CONTRIBUTORY NEGLIGENCE OF A MINOR AS A MATTER OF LAW IN MISSOURI

James W. Starnes†

INTRODUCTION

With respect to the degree of care which must be exercised by a child, for purposes of determining whether he is guilty of negligence or contributory negligence, the general rule is stated that he must conform to that standard of conduct to be expected of a child of similar age, experience and intelligence.[1] While it may be said that the courts of Missouri are generally in accord with this rule, the cases have varied widely in the application thereof. As a matter of fact, it has been admitted by the Supreme Court of Missouri that the Missouri cases involving the issue of contributory negligence of a minor as a matter of law "are in irreconcilable conflict."[2] With this in mind, the maxim that each case must be decided upon its own facts seems particularly appropriate to the determination of whether a minor has, in a given case, been contributorily negligent as a matter of law. However, to facilitate analysis of the Missouri cases, they should be classified at least according to the general types of factual situations involved therein. This article will attempt to make such an analysis, and, to that end, will be based upon a classification involving the following four general categories: (1) Cases involving minors who were injured in rail crossing accidents; (2) Attractive nuisance cases; (3) Cases in which minors were injured as a result of their employment, usually while operating machinery; and (4) Cases where minors and adults were injured while in the attempt to alight from public carriers.

It should be noted, in the consideration of this problem, that contributory negligence is an affirmative defense, and that the rules are rather stringent when this question is presented as a matter of law.[3]

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† Member of the Missouri Bar; associated with Stinson, Mag, Thomson, McEvers & Fizzell, Kansas City, Mo.

1. Restatement, Torts §§ 464(2), 283, comment *e* (1934).

2. Cathey v. De Weese, 289 S.W.2d 51, 54 (Mo. 1956).

3. In Thompson v. Byers Transp. Co., 239 S.W.2d 498, 499-500 (Mo. 1951), it was stated:

> The burden of establishing plaintiff's contributory negligence falls upon the defendant unless it be established as a matter of law by plaintiff's evidence. With defendant carrying the burden of proof, plaintiff's contributory negligence most frequently is a fact issue for the jury for the credibility of the witnesses is involved, especially where there is a conflict in the testi-

This principle, when coupled with the rule that a minor is not bound by the standards of conduct of the reasonably prudent adult, but need exercise only that degree of care to be expected of children of like age, intelligence and experience, seemingly could be used to construct a strong argument in support of the position that the issue whether a minor plaintiff was guilty of contributory negligence is a question for the jury and, therefore, not a matter subject to determination as a matter of law.

A. Cases Involving Minors Who Were Injured in Rail Crossing Accidents.

Probably the oldest Missouri case involving the question of contributory negligence of a minor as a matter of law was *Berger v. Missouri Pac. Ry.*[4] In this case, plaintiff, a nine year old boy, was injured while attempting to climb between two cars of a train stopped at a crossing and the train moved without warning. Plaintiff had been waiting for the crossing to be unblocked for about fifteen minutes prior to his attempt to climb between the cars. A judgment for plaintiff was affirmed by the Supreme Court of Missouri, which held that whether plaintiff was guilty of contributory negligence was a question for the jury. The court stated:

> Common experience and observation teach us that due care on the part of an infant does not require the judgment and thoughtfulness that would be expected of an adult person under the same circumstances. *In the conduct of a boy, we expect to find impulsiveness, indiscretion and disregard of danger, and his capacity is measured accordingly.* A boy may have all the knowledge of an adult respecting the dangers which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness and discretion to avoid them, which are possessed by the ordinarily prudent adult person. Hence, the rule is believed to be recognized in all the courts of the country, that a child is not negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity. Whether he used such care in a particular case, is a question for the jury.[5]

Notwithstanding the emphatic language of the *Burger* case, however, it was decided twenty years later, in *Cherry v. St. Louis &*

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mony, the same as is defendant's actionable negligence ordinarily a fact issue. . . . The whole evidence and all legitimate inferences deducible therefrom are viewed in the light more favorable to plaintiff and taken as true while the evidence and inferences favorable to defendant are disregarded in ruling the issue of contributory negligence as a matter of law.

See also Johnson v. Lee Way Motor Freight, Inc., 261 S.W.2d 95 (Mo. 1953).

4. 112 Mo. 238, 20 S.W. 439 (1892).

5. Id. at 249-50, 20 S.W. at 441. (Emphasis added.)

S.F.R.R.,[6] upon virtually identical facts, that a thirteen year old plaintiff was guilty of contributory negligence as a matter of law. While other grounds were also the basis for the reversal of the judgment for plaintiff, the court stated that because plaintiff's testimony indicated that he was as intelligent as any of the adult witnesses, it was error to allow the jury to consider the plaintiff's age in passing on the question of contributory negligence. That this decision is erroneous seems too obvious for comment. The fact that plaintiff was highly intelligent should not prevent his age from being considered, inasmuch as experience and prudence are also factors involved in the determination of the question whether due care was exercised.

In the case of *Holmes v. Missouri Pac. Ry.*,[7] an action for wrongful death, plaintiff's child, an eight year old boy, was struck and killed as he ran across defendant's tracks at a crossing, without looking to see if a train was approaching. Had he looked, he would have seen the train at a distance of 500 to 700 feet. A judgment for defendant was reversed upon the theory that the question whether the child was contributorily negligent should not have been decided by the court as a matter of law, but should have been submitted to the jury.

McGee v. Wabash R.R.,[8] was a wrongful death action which involved facts similar to those in the *Holmes* case. Plaintiff's thirteen year old child was killed by defendant's train, which was traveling in the country at a speed of 40 to 50 miles per hour. At a distance of six feet from the crossing, an approaching train could be seen at a distance of 40 to 100 feet. The boy was killed when he walked across the track without looking for an approaching train. It was held that the child was guilty of contributory negligence as a matter of law.

In *Spillane v. Missouri Pac. Ry.*,[9] plaintiff, a boy eleven years of age, was crossing a series of railroad tracks while dragging a piece of ice which was tied to his arm with a length of string. Defendant's train ran over the string causing plaintiff to be pulled against the train and injured. Plaintiff had walked slowly across the track without looking for an approaching train. It was held that a judgment for defendant should be affirmed on the theory that plaintiff was guilty of contributory negligence as a matter of law.

Where a nine year old boy was killed by a street car when he darted from behind another, it was held that a judgment for plaintiff should be reversed for the reason that defendant was not negligent and that the boy was guilty of contributory negligence as a matter of law.[10]

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6. 163 Mo. App. 53, 145 S.W. 837 (1912).
7. 190 Mo. 98, 88 S.W. 623 (1905).
8. 214 Mo. 530, 114 S.W. 33 (1908).
9. 135 Mo. 414, 37 S.W. 198 (1896).
10. Battles v. United Rys., 178 Mo. App. 596, 161 S.W. 614 (1913).

Thus, it appears that the Missouri cases involving the issue of a minor's contributory negligence as a matter of law, when injured as a result of a rail crossing accident, are in hopeless disagreement. Either each group of opinions ignores the other, or the courts apparently are able to distinguish the indistinguishable. Of the cases discussed in this area, the oldest, *Burger v. Missouri Pac. Ry.*, is the most strongly written and, it is submitted, the most well reasoned. The *Cherry* case is in conflict with *Burger*, and since the former was decided by the appellate court, it cannot be considered as authoritative. The *Holmes* and *McGee* case involved clearly analogous factual situations. Actually the facts in the *McGee* case were more favorable to the plaintiff than those in *Holmes*, yet in the former plaintiff's conduct was held to constitute contributory negligence as a matter of law, while in the latter the court allowed the issue to go to the jury. *Spillane v. Missouri Pac. Ry.* is a strong opinion favoring a stringent rule as to the measure of care required of a minor. The case of *Battles v. United Rys.*[11] held that the plaintiff was guilty of contributory negligence as a matter of law; however, this holding was unnecessary to reach the result of the case since it clearly appeared that there was no negligence on the part of the defendant. In the light of the widely divergent attitudes expressed by these cases, the conclusion seems unavoidable that the law of Missouri in this area is at best unsettled.

B. Attractive Nuisance Cases

Hight v. American Bakery Co.[12] was an action for damages by a ten year old plaintiff who was injured when defendant's slowly moving wagon ran over his arm while he reached to obtain one of a number of toys thrown into the air by defendant's employees pursuant to an advertising campaign. In reversing a judgment for plaintiff the court stated that plaintiff was guilty of contributory negligence as a matter of law because "he was old enough to know that if he put his arm in front of a moving wheel and left it there, that he was going to be hurt; he was of sufficient discretion to know that. . . ."[13] However, it is to be noted that this appellate court opinion also held that plaintiff had made no case of negligence on the attractive nuisance theory. Since such a case appears to have been clearly shown, and since the contributory negligence issue was treated rather summarily—almost as an afterthought—at the end of the opinion, it is submitted that this case is of doubtful authority.

11. Ibid.

12. 168 Mo. App. 431, 151 S.W. 776 (1912).

13. Id. at 460, 151 S.W. at 784.

Davoren v. Kansas City[14] was a case in which the city was sued for negligence in causing a pond to form by virtue of an earth fill, for a street, across a ravine. Plaintiff's sons, one six years old and the other seven months, were drowned when ice on the pond broke under their weight while they were playing. A judgment for plaintiff, based on the attractive nuisance theory, was affirmed by the Supreme Court of Missouri.

The *Davoren* case was distinguished in *Van Alst v. Kansas City*[15] on the theory that the issue of contributory negligence was not involved in the *Davoren* case. In the *Van Alst* case, Kansas City had constructed a sewer which acted as a dam and caused a pond to form in an old creek bed. Plaintiff's son, an intelligent fourteen year old boy, who had been warned by his father not to swim in the pond, was drowned when he dived into the pond. A judgment for plaintiff was reversed on the ground that plaintiff's son was guilty of contributory negligence as a matter of law.

In *Turner v. City of Moberly*,[16] plaintiff's son, a fourteen year old boy who was unable to swim, was drowned when he fell from a rope which was attached to a tree and upon which he was swinging out over a lake in a city park. In reversing a judgment for plaintiff on the ground that he was contributorily negligent as a matter of law, the court relied upon *McGee v. Wabash R.R.*,[17] and also upon *State ex rel. Kansas City Light & Power Co. v. Trimble*,[18] a case in which it was held that a fourteen year old boy, who climbed an electric light pole in order to attract the attention of some girl friends and was electrocuted as a result, was guilty of contributory negligence as a matter of law.

Henry v. Missouri Pac. Ry.,[19] was a case in which a fourteen year old plaintiff was injured when his leg was crushed between a railroad turntable and a spur track. His leg was crushed while he was sitting on the moving turntable and saw that he would be caught if he did not remove his legs in time. It was held that since plaintiff knew of the danger and of the likelihood of harm, he was guilty of contributory negligence as a matter of law, and therefore judgment for plaintiff was reversed.

It is submitted that in these cases based on negligence for maintenance of an attractive nuisance, there is no logical support for holding that the plaintiffs were guilty of contributory negligence as

14. 308 Mo. 513, 273 S.W. 401 (1925).
15. 239 Mo. App. 346, 186 S.W.2d 762 (1945).
16. 224 Mo. App. 683, 26 S.W.2d 997 (1930).
17. 214 Mo. 530, 114 S.W. 33 (1908).
18. 315 Mo. 32, 285 S.W. 455 (1926).
19. 141 Mo. App. 351, 125 S.W. 794 (1910).

a matter of law. Further, it would seem that the doctrine of contributory negligence is wholly inapplicable, and should not even be an issue for the jury. The law imposes liability for the maintenance of an attractive nuisance because of the likelihood that a child will be attracted and hurt thereby because his tender years prevent him from exercising that degree of prudence necessary to his well-being. How can it be said that a child's action in diving into a pond, swinging on a rope over a lake, playing on ice, or reaching under a wagon to obtain a toy, constitutes contributory negligence which will bar his recovery for damages from a defendant whose negligence consists of creating or maintaining an unreasonable risk that harm will come to some child attracted by the condition which constitutes that risk? Since the very risk created by the defendant, *viz.*, that some child will be attracted and hurt, has caused the injury, it is untenable to say that because the child was attracted and hurt by that condition constituting an unreasonable risk of harm, he is guilty of contributory negligence which will bar his recovery. The very purpose of the attractive nuisance doctrine is to protect children from injury likely to result from their own indiscretion. The more logical basis for denying recovery, in those cases in which the court is of the opinion that the minor plaintiff should not recover, is that the defendant simply is not guilty of negligence, under the attractive nuisance doctrine, as to those children whose discretion is ordinarily sufficient to prevent them from being attracted by the nuisance.

This rationale is also applicable in two analogous cases which involved injury to minors as a result of handling explosives. In *Shields v. Costello*,[20] plaintiff, who was nearly twelve years old, was injured when he exploded a dynamite cap which he had found on defendant's premises. The court held that since plaintiff knew of the danger, that dynamite caps would explode, he was contributorily negligent as a matter of law. A later case, *Lottes v. Pessina*,[21] has held that a plaintiff who was nearly thirteen years of age, and who was injured when he removed and ignited powder found in paper tubes in a city park subsequent to a fireworks display, was not guilty of contributory negligence as a matter of law. Rather, the issue was a question for the trier of fact.

In summation of the cases considered under this heading, two considerations should be noted: (1) Those cases in which the plaintiff has been held contributorily negligent as a matter of law are based on what is submitted to the faulty analysis; and (2) The only supreme court case, *Davoren v. Kansas City*,[22] held the defendant liable on the

20. 229 S.W. 411 (Mo. App. 1921).
21. 174 S.W.2d 893 (Mo. App. 1943).
22. 308 Mo. 513, 273 S.W. 401 (1925).

attractive nuisance theory. While it is true that, as stated by the court in *Van Alst v. Kansas City*,[23] the issue of contributory negligence was not expressly raised in the *Davoren* case, it is submitted that the tenor, substance and spirit of the opinion indicate that contributory negligence would not have been found as a matter of law.

C. Cases in Which Minors Were Injured as a Result of Their Employment, Usually While Operating Machinery

In the recent case of *Wilson v. White*,[24] plaintiff, who was thirteen years, five and one-half months of age, while operating defendant's lawn mower, was injured when the mower ran over his hand. Defendant had cautioned plaintiff generally to be careful and not to get in front of the mower, but had not specifically warned him of its tendency to creep forward. Plaintiff had operated similar mowers previously. The court affirmed a judgment for plaintiff, holding that he was not guilty of contributory negligence as a matter of law when he allowed the mower to creep forward and injure his hand. The court stated that the question whether a minor was contributorily negligent is usually for the jury, and that the question may be determined by the court, as a matter of law, only when reasonable minds cannot differ as to plaintiff's negligence.[25] The court quoted favorably from *Burger v. Missouri Pac. Ry.*[26] and stated in addition that "the law recognizes that thoughtless conduct, impulsive action and immature judgment are concomitants of youth . . . ."[27]

The most recent pronouncement of the Supreme Court of Missouri on the subject of contributory negligence of minors apparently is in *Cathey v. De Weese*.[28] In that case, plaintiff, who was seventeen years and five months old, was injured when he attempted to free a tie arm on a hay baler while the "power take-off" was engaged. His foot was caught in the rollers, necessitating the amputation of one leg. Plaintiff had four years' experience as a farm hand, and had operated the particular machine which caused his injury for about three weeks. He had been warned by defendants, his employers, to be careful and never to go onto the platform without first disengaging the "power take-off." A verdict for plaintiff was reinstated, and a judgment for defendant reversed on the theory that contributory negligence was an issue for the jury. The court stated:

> [Plaintiff's] awareness of some danger is not conclusive evidence of contributory negligence . . . and his testimony that he knew it

23. 239 Mo. App. 346, 186 S.W.2d 762 (1945).
24. 272 S.W.2d 1 (Mo. App. 1954).
25. Id. at 7.
26. 112 Mo. 238, 20 S.W. 439 (1892).
27. 272 S.W. 2d at 7.
28. 289 S.W.2d 51 (Mo. 1956).

> was dangerous to come into contact with the rollers is not an admission that he *appreciated* the hazard. . . . Not only must the minor employee have had knowledge of the danger, it is essential that he must have *appreciated* the hazard before it can confidently be said that there could be no reasonable difference of opinion as to the rashness and imprudence of his conduct.[29]

It is apparent that this case is powerful authority upon which to base an argument that a minor plaintiff, in practically any given case, was not guilty of contributory negligence as a matter of law. Under the theory of *Cathey v. De Weese,* the issue in a case involving the issue of contributory negligence of a minor as a matter of law is whether plaintiff *appreciated* the danger of his action. Under this doctrine, the fact that plaintiff was aware of some danger would not be conclusive evidence that he *appreciated* the hazard. Just what constitutes "appreciation" has not been defined by the Missouri courts. However, the clear import of the *Cathey* case is that the question is one for the consideration of a jury. The case constitutes a further severe erosion upon the defense of contributory negligence and goes far toward eliminating completely the application of the doctrine as a matter of law.

In *Stegmann v. Gerber*[30] it was held to be contributory negligence as a matter of law where plaintiff, who was fifteen years and nine months of age, and who had been through public school and had attended a university for two years, was injured when he put his fingers in the hopper of a sausage grinder.

Boesel v. Wells Fargo & Co.[31] was a case in which plaintiff, a girl fourteen years, eight and one-half months old, was injured while operating an elevator for her employer. She had placed her leg over a safety bar on the elevator and left it there thinking that there was sufficient clearance to allow the elevator to pass the second floor without injury to her, when in fact the space was insufficient. This conduct was held to constitute contributory negligence as a matter of law.

In *Marshall v. United Rys.*,[32] plaintiff, a boy fifteen years of age, jumped down a dark elevator shaft in the mistaken belief that the elevator was fourteen inches below floor level. Plaintiff had been led to believe that the elevator was even with the floor level of a driveway on the opposite side of the shaft because the doors were normally closed when the elevator was not there, and because another emyloyee, who was wearing a white shirt, was standing on a ledge in the darkened shaft while attempting to open the driveway doors. A judgment for plaintiff was affirmed in the appellate court but was reversed by

29. Id. at 56-57.
30. 146 Mo. App. 104, 123 S.W. 1041 (1909).
31. 260 Mo. 463, 169 S.W. 110 (1914).
32. 184 S.W. 159 (Mo. App. 1915).

the supreme court[33] on the theory that this conduct constituted contributory negligence as a matter of law.

While it is true that the *Marshall* and *Boesel* cases seem to represent an attitude contrary to the theory advanced herein, it is to be noted that these cases are readily distinguishable upon their facts, and further that these cases are not of recent date.

Jackson v. Butler[34] was an action by a minor, who was between the ages of seventeen and eighteen, for damages for personal injuries caused by his employer's negligence for failure to provide a safe place to work. Specifically, the negligence alleged was the maintenance of faulty lockers which fell upon plaintiff and injured him. In holding that it was a jury question whether plaintiff was guilty of contributory negligence in failing to observe the dangerous condition of the premises, the court stated that this omission would clearly constitute contributory negligence on the part of an adult, but that where a minor is involved, it becomes a question for the jury. The court, quoting from Beven on Negligence,[35] stated:

> (a) An infant of the age of 14 years is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it, and this presumption will stand till overthrown by clear proof of the absence of such discretion. (b) An infant between the age of ten and fourteen years *must* be shown to have capacity, in the particular instance, to understand and avoid danger. . . . The measure of responsibility varies with each additional year. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of the intelligence, prudence, foresight or strength usual in those of such age.[36]

The court went on to say:

> As the standard of care thus varies with the age, capacity and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated . . . .[37]

The rule as to the presumptions involved in a case in which a minor is charged with contributory negligence has been stated more succinctly as follows:

> [T]he authorities appear to agree that after an infant has reached the age of fourteen, there is no presumption that he is

33. 209 S.W. 931 (Mo. 1919).

34. 249 Mo. 342, 155 S.W. 1071 (1913).

35. See Beven, Negligence 40 (4th ed. 1928).

36. 249 Mo. at 370, 155 S.W. at 1079.

37. Id. at 372, 155 S.W. at 1080, quoting from Holmes v. Missouri Pac. Ry., 190 Mo. 98, 106, 88 S.W. 623, 624-25 (1905).

> incapable of contributory negligence, and that in the absence of proof to the contrary, the legal presumption is that such a child is capable of being charged with contributory negligence . . . .
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> But . . . the fact that a child has reached such an age as to be deemed sui juris or capable of exercising care for his safety does not necessarily mean that he is to be judged by the standard of care required of an adult.[38]

The holding in *Jackson v. Butler* indicates at least an implicit adoption of this statement of the law. In the language of the court, a minor of the age of fourteen is presumed to have the *capacity* for contributory negligence, but the court went on to hold that the plaintiff in that case, who was seventeen years old, was not guilty of contributory negligence as a matter of law. Thus, any minor plaintiff who is fourteen years of age would be rebuttably presumed to have capacity for contributory negligence. But this does not mean that he is to be held to the same standard of care required of an adult. The question whether his conduct actually did constitute contributory negligence, it is submitted, is a question for the jury, under the doctrine of *Cathey v. DeWeese.*

D. Cases Involving Minors and Adults Injured in the Attempt to Alight from a Public Carrier

Under this heading, the Missouri cases will be discussed so as to indicate the general standards of care required on the part of persons bringing suit against carriers for damages sustained in the attempt to alight from the carrier's vehicle. The Missouri law in this area will be discussed as it applies to the issue of contributory negligence of a minor. While it is true that a carrier owes the highest practical degree of care to its passengers,[40] it will be shown that this duty is often in effect mitigated by the rules developed by the Missouri courts in regard to contributory negligence.

Tillery v. Harvey,[41] was a case in which plaintiff, a man old enough to have two sons in World War I at the time of the trial, was injured as he stepped from defendant's streetcar. The car was approaching a regular stop at night, when the doors opened, and plaintiff, relying on a custom of defendant not to open the doors until the car had stopped, stepped out without looking to see if the car had stopped. A judgment for plaintiff was affirmed on the ground that the issue of contributory negligence was a proper question for the jury. The court stated:

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38. Annot., 174 A.L.R. 1080, 1145 (1948).
39. Roach v. Kansas City Rys., 228 S.W. 520 (Mo. App. 1920).
40. 214 S.W. 246 (Mo. App. 1919).
41. Id. at 247-48.

> Plaintiff had a right to rely on the custom . . . for the motorman not to open the exit doors for passengers to alight until the car was brought to a full stop. . . . If the motorman opened the exit doors, his action could not have been construed in any other light than as a direction for passengers to alight then and there. Plaintiff, in the absence of anything to the contrary, had a right to conclude that the car had stopped for the purpose of permitting him to alight at that place. . . .
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> It is apparent that plaintiff was relying implicitly upon the duty of the motorman not to open the exit doors until the car was brought to a stop, and that the plaintiff had his attention more on whether the car was stopping at the usual stopping place as he looked up Elmwood Avenue and saw the sidewalk. Whether plaintiff should have taken any greater precaution to determine whether the car had come to a full stop was a question for the jury to decide. Defendants were under the duty to exercise the highest degree of care to provide for plaintiff's safety. We cannot say as a matter of law that plaintiff did not have the right to rely entirely upon the motorman discharging his duty under the circumstances.[42]

The *Tillery* case is supported by *Hibbler v. Kansas City Rys.*,[43] where plaintiff was injured when she stepped out of the door of a moving streetcar. It was dark and plaintiff thought the car had stopped. Rules of defendant prohibited motormen from opening doors prior to a complete stop of the car. Although a judgment for plaintiff was reversed because of error in allowing certain damages not pleaded to be proved, the court held that the issue of contributory negligence was a question for the jury.

The Missouri law, as announced in the *Tillery* and *Hibbler* cases, however, has been somewhat modified by subsequent cases. In *Delegarder v. Wells*,[44] plaintiff stepped from the open doors of a moving streetcar before it came to a regular stopping place. It was held that plaintiff was guilty of contributory negligence as a matter of law. The court stated:

> The opening of a vestibule door as a car is slackening its speed and coming to a stop, but while moving very slowly, may well constitute an invitation to a passenger to alight, and make the question of his negligence in stepping from the car under such circumstances one for the jury, if, on account of darkness or other conditions, he is thereby misled, particularly where . . . the passenger relies upon a custom to keep the door closed until the car has stopped. But where, as here, it appears, without more, that upon the opening of the car door the passenger stepped from the moving car before it had reached or nearly reached a stopping place, without taking any precaution to ascertain

42. 292 Mo. 14, 237 S.W. 1014 (1922).
43. 258 S.W. 7 (Mo. App. 1924).
44. Id. at 9.

> whether the car had stopped or had so slackened its speed as to make it safe to alight, and when the motion of the car was such as to be readily perceptible to one exercising ordinary care in regard thereto, the passenger's injury thereby sustained must, we think, be referred to his own negligence as being in law the proximate cause thereof.[45]

It may be said, with respect to the *Delegarder* case, however, that such a result is not particularly surprising when it is considered that no brief was submitted by plaintiff on the appeal.[46]

Simmons v. Wells,[47] involved a situation where the conductor of the street car upon which plaintiff was riding announced a stop and opened the doors. Plaintiff went to the door and stepped down onto the step. He noticed that the car was still in motion, so he waited for it to come to a stop. While he was standing there, the car made a sudden jerk and he was thrown into the street. This was held to constitute contributory negligence as a matter of law. The court stated:

> Where it is the custom of the operator of street cars to not open the door of a car until it has reached a regular stopping place and come to a full stop, a passenger having no knowledge to the contrary, and such lack of knowledge is due to darkness or other conditions calculated to mislead him, may assume when the doors are opened that the car has reached such a stopping place and has stopped. . . . But to the passenger who knows, or in the exercise of ordinary care would know, that the car is still in motion the opening of the doors is not an invitation to alight, or even to step down onto the step preparatory to alighting.[48]

In *Kirby v. United Rys.*,[49] the conduct of an eighteen year old girl, who stepped from a moving street car at night and was injured when she fell from the car, which had stopped and had started again, was held by a divided court to constitute contributory negligence as a matter of law. This holding is supported by the *Delegarder* case and by *Simmons v. Wells*.

The rules established by the *Delegarder, Simmons* and *Kirby* cases, however, are apparently mitigated with respect to their application to cases involving minor plaintiffs by the case of *Moeller v. United Rys.*[50] In this case, plaintiff, a boy of twelve, was injured as he attempted to alight from defendant's electric car, which was moving "a little faster than a man ordinarily walks." Plaintiff stepped from the car, which he was aware was moving, about three feet from the end of the platform, and was carried over the end by momentum. It was held that since the danger was not so obvious to one of his years

45. Ibid.
46. 323 Mo. 882, 20 S.W.2d 659 (1929).
47. Id. at 888, 20 S.W.2d at 661.
48. 242 S.W. 82 (Mo. 1922).
49. 242 Mo. 721, 147 S.W. 1009 (1912).
50. Id. at 729, 147 S.W. at 1017.

and experience to enable the court to say, as a matter of law, that he must have seen and appreciated the danger, the question of his contributory negligence was for the jury. The court stated:

> The court cannot specify the age to which a child when he has attained it shall be held as liable in such case as a person of full maturity, because there are other facts to be taken into account: the peculiar circumstances of the particular case, the knowledge and experience of the child in reference to those circumstances, and his capacity to appreciate the danger.[51]

In this case, plaintiff was aware of the fact that the car was moving, yet the court held that this did not mean that he saw and appreciated the danger. This case would therefore seem to be strong authority for the position that a minor plaintiff should be allowed to go to the jury for the determination of the question whether his conduct constituted contributory negligence, in a case involving a cause of action for injuries received while alighting from a public carrier.

CONCLUSION

In summation, it must be reiterated that the Missouri cases on the subject of contributory negligence of minors abound in confusion—and this makes prediction somewhat hazardous. Apparently, no reported case has been decided in Missouri since 1929 concerning the issue of contributory negligence of passengers injured while attempting to alight from a carrier. The only Missouri case found which involved the issue of contributory negligence of a minor injured while alighting from a carrier is *Moeller v. United Rys.* The most recent case decided by the Supreme Court of Missouri, with respect to the issue of contributory negligence of a minor as a matter of law, was *Cathey v. De Weese.* This case is an extremely liberal one (particularly in view of the fact that the plaintiff was seventeen years old) and indicates that Missouri's modern judicial attitude may be somewhat less than entirely sympathetic to the defense of contributory negligence, particularly where it is asserted against minors. The next most recent Missouri case was *Wilson v. White,* which also represents a favorable attitude toward a minor plaintiff's position in a case involving the defense of contributory negligence as a matter of law. While it must be admitted that the numerous cases discussed herein definitely point to inconclusiveness, it is submitted that the present Missouri Supreme Court would allow the question whether a minor plaintiff has been guilty of contributory negligence to go to the jury in virtually every case. For practical purposes the defense of contributory negligence of a minor as a matter of law has been all but abrogated in Missouri and there is little likelihood that the doctrine will be applied in the future except in extreme factual situations.

CONTRIBUTORS TO THIS ISSUE

ALAN C. KOHN—Associated in the practice of law with Coburn & Croft, St. Louis, Mo. A.B. 1953, LL.B. 1955, Washington University. Law clerk to Mr. Justice Whittaker, Supreme Court of the United States, 1957-58. Member of the Missouri Bar and the Bar of the Supreme Court of the United States.

H. FRANK WAY—Assistant Professor in political science, University of California, Riverside. B.S. 1951, Northeast Missouri State College; M.A. 1952, Oklahoma A. & M.; Ph.D. 1958, Cornell University.

JAMES W. STARNES—Associated in the practice of law with Stinson, Mag, Thomson, McEvers & Fizzell, Kansas City, Mo. LL.B. 1957, Washington University. Member of the Missouri and Illinois bars.

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