App. 164, 169, 175 S.W. 234, 236 (Spr. Ct. App. 1915); Enyeart v. Peterson, *supra* note 17, at 522, 170 S.W. at 459; Robertson v. Western Union Tel. Co., *supra* note 17, at 285, 172 S.W. at 61; Harmon v. Stuyvesant Ins. Co. of New York, 170 Mo. App. 309, 316, 156 S.W. 87, 89 (K.C. Ct. App. 1913); Marts v. Powell, *supra* note 15, at 132, 161 S.W. at 873; McGinnis v. R. M. Rigby Printing Co., 132 Mo. App. 227, 233, 99 S.W. 4, 7 (K.C. Ct. App. 1906).

25. *Ibid.*

26. Enyeart v. Peterson, *supra* note 17, at 522, 170 S.W. at 459.

27. Marts v. Powell, *supra* note 15, at 132, 161 S.W. at 873.

appellant invited the evidence.[28] All of these opinions are grounded upon an estoppel theory, and place the emphasis on the opponent's previous breach of the rules of evidence. Although no single early opinion attempts to state a rule, these cases when viewed together, appear to adopt the majority view[29] allowing curative evidence as a matter of right. This interpretation is buttressed by the fact that these cases involve everything from evidence beyond the scope of the pleadings[30] to hearsay,[31] and yet no opinion discusses prejudice or the character of evidence to which this "rule," if such it was, should be properly applied.

Then in 1916 the Supreme Court of Missouri decided *Buck v. St. Louis Union Trust Co.*,[32] a will contest. Contestant appealed an adverse judgment at trial, arguing that the refusal below to allow him to introduce curative evidence constituted error. The court, after agreeing that respondent's evidence was "wholly inadmissible and should have been excluded,"[33] held the exclusion of appellant's curative evidence was not error and affirmed. The opinion emphatically embraced the minority rule,[34] and ignored the existing line of Missouri cases discussed previously. This statement of policy on curative admissibility was extremely unfortunate since appellant had duly objected to respondent's evidence below and had been in the court's own words "erroneously overruled,"[35] thus providing a sufficient ground for a ruling on appeal without ever reaching the issue of his attempt to offer curative evidence. The court's refusal to reverse judgment was based upon its finding that none of the errors at trial was sufficient to warrant overthrowing what it regarded as a just result.[36]

Despite the *Buck* dictum, the court in *Pinson v. Jones*,[37] another will contest, refused to reverse the trial court's admission of curative opinion evidence by lay witnesses regarding testamentary capacity. The court found it unnecessary to consider the merits of appellant's objections since he had pursued the same practice in presenting his case, and was in no condition to complain of his opponent's incompetent evidence.[38] The fact that the evidence in question in this case was highly material (the court noted that without it neither side would have any evidence on which to go to the jury)[39] appears to have been a major reason for the holding. However, three years later in *Jones v. Werthan Bag Co.*,[40] precisely the converse was the basis for an identical holding. The court held the admission of

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28. Robertson v. Western Union Tel. Co., *supra* note 17, at 285, 172 S.W. at 61.
29. See text *supra*, part II B.
30. McGinnis v. R. M. Rigby Printing Co., 122 Mo. App. 227, 99 S.W. 4 (K.C. Ct. App. 1906).
31. Harmon v. Stuyvesant Ins. Co. of New York, 170 Mo. App. 309, 156 S.W. 87 (K.C. Ct. App. 1913).
32. 267 Mo. 644, 185 S.W. 208 (1916).
33. *Id.* at 661, 185 S.W. at 213.
34. *Id.* citing Stapleton v. Monroe, *supra* note 10.
35. *Id.* at 661, 185 S.W. at 213.
36. *Id.* at 666, 185 S.W. at 214.
37. 221 S.W. 80 (Mo. 1920).
38. *Id.* at 87.
39. *Ibid.*
40. 254 S.W. 4 (Mo. 1923).

curative evidence below was not error on the ground that such testimony related to a "collateral issue."[41] The court stated, *inter alia,* that "in common fairness, it was within the discretion of the court to permit plaintiffs . . . to refute the statement and remove the prejudice . . . ."[42] In support of this position, the court cited several of the pre-*Buck* estoppel decisions.[43] This was the first opinion to discuss the issue of prejudice, and introduced the collateral versus non-collateral evidence distinction. Subsequent cases did not follow the *Jones* view, however, and affirmed the admission of curative evidence without regard for the nature of the original or rebutting evidence.[44] By 1936 the Kansas City Court of Appeals went as far as to assert the estoppel theory cases constituted a "well settled rule in this state," but made no attempt to state the rule or explore its boundaries.[45]

In 1942 the St. Louis Court of Appeals applied the doctrine by name in *Biener v. St. Louis Public Service Co.* and departed from previous cases by asserting Missouri adhered to the Massachusetts Rule set out by Professor Wigmore[46] citing several of the earlier cases.[47] The suit for personal injuries went to trial on an agreed statement of facts with defendant public service company admitting responsibility for the streetcar collision, but denying plaintiff was injured. All of defendant's cross-examinations were calculated to create the inference that the force of the collision was too slight to injure anyone. A plaintiff witness was then allowed to state, over a hearsay[48] objection, that another passenger was confined to the hospital for a week following the collision. In affirming this ruling the court stated:

41. *Id.* at 10. The word "collateral" is used by the courts as well as by the author to denote the opposite of relevant and material. Apparently the frequent use of the word by the courts is an attempt to avoid confusion between collateral matters and matters which may be relevant but not material or material but not relevant.

42. *Id.* at 11.

43. Jones v. Werthan Bag Co., *supra* note 40, at 11, citing Enyeart v. Peterson, *supra* note 17, and Marts v. Powell, *supra* note 15.

44. Union Electric Light and Power Co. v. Snyder Estate Co., 65 F.2d 297, 311 (8th Cir. 1933) (relevant hearsay; reversed on other grounds); Massman v. Muehlebach, 231 Mo. App. 72, 80, 95 S.W.2d 808, 814 (K.C. Ct. App. 1936) (evidence made relevant by affirmative defense); McCall v. City of Butler, 285 S.W. 1018, 1020 (K.C. Mo. App. 1926) (evidence of repairs); Larabee Flour Mills v. West Plains Comm'n. Co., 216 Mo. App. 257, 263, 262 S.W. 389, 391 (Spr. Ct. App. 1924) (parole to vary the terms of a contract); *But* Long v. F. W. Woolworth Co., 232 Mo. App. 417, 427, 109 S.W.2d 85, 91 (K.C. Ct. App. 1937) (irrelevant evidence); Terry v. Woodmen Acc. Co., 225 Mo. App. 1223, 1228, 34 S.W.2d 163, 165 (K.C. Ct. App. 1931) (irrelevant testimony); Rainier v. Quincy O. & K. C. R. Co., 271 S.W. 500, 503 (Mo. 1925) (irrelevant evidence).

45. Massman v. Muehlebach, *supra* note 44, citing Larabee Flour Mills v. West Plains Comm'n. Co., *supra* note 44.

46. 160 S.W.2d 780, 786 (St. L. Mo. App. 1942).

47. Including Jones v. Werthan Bag Co., *supra* note 40; Long v. F. W. Woolworth Co., 232 Mo. App. 417, 109 S.W.2d 85 (K.C. Ct. App. 1937); and Enyeart v. Peterson, *supra* note 17.

48. This was an objection to hearsay conduct; the fact that a third party spent a week in a hospital intended as a statement that the collision injured someone.

> Where . . . *collateral matters* are once permitted . . . without objection when first offered . . . , if by limiting full inquiry an *unfair advantage* would accrue to one of the parties, the trial court should not be convicted of abuse of discretion by allowing full scope to the inquiry . . . . The effect of ruling out the evidence complained of by appellant herein would have been to deny respondent the right to rebut the prejudicial effect of evidence brought out by appellant . . . .[49]

The *Biener* opinion,[50] by asserting Missouri followed the Massachusetts Rule reinforced the *Jones*[51] view regarding the importance of prejudice or unfair advantage as a big factor. These two cases, particularly *Biener* because of its emphatic statement of the rule, indicated a trend away from the previous estoppel cases embracing the curative-evidence-as-a-matter-of-right view in favor of the more sophisticated Massachusetts Rule. Furthermore, since both involved irrelevant, immaterial evidence, and rely heavily on this fact, Missouri appeared to be limiting the application of the Massachusetts Rule to cases where the evidence in question was collateral.[52]

Just two years later the development of a Missouri rule took a long step backward in an opinion by the same court that decided *Biener*. *Longmire v. Diagraph-Bradley Stencil Machine Corp.*[53] was an action for payment for services rendered in procuring a third party's investment of capital in defendant's business. Without objection plaintiff was allowed to state that at the time of making the contract he expected to be paid. On appeal defendant claimed error in the court's exclusion of his own evidence to the effect that he never intended to pay. Defendant argued that plaintiff having adduced similar evidence was estopped from objecting to his. The court squarely rejected this, stating *inter alia* "We do not so understand the law. Because an . . . improper question is asked and answered, it will not justify another that is equally obnoxious or objectionable."[54] The court continued:

> It is insisted . . . as plaintiff opened the door for the admission of the . . . incompetent matter he must take the consequences. This view loses sight of the well-established rule that one error of the court does not authorize its repetition by the opposite party . . . .[55]

With this statement, Missouri returned to 1916 and the *Buck*[56] minority rule. This assertion of the court's opinion regarding curative admissibility was altogether un-

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49. Biener v. St. Louis Pub. Ser. Co., *supra* note 46, at 785 (emphasis added).
50. *Id.* at 786.
51. Jones v. Werthan Bag Co., *supra* note 40.
52. The evidence in *Biener* concerned the conduct of a third person not a party to the suit, and therefore, had no bearing on the issue of whether or not plaintiff was injured by defendant. In *Jones,* the evidence in question related to whether or not a plaintiff's witness had been previously discharged from defendant's employ for inefficiency. Thus it was inpeaching evidence and not directed to the central issue of defendant's liability.
53. 176 S.W.2d 635 (St. L. Mo. App. 1944).
54. *Id.* at 646.
55. *Id.* citing Redman v. Peirsol, 39 Mo. App. 173 (St. L. Ct. App. 1890).
56. Buck v. St. Louis Union Trust Co., *supra* note 32.

necessary here just as it was in *Buck*. This is so because appellant contented since plaintiff offered inadmissible testimony on one issue, to wit: Longmire's intention, defendant had a right to offer inadmissible testimony on an entirely different question, to wit: his own intention. The fact, if it be a fact, that defendant did not expect to pay, would in no manner prove that Longmire did not expect pay. Following this analysis, the court concludes defendant's offer could not have been for the purpose of meeting an issue which plaintiff improperly brought into the case.[57] Viewed thus, the case does not present a curative admissibility situation, although defendant thought it did and gave the court an opportunity to reassert the minority rule. That the *Longmire* opinion tempered its statement of the minority view by asserting such was not the rule when the evidence in question was purely collateral,[58] thus appearing to distinguish *Jones* and *Biener,* proved to be a short lived exception to its statement of the law. In *Shepard v. Shepard*[59] two years later, a trial court's allowance of curative evidence on a collateral point was reversed[60] citing *Longmire, Redman,*[61] and *Buck.*

In 1952 a landmark decision was rendered. The comprehensive opinion in *Dorn v. St. Louis Public Service Co.*[62] faced the conflict of Missouri opinions and attempted to resolve it. In plaintiff's action for injuries sustained in a collision between it and a streetcar, plaintiff had judgment in circuit court and defendant appealed. In the presentation of its case plaintiff, without objection, read into evidence portions of the hospital records relating to the diagnosis and treatment of plaintiff's injury. Just prior to the closing of its case plaintiff formally offered into evidence all of its exhibits including portions of the hospital records. These were admitted without objection. Defendant's doctor then testified that from his examination of x-rays of plaintiff's right shoulder, the fracture was much older than the date of the accident in question. Defendant then offered x-ray reports which were part of the hospital records brought into court in response to a *subpoena duces teucum* served on the hospital by plaintiff. Plaintiff objected to the x-ray

57. Longmire v. Diagraph-Bradley Stencil Mach. Corp., *supra* note 53, at 647. The court's analysis and conclusion that the proffered curative evidence went to a different issue than the original evidence is open to question. The ultimate issue in the case was the nature of the agreement between the parties. Surely the expectations of each party must have arisen from the nature of their relationship and their agreement. Therefore, each party's evidence bore on the same issue: their actual agreement. Similarly, in the example set out in the Introduction, *supra,* the ultimate issue was the cause of the accident. Thus, the passing driver's understanding of the cause could be rebutted by the oncoming driver's belief regarding the cause of the collision. However, if the *Longmire* court's analysis is applied to that case, the oncoming driver's belief must be offered to rebut the *fact* of the passing driver's belief, which it clearly can not do. Therefore, it is obvious that when applying the doctrine of curative admissibility, the courts must view the original and rebutting evidence in the light of how both bear on the ultimate issue to which they were directed. To do otherwise, results in hopeless confusion regarding the proper application of the doctrine.

58. *Id.*

59. 194 S.W.2d 319 (K.C. Mo. App. 1946).

60. *Id.* at 324.

61. Redman v. Peirsol, *supra* note 55.

62. 250 S.W.2d 859 (St. L. Mo. App. 1952).

interpretation report because this would inject into the trial the opinion of an expert not subject to cross-examination. The court sustained this objection excluding defendant's evidence as hearsay. The offer of proof showed the reports tended to prove the injury was an old one antedating the accident in question. Defendant claimed this ruling was reversible error, arguing his curative evidence ought to have been admitted. Agreeing, the court reversed and remanded. After noting that neither party made any attempt to qualify the records as evidence admissible under section 490.680, RSMo 1949,[63] the court continued:

> . . . respondent was the first to resort to hearsay in support of his cause, [and] . . . under the circumstances [is] in no position to object to appellant meeting it with evidence of like kind. The doctrine of curative admissibility is applicable. . . . Appellant was unfairly prejudiced by the action of the trial court in excluding appellant's Exhibit . . . . The evidence should have been admitted.[64]

On rehearing, plaintiff-respondent contended the court's holding was in conflict with *Buck v. St. Louis Union Trust Co.*[65] In rejecting this argument the court distinguished that case from the instant one by pointing out the evidence in *Buck* was irrelevant and therefore inadmissible. The opinion then proceeded to analyze its holding as follows:

> In the case at bar, the evidence offered by appellant and excluded by the court was, in fact, *logically relevant,* and was offered to rebut evidence which went into the record without objection on the part of appellant. Appellant thus elected to protect itself, not by objecting to respondent's evidence on the ground that no proper foundation had been laid, but by using portions of the hospital record favorable to its cause which had been brought into court by respondent, but not offered by him. . . .
>
> The rule that irrelevant, incompetent, or illegal evidence may be admitted to rebut evidence of like character is rightly limited to cases where the rebuttal is confined to the evidential fact to which the original evidence was directed. It does not permit the indiscriminate introduction of like evidence touching other issues. The permissible office of such evidence is merely to neutralize by direct contradiction the force and effect of the inadmissible evidence offered by the adverse party, and afford reciprocal rights to the parties in the use of evidence which the original party has in effect vouched for as being the kind of evidence properly to be considered.
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> Nor is the rule confined merely to the introduction of immaterial evidence, as contended by respondent. It applies not only to the subject matter of evidence, but also its nature.[66]

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63. Now § 490.680, RSMo 1959. A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.
64. Dorn v. St. Louis Pub. Serv. Co., *supra* note 62, at 865.
65. 267 Mo. 644, 185 S.W. 208 (1916).
66. 250 S.W.2d at 866 (emphasis in original).

The *Dorn* analysis is the most comprehensive of the Missouri opinions dealing with curative admissibility. Subsequent cases, either expressly or impliedly, follow its holding and analysis with statements such as ". . . having injected the matter into the case for the purpose of deriving a benefit, [appellant] is in no position to complain;"[67] or "the sour must be taken with the sweet;"[68] or "it was evidence of the same caliber as that originally brought into the case by plaintiff. . . . [and] having opened the door, appellant is in no condition to complain . . . ;"[69] or ". . . having voluntarily selected the area of combat [plaintiff] should not be permitted to complain on appeal that defendants met her on her selected ground."[70]

B. *The Modern Rule*

The St. Louis Court of Appeals statement of the Missouri Rule in *Dorn*[71] can not be improved upon. Viewed generally it is an adoption of the Massachusetts Rule. However, upon closer analysis it reveals a more sophisticated and definitive approach to the curative admissibility problem. As it stands today, the Missouri Rule contains the following elements:

1. The original evidence must have been admitted without objection (either through accident or design) so that the opposing party has no recourse save curative evidence.
2. The curative rebuttal must have been confined to the evidential point to which the original evidence was directed.
3. The court must find the curative evidence was required to neutralize and contradict an unfair advantage gained by the opposing party's use of the original improper evidence.
4. If all of the above elements are present, the Rule is applicable without regard for the nature or subject matter of the evidence in question.

Wigmore[72] indicates the divergent views on curative admissibility in the United States are the result of conflicting trial rulings and the refusal of appellate courts to substitute judgment on the matter and reverse. Noting that in nearly all the minority rule cases the evidence was excluded at trial, and that the converse is true in majority rule jurisdictions, he concludes the problem is one of trial court discretion, modified only by an occasional appellate reversal in Massachusetts Rule cases when the prejudice resulting from the ruling below is great enough to warrant it.[73] The divergent opinions in Missouri are no doubt in part a result of this practice since a survey of the cases reveals an overwhelming majority of the opinions affirm the ruling below and adopt whichever view is necessary to support it. The Missouri Rule as stated in *Dorn,* however, appears to be sufficiently comprehensive, yet flexible enough, to survive this procedural barrier to the formula-

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67. State *ex. rel.* State Highway Comm'n. v. Schutte Inv. Co., 334 S.W.2d 241, 247 (Mo. 1960).
68. Vanneman v. W. T. Grant Co., 351 S.W.2d 729, 731 (Mo. 1961).
69. Sigman v. Kopp, 378 S.W.2d 544, 547 (Mo. 1964).
70. Eddings v. Keller, 400 S.W.2d 164, 174 (Mo. 1966).
71. Dorn v. St. Louis Pub. Serv. Co., *supra* note 62, at 866.
72. 1 WIGMORE, EVIDENCE § 15 (3rd ed. 1940).
73. *Id.* at 309.

tion of a consistent rule. *Young v. Dueringer*,[74] the most recent Missouri opinion, took a crucial step toward crystalizing the *Dorn* statement as the Missouri Rule. In that case the trial court sustained the original party's objection to the proffered curative evidence. But instead of affirming the ruling as previous courts had done when faced with such a situation,[75] thereby embracing the minority rule, the court reversed and remanded.[76] The opinion quotes the language of *Dorn*[77] and indicates a willingness on the part of Missouri appellate courts to apply the *Dorn* rule on the appellate level. Thus, while the ruling below is a factor to be considered in resolving the question, Missouri appears unwilling to leave the matter exclusively to the trial judge's discretion, and has found the *Dorn* language to be flexible enough to allow a substitution of judgment on a question of the admissibility of evidence.

IV. Problems of Application

A. *Theory*

The Missouri Rule is grounded upon an estoppel theory, to wit: the party objecting to the curative evidence is estopped by virtue of his prior conduct, and, given the other required elements, the evidence must be allowed. However, there is a series of recent Missouri cases which reach exactly the same result, but do so on a waiver theory.[78] These cases take the position that the right to object to the curative evidence was waived when the objector presented similarly inadmissible evidence. Without exploring the niceties of distinction between waiver and estoppel, it may safely be said that this approach amounts to the Missouri Rule in different language. A recent case employs both terms in the same opinion[79] with the result that whatever label is attached to the theory, the Missouri Rule remains unaffected. Hopefully this situation will not breed needless confusion, and divert opinions from a clear analysis of the problem.

B. *Scope*

What is the scope of the Missouri Rule? What kinds of situations are properly subject to the rule? These questions remain inadequately answered, and will prove to be the largest obstacle to the application of the modern Missouri Rule. The *Dorn* assertion that the Rule applies ". . . not only to the subject matter of evidence, but also its nature"[80] is unfortunately too broad a statement to provide

74. 401 S.W.2d 165 (St. L. Mo. App. 1966).
75. With the exception of Dorn v. St. Louis Pub. Serv. Co., *supra* note 62.
76. Young v. Dueringer, *supra* note 74, at 168.
77. *Id.* at 167.
78. Land Clearance Authority v. Doerenhoefer, 404 S.W.2d 385, 388 (Mo. En Banc 1966); Alvey v. Sears, Roebuck and Co., 360 S.W.2d 231, 234 (Mo. 1962); Jackson County v. Meyer, 356 S.W.2d 892, 897 (Mo. 1962); Bowyer v. Te-co, Inc., 310 S.W.2d 892, 895 (Mo. 1958); Moore v. Adams' Estate, 303 S.W.2d 936, 939 (Mo. 1957).
79. Young v. Dueringer, *supra* note 74, at 167.
80. Dorn v. St. Louis Pub. Serv. Co., *supra* note 62, at 867.

much of a guideline. If the "subject matter" of evidence is that which is considered in determining its relevancy and materiality, and the "nature" of evidence refers to whether it is characterized as hearsay, opinion, or fact testimony, then the scope of the rule is unlimited. It would apply equally to all evidentiary situations.

Perhaps a better approach would be to analyze the particular evidence in question to determine *why* it is inadmissible. Is it because of a rule of law as with parole evidence offered to alter or vary the terms of a written contract? Or, is it because of an overriding social policy as in the exclusion of evidence of repairs as an admission of fault? Or, is it inadmissible because of a rule of evidence in favor of only the best evidence at trial to the exclusion of that which is of little probative value and may tend to confuse the jury as in the case of hearsay? Missouri has applied the rule in each of the above situations without comment or analysis.[81] Further refinement of the Missouri Rule is hampered by the fact that terms such as collateral, incompetent, or illegal, when applied in opinions to evidence without analysis as to why the evidence is so classified, or for what purpose it was offered, or how it related to the specific issues, do not mean anything. Yet Missouri opinions are replete with these terms, and as long as this situation continues it will be difficult to find a basis on which to limit the application of the Missouri Rule.

There remains one further problem relating to the scope of the rule. The Missouri Rule, set out previously, requires that the curative rebuttal have been confined to the evidential point to which the original evidence was directed.[82] Most courts are quite strict on this element. However, in *Zarisky v. Kansas City Public Service Co.*,[83] plaintiff, cross-examining defendant's doctor, was permitted to make improper inquiries concerning the frequency with which the doctor had appeared in personal injury cases as a witness for defendant solely because defendant had pursued a similar line of impeachment when cross-examining plaintiff's doctor.[84] The basis for the holding was curative admissibility; the court stating defendant was in no position to complain.[85] This case broadens the rule to encompass even improper trial tactics, and does not limit curative evidence to direct rebuttal of the original evidence since the improper impeachment of plaintiff's doctor is in no way cured by similarly impeaching defendant's. Whether this case is the isolated result of careless analysis, or will serve to broaden the rule in the future remains to be seen. If it should be followed, curative admissibility could serve as a means

81. Sigman v. Kopp, *supra* note 69 (hearsay); McCall v. City of Butler, *supra* note 44 (repairs); Larabee Flour Mills v. West Plains Comm'n. Co., *supra* note 44 (parole evidence).

82. See text *supra*, part III B.

83. 239 Mo. App. 396, 186 S.W.2d 854 (K.C. Ct. App. 1945).

84. In the cross-examination of plaintiff's doctor, defendant inquired at length, over plaintiff's objection, concerning the number of personal injury cases in which the doctor had testified wherein one of the counsel for plaintiff in the case at bar was the attorney for plaintiffs. Subsequently, plaintiff entered into a similar field of inquiry wherein it was shown by naming specific cases that defendant's doctor usually testified for defendant, and always said plaintiff was not injured or at least not by any act of defendant, and that often jury verdicts proved him to have been wrong.

85. Zarisky v. Kansas City Pub. Serv. Co., *supra* note 83, at 402, 186 S.W.2d at 857.

for turning the adversary system into an exercise in gamesmanship and double dealing which, if carried to its logical extreme, could corrupt all established rules of evidence.

V. Conclusion

The divergent views on the use of curative evidence which plagued Missouri courts, and persist across the United States are most adequately explained as reflections of conflicting social policies. First, we have a policy that trials ought not be cluttered with all manner of collateral matters and improper evidence. The courts are burdened enough when their business is expedited in a proper manner. Thus, the rule that one error does not justify another, and that parties may not create a right to try immaterial matters by silence or consent. Second, there is a policy that one ought not be allowed to profit from his own willful violation of the rules.[86] Therefore, allow curative evidence and thus remove his advantage. This view has the additional function of serving a policy against needless and costly appeals by curing the matter at trial. Finally, a directly conflicting policy that one ought not be permitted ultimately to benefit from his own mistake, to wit: his failure to object to the original evidence. Thus, the rule that curative evidence be denied except in those cases where the prejudice resulting from such a ruling is so manifest that the second social policy prevails over the third.

Viewed in this light, the Missouri Rule as stated in *Dorn v. St. Louis Public Service Co.*[87] and applied in *Young v. Dueringer*[88] attains a stature sufficient to warrant its recognition as a solution to the problem of the admissibility of curative evidence. The elements of the Rule[89] are definitive enough to constitute a workable rule, and flexible enough to satisfy the conflicting dictates of social policy. Improper evidence on a matter so far removed from the issues of the case as to violate the policy against cluttered trials could hardly result in the degree of prejudice required by the third element of the Missouri Rule to warrant curative evidence. Thus, Missouri could refuse the curing evidence without doing violence to the Rule. The policy against allowing one to profit from his own violation of the rules of evidence is satisfied since the fact that he has gained an advantage requires the allowance of curative evidence. Finally, the Missouri Rule will not permit one to profit from his own failure to object, since the court can find the curative evidence accomplished more than its permissible office of neutralizing an advantage gained by direct contradiction. Such a finding would authorize the court to reverse the admission of the curative evidence below and order a new trial.

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86. He would indeed profit inasmuch as inadmissible evidence, once received without objection, is to be considered and given its natural probative effect as if it were in law admissible. *See* Diaz v. United States, 223 U.S. 442, 450 (1912); Fellows v. Farmer, 379 S.W.2d 842, 846 (Spr. Mo. App. 1964); Turner v. Yellow Cab Co., 361 S.W.2d 149, 154 (Spr. Mo. App. 1962); Edmisten v. Dousette, 334 S.W.2d 746, 753 (Spr. Mo. App. 1960) (and cases collected note 13 therein).
87. 250 S.W.2d at 886.
88. 401 S.W.2d 165.
89. See text *supra,* part III B.

Originally, the doctrine of curative admissibility was the product of an attempt on the part of trial courts to allow a wronged party to correct the error. However, Missouri appears to have developed a rule of appellate review, which enables the reviewing court to deal with any situation and put the parties back on an even basis. The Missouri Rule represents a long process of evolution, and satisfies the requirements of a sophisticated, workable rule. Although problems remain regarding its proper application, these are minor and should prove no barrier to its development into a recognized and established rule of law.

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