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Work of the Supreme Court for the Year 1953 - Statistical Survey, The

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THE WORK OF THE SUPREME COURT FOR THE YEAR 1953

STATISTICAL SURVEY

STEPHEN E. STROM*

The statistical survey for 1953 shows that during the year, 270 majority opinions were written by the judges and commissioners of the Supreme Court of Missouri. The number has been exceeded only once since 1945, when 291 opinions were filed in 1952. Therefore, the year's total showed a decrease of 21 opinions from the preceding year.[1]

In addition to the 270 majority opinions, there were 6 opinions concurring in result in a separate opinion, and 10 concurrences in result without opinion. Seven dissenting opinions were filed, while 6 dissents were registered without opinion. The 7 justices wrote 116 majority opinions, while the 6 commissioners presented 147. There were 7 Per Curiam decisions. During the year, Court of Appeal Judges Walter E. Bennick and Nick T. Cave served as Special Judges for brief periods.

TABLE I

NUMBER OF OPINIONS WRITTEN BY EACH DIVISION

En Banc	60
Division Number One	110
Division Number Two	100
Total	270

*Chairman, Board of Student Editors.

1. Total majority opinions for the preceding years is as follows: 1945, 197; 1946, 181; 1947, 244; 1948, 254; 1949, 244; 1950, 265; 1951, 259; 1952, 291.

Table II represents a classification of the opinions according to their dominant issue. The selection of the most important issue was somewhat arbitrary, since nearly every case contained several issues.

TABLE II

Topical Analysis of Decisions

Adoption	1
Appeal and Error	22
Attorney and Client	1
Brokers	4
Condemnation	1
Constitutional Law	2
Contempt	1
Contracts	5
Counterclaim	1
Criminal Law[2]	10
Courts	3
Damages	9
Declaratory Judgment	1
Dedication	1
Depositions	1
Discovery	1
Divorce	2
Easement	1
Ejectment	1
Elections	1
Estates	1
Evidence (Rules)	3
Evidence (Sufficiency)	46
Fraudulent Conveyances	2
Habeas Corpus	1
Instructions	28
Insurance	3
Judges	1
Judgments	2
Libel and Slander	4
Liens	1
Malpractice	1
Mandamus	2
Master and Servant	2
Mistrial	1
Monopolies	2

2. See also Evidence (Sufficiency) and Instructions.

Mortgages	1
Negligence	20
Officers	1
Ordinances	2
Pensions	1
Perjury	1
Pleading	1
Principal and Agent	3
Prohibition	3
Real Property	17
Res Ipsa Loquitur	1
Roads	1
Schools and School Districts	7
Statutes	3
Statutes of Limitation	1
Street Railroads	1
Sureties	1
Taxation	2
Trial	19
Trusts	3
Verdicts	1
Wills	3
Witnesses	1
Workmen's Compensation	7
Total	270

Table III shows the disposition made of each case for which an opinion was written. The particular wording below is basically that of the judge or commissioner writing the opinion. These figures include the disposition of the 11 original proceedings handled by the court.

TABLE III

DISPOSITION OF LITIGATION

Alternative Writ of Mandamus Made Peremptory	1
Appeal Dismissed	4
Appeal Retransferred	1
Appeal Transferred	1
Award and Judgment Affirming It Reversed	1
Cause Transferred to Court of Appeals	10
Cause Retransferred	1
Decree Affirmed	2
Decree Affirmed and Cause Remanded	1
Defendant Adjudged Guilty of Contempt	1

Judgment Affirmed	136
Judgment Affirmed in Part and Reversed and Remanded in Part	2
Judgment Affirmed on Condition of Remittur	5
Judgment Modified and Affirmed as Modified	2
Judgment Reversed	12
Judgment Reversed and Cause Remanded	38
Judgment Reversed and Cause Remanded with Directions	33
Order Granting New Trial Affirmed and Cause Remanded	2
Order Granting New Trial Set Aside and Judgment Originally Entered Reinstated	1
Order in Accordance with Opinion	5
Orders Reversed and Cause Remanded with Instructions	2
Order Set Aside and Cause Remanded for Reinstatement of Verdict and Judgment Accordingly	1
Preliminary Rule in Prohibition Discharged	1
Prohibition Denied	1
Provisional Rule in Prohibition Made Absolute	3
Rule Made Absolute	1
Rule Made Partially Absolute, Partially Discharged	1
Writ of Mandamus Denied	1
Total	270

Table IV shows how the court disposed of motions which were presented subsequent to the decision, so far as may be ascertained from the reported opinions. Cases wherein rehearings or transfers were granted are not included.

TABLE IV

MOTIONS SUBSEQUENT TO DECISION

Motion for Rehearing or to Modify Opinion or to Transfer to Court *En Banc* Denied	1
Motion for Rehearing or to Remand for New Trial Denied	1
Motion for Rehearing or to Transfer to Court *En Banc* Denied	40
Motion for Rehearing or to Transfer to Court *En Banc* Denied and Opinion Modified	3
Motion for Rehearing or to Transfer to Court *En Banc* or to Reverse and Remand Denied	1

Motion to Correct Opinion Denied	1
Motion to Modify Opinion and Order of Affirmance Denied	1
Opinion Modified on Court's Own Motion	2
Rehearing Denied	39
Rehearing Denied and Opinion Modified	2
Total	91

APPELLATE PRACTICE

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

A few years before the adoption of the 1945 Constitution, the Missouri Supreme Court promulgated a rule requiring the appellant to set out a jurisdictional statement[1]. The purpose of that rule was to direct the attention of counsel to the fact that appellate jurisdiction in this state is divided between the supreme court and the courts of appeals, and is defined by the provisions of what is now Section 3 of Article 5 of the 1945 Constitution. Thus, it was hoped, many of the delays attendant upon cases reaching the wrong appellate court would be obviated. In general, the rule has served its purpose; but the fact that 13 cases were transferred to the courts of appeal in the year 1953 by the supreme court would seem to indicate that the bar, in general, is rendering only lip service to the requirements of a jurisdictional statement in the appellant's brief.

The purpose of the rule is again emphasized by the court in *Jameson v. Fox*,[2] where it is said that the record facts should be "sufficiently developed to demonstrate the existence of the asserted jurisdiction." That was one of 13 cases transferred, and is also one where the appeal was first lodged in the court of appeals and was by that court transferred to the supreme court without opinion. The appeal was by defendant in a suit where plaintiff sought damages in the amount of $5500.00 and defend-

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1. Mo. Sup. Ct. Rule 1.08 (a) (1).
2. 260 S.W. 2d 507 (Mo. 1953).

ant, by counter-claim, sought damages for over $25,000.00, and where the verdict was in favor of plaintiff on his cause of action for an amount within the jurisdiction of the court of appeals and against the defendant on its counter-claim. The court points out that plaintiff's claims and the defendant's claims cannot coexist and proof of one necessarily disproves the other. The court reasons that the issues arising both on the petition and on the counter-claim have been merged in and have been resolved by a judgment for $1,000.00 of which defendant complains on appeal, and the only question is whether that judgment should be affirmed or reversed. In such case, the court holds that the sum demanded in the counter-claim does not represent the amount in dispute but that such amount is fixed by the amount of plaintiff's judgment. Accordingly, the case is re-transferred to the court of appeals.

Somewhat similar reasoning compelled the re-transfer of the case of *Nickels v. Borgmeyer*[3] which the St. Louis Court of Appeals had originally transferred to the supreme court because in doubt as to whether or not the amount in dispute exceeded its monetary jurisdiction. That, also, was an action for damages, to which certain counter-claims for damages had been filed. There was a verdict for plaintiff on all issues and the combined amounts of plaintiff's claim and the counter-claims would have exceeded the jurisdiction of the court of appeals. However, the supreme court points out that in none of the after trial motions filed by the defendants was complaint made as to the verdict and judgment on the counter-claim and that there was no assignment of error made touching the judgment on the counter-claim. Consequently, it was held that in computing the amount in dispute the sums originally sued for under the counter-claims should be entirely disregarded; and the case was re-transferred to the court of appeals.

Also, in *Koch v. Board of Regents*[4] the jurisdiction statement in appellant's brief did not "develop the facts" which would show appellate jurisdiction but merely stated that the amount of money "involved" in the litigation exceeds the sum of $7500.00. The suit was one to enjoin the Board of Regents of a State College from entering into a certain construction contract which, if not enjoined, would have called for the expenditure of over $200,000.00. The court, however, points out that the petition

3. 256 S.W. 2d 560 (Mo. 1953).
4. 256 S.W. 2d 785 (Mo. 1953).

does not ask for a money judgment, but only for an injunction, and that nowhere does it affirmatively appear that the money value or pecuniary loss to plaintiffs or defendants resulting from either the denial or granting of the injunctive relief sought would exceed the jurisdictional minimal sum of $7500.00. That case, also, was transferred to the appropriate court of appeals.

In one case, *Ray v. Netherly*,[5] both parties "agreed" that the jurisdictional amount was present and that the appeal was properly in the supreme court because of that fact. The court, however, disagreed, the suit being one for a declaratory judgment involving a will and the record failing to show, affirmatively, that the portion of the estate involved in the suit was more than $7500.00. However, although the parties did not so contend, the court concluded that it had jurisdiction on the ground that title to real estate was directly involved, the suit for declaratory judgment being of such a nature that the decision with respect to the will would operate directly upon the title to the real estate of the decedent covered thereby. Accordingly, the court retained jurisdiction.

In *Boesel v. Perry*,[6] the court again points out that suits to enjoin or enforce liens against real estate do not involve title to real estate in the jurisdictional sense. That was a suit to enjoin a threatened foreclosure and to cancel a deed of trust, the primary purpose of the pleadings on both sides being to obtain a judgment of the court on whether the deed of trust admittedly valid in its inception was still an enforceable lien. Title, therefore, was not directly involved and the cause was transferred to the appropriate court of appeals.

In *Phillips Pipe Line Company v. Brandstetter*,[7] the court again adheres to the previous decision of the court *en banc* in the case of *City of St. Louis v. Butler Company*,[8] where it was held that a condemnation suit does not "involve" title to real estate even though the disposition of the case may "affect" that title. Even though there was a contention that a constitutional question was raised on the appeal the case was transferred to the appropriate court of appeals because, in the opinion of the court, the mere contention that "if" the Missouri Statute which authorized the plaintiff Pipe Line Company to institute condemnation proceedings

5. 255 S.W. 2d 817 (Mo. 1953).
6. 262 S.W. 2d 636 (Mo. 1953).
7. 363 Mo. 904, 254 S.W. 2d 636 (1953).
8. 358 Mo. 1221, 219 S.W. 2d 372 (1949).

be construed to support plaintiff's right to do so, then it was unconstitutional. The court ruled that to say that a statute would be unconstitutional *if* construed in a certain manner does not meet the requirement of jurisdiction to consider a constitutional question.

It is, of course, well settled that even where a constitutional question has been raised, it must be kept alive at all stages of the proceeding in order to vest appellate jurisdiction in the supreme court on the ground that a constitutional question is involved. In *Ingle v. City of Fulton,*[9] and also in *State v. Sappington,*[10] it was pointed out that the motions for new trial did not sufficiently assign any error of the trial court in ruling a constitutional question and that thereby they failed to preserve the constitutional question for review. Both cases were transferred to the appropriate court of appeals. The same result was reached in *Cirese v. Spitcaufsky.*[11] In that case, the Kansas City Court of Appeals had transferred the appeal to the supreme court on the ground that a constitutional question was involved, but the latter court, noting that no constitutional question was preserved in the motion for new trial, retransferred the case to the court of appeals.

The mere assertion, however, in the motion for new trial that a constitutional question is involved, does not give the supreme court appellate jurisdiction. The court transferred to the court of appeals the case of *Nelson v. Watkinson*[12] an action challenging the validity of an election under the provisions of the School Reorganization Law. The motion for new trial asserted that the decision of the court was against certain sections of the Constitution guaranteeing that elections shall be by secret ballot. The petition had alleged fraudulent failure to comply with the secret ballot law. The court rules, however, that the simple fact that a constitutional right has been denied does not take a case out of the jurisdiction of the courts of appeal but that the construction of the constitution must be involved. While denial of a constitutional right is error that is not sufficient to control appellate jurisdiction. The case was transferred to the court of appeals.

In *Holland v. City of St. Louis,*[13] a suit by the Civil Service Com-

9. 260 S.W. 2d 666 (Mo. 1953).
10. 260 S.W. 2d 669 (Mo. 1953).
11. 259 S.W. 2d 836 (Mo. 1953).
12. 260 S.W. 2d 1 (Mo. 1953).
13. 262 S.W. 2d 1 (Mo. 1953).

missioners against the City of St. Louis for a declaratory judgment to determine the authority of the commissioners to make salary recommendations for certain employees, the court held that the city was not a party to the action in its capacity as a political subdivision and that appellate jurisdiction could not be sustained on the ground that the city as a political subdivision of the state was involved. Because no particular amount was involved in the dispute, the court held that appellate jurisdiction was in the court of appeals and transferred the case to that court.

In *Knight v. Calvert Fire Insurance Company*[14] plaintiff brought suit upon an automobile collision policy. Defendant filed a motion to dismiss on certain factual grounds alleged in the motion, and the court, after hearing evidence on the motion, sustained it. Plaintiff appealed and contended that jurisdiction was in the supreme court because the trial court's construction of the section of the code, requiring all defenses other than those permitted by motion to be raised in a responsive pleading, as permitting defendant to raise its defenses by motion to dismiss deprived plaintiff of the right of trial by jury guaranteed under the constitution. In other words, plaintiff sought to raise a constitutional question on the theory that he would be deprived of a jury trial if the trial court erroneously construed the statute. The court held that the simple fact that a constitutional right has been denied does not take a case out of the jurisdiction of the courts of appeal but that the construction of the constitution must be involved to confer jurisdiction on the supreme court. Since the statute involved was attacked only on contingent grounds the court held that the jurisdiction was in the court of appeals and transferred the case to that court.

In *Appeal of Mac Sales Company*[15] the proceeding was one under search warrant to seize and destroy certain obscene matter under the provisions of the statute.[16] It was contended that constitutional questions were involved in the appeal, but, since the record showed that such questions were raised for the first time in motion for new trial, the court held that the constitutional questions had not been properly preserved and transferred the case to the court of appeals. So, also, in *Junkins v. Local Union,*[17] an action to enjoin a labor union from taking disciplinary

14. 260 S.W. 2d 673 (Mo. 1953).
15. 256 S.W. 2d 783 (Mo. 1953).
16. Mo. REV. STAT. 542.380 (1949).
17. 263 S.W. 2d 337 (Mo. 1954).

action against a member, the court held that, in spite of repeated reference in the pleadings to denial of due process and the right of trial by jury, the real issues in the case as raised by the pleadings and the evidence of the contention of the parties presented questions other than those involving constitutional rights, and transferred the case to the court of appeals.

The Right of Appeal

In *Weir v. Brune*[18] plaintiff sued, in three alternative counts, for damages for one tort, each count purporting to state a cause of action on a different legal theory but all arising from the same state of facts. The trial court dismissed one count and ordered a separate trial on the second and third counts of the amended petition. Plaintiff then prosecuted an appeal from the order of the court dismissing count one; but the court held that the action was not one involving multiple claims founded on different transactions or occurrences and that the three counts of the petition were only different ideas of the pleader for recovery on one single matter involved. Consequently, the order of the trial court dismissing count one but ordering trial on the other two counts was not a final, appealable order and the appeal was accordingly dismissed. The converse of the rule was applied in *Lightfoot v. Jennings*,[19] where the trial court dismissed two counts of a petition and ordered a separate trial on the third. The action was one for damages for slander and libel and each count was a separate cause of action. Consequently it was held that the judge of dismissal as to the two counts dismissed was a final appealable judgment and the motion to dismiss appeal was overruled.

In *Tucker v. Miller*[20] appellant had filed in the trial court, less than ten days after judgment there, his motion for new trial. Action was not taken on the motion in the trial court. Ninety days after the judgment had been rendered, but less than ninety days after the motion for new trial had been filed, the appellant filed his notice of appeal. The appeal was dismissed as premature under the rules of the supreme court and the provisions of the code[21]. Such an appeal would be premature unless

18. 262 S.W. 2d 597 (Mo. 1953).
19. 363 Mo. 878, 254 S.W. 2d 596 (1953).
20. 363 Mo. 820, 250 S.W. 2d 821 (1953).
21. Mo. Sup. Ct. Rule 3.24; Mo. Rev. Stat. § 510.360 (1949).

the notice was filed more than ninety days after the filing of the motion for a new trial and less than one hundred days thereafter. If, however, the notice was filed more than one hundred days thereafter then the appeal would be too late and appellant would be relegated to special appeal to be obtained within six months after the judgment became final.

Records and Briefs

It has now been approximately ten years since the adoption of the present Civil Code in Missouri and the Rules of Court promulgated thereunder. The leniency of the court with respect to infractions of its rules governing records and briefs has been illustrated each year by repeated refusals of the court to dismiss appeals or otherwise punish such infractions. In the year under review, however, the warnings of recent years are far more pronounced. In *Fosmire v. Kansas City*[22] the court again refused to dismiss an appeal for flagrant violation of its rules with respect to appellant's brief saying that: "In our desire to do what is possible to review cases on the merits, we have in the past overlooked many violations of the rule 1.08. In this case we have endeavored to examine the case on the merits, and we believe there was prejudicial error in the admission of evidence; consequently, we will not dismiss the instant appeal." Nevertheless, that opinion, written in Division I, refers to an opinion of the same Division decided the same day in the case of *Ambrose v. M. F. A. Cooperative Association of St. Elizabeth.* The *Ambrose* opinion of Division I is not reported but in the *Fosmire* case it is pointed out that it does contain a warning that dismissal of appeals may become necessary to obtain compliance with the rule.[23]

That warning was repeated by the court in *Hughes v. Aetna Insurance Company*[24] where the transcript of the record contained no reference in the index or indentification of the numerous exhibits filed, thus violating the provisions of Supreme Court Rule 1.04 (b). The court pointed out that the transcript presented the very type of situation the

22. 260 S.W. 2d 252 (Mo. 1953).

23. Apparently the divisional opinion in the Ambrose case is not reported because that case was tranferred to the court *en banc*. The *en banc* opinion was not handed down during the year under review; but it will be noted that, as reported in 266 S.W. 2d 647 (Mo. 1954), the appeal was dismissed, the opinion having been written by Tipton, J., and filed for the court *en banc* on April 12, 1954. That opinion will be more extensively reviewed in the general review of the 1954 decision, to be published in November, 1955 in the *Missouri Law Review*.

24. 261 S.W. 2d 942, 945 (Mo. 1953).

rule was intended to prevent and that its observance "would save the reviewing Court much time, energy—and patience!" The court's comment upon the subject concludes with the following:

> "Laxity in complying generally with this *and other sections* of Rule I governing appellate practice and procedure, has become so widespread and commonplace as to approach the point of vexatiousness. For this reason, more stringent enforcement of all of its provisions, including the prescribed penalty of dismissal for violations, is in immediate prospect, and should be anticipated."

But, notwithstanding that warning, the court did not dismiss the appeal in *Daugherty v. Maddox*[25] handed down in the same Division and on the same day that the *Hughes* opinion was filed, although, in the *Daugherty* case, the brief of appellant was so hopelessly violative of the fundamental requirements of the rule with respect to the statement of the assignments of errors or points and authorities that the court refused to consider all questions raised in the brief except the single question of admissiability of certain evidence which, in the opinion of the court, was sufficiently preserved in the assignment of errors. Actually, the case was reversed on that assignment of error, but it is plain that the patience of the court has become exhausted with respect to briefs which violate the rules concerning assignment of error. Two months earlier, in the case of *See v. Wabash Railroad Company,*[26] the court found that the three points presented by appellant's brief were wholly insufficient but held that although it would be justified in ignoring that portion of appellant's brief, nevertheless, in the interest of justice, the court would attempt to discover from the printed argument the alleged error complained of by the appellant. The court then analyzes the merits and affirms the judgment below.

It will be noted, also, that in *Douglas v. Twenter*[27] the court strongly criticised the Respondent's brief and entered an order striking out a narrative digest of 153 printed pages contained in that brief on the ground that there is no reason or authority or provision for the filing of such a document.

In *Rigg v. Hart*[28] appellant's statement of the facts was condemned

25. 260 S.W. 2d 732 (Mo. 1953).
26. 259 S.W. 828 (Mo. 1953).
27. 259 S.W. 2d 353 (Mo. 1953).
28. 255 S.W. 2d 778 (Mo. 1953).

as having been made more favorable to appellant than the record justified. The court comments: "we should dismiss the appeal." However, the appeal was not dismissed because, in the opinion of the court, counsel were under the erroneous impression that, since the suit was in equity, and was disposed of in the trial court on motion to dismiss at the close of plaintiff's case, the evidence should be reviewed in the light most favorable to plaintiff.

For the foregoing review of the pronouncements of the court during the year under consideration with respect to its own rules governing records and briefs, it is quite apparent that the so-called "honeymoon days" following the adoption of a new Code and new rules to enforce it are about over, and that the court, in the future, will require counsel to use diligence in conforming to the plain, simple and understandable rules which have been adopted to simplify and expedite appellate practice.

CRIMINAL LAW

WILLIAM J. CASON*

Cases in the field of criminal law again accounted for a large per cent of the supreme court opinions. There were forty-eight decisions by the Missouri Supreme Court of which one was reversed, twelve were reversed and remanded, one was reversed and defendant discharged and thirty-four were affirmed.

Many of the cases presented were disposed of upon settled principles of law; however, there are several novel questions presented which give credit to the ingenuity of the bar of this state when acting as either counsel for the state or counsel for the defendant. The court's treatment of these novel questions, along with those previously settled questions which have again been presented and which appear to be of considerable significance to the attorney actively engaged in trying criminal cases, will be here discussed.

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I. Procedure Before Trial

Most of the 1953 cases concerning procedure before trial were confined to the question of sufficiency of information. However, there was at least one unique question presented that appears to open a new field of trial strategy consideration.[1] In this case the supreme court handed down a decision with a dissenting opinion concerning the propriety of the following events. Defendant was charged in the Circuit Court of the City of St. Louis with molesting a minor. At the beginning of the trial an attorney presented himself to the court as representing neither the state nor the defendant but rather the family of the prosecuting witness, who was a minor female, and the minor female. After some discussion the court declared that he would appoint the third party counsel as an amicus curiae. The trial proceeded and the amicus curiae took quite an active part. He interposed certain objections to testimony and he entered generally in the conduct of the trial. It appears from the facts available in the court's opinion that the activity of this third party counsel at least could have had some effect on the outcome of the trial. The majority opinion of the court found that the defendant was not prejudice by this procedure. The dissenting opinion of Commissioner Barrett, in which Judge Conkling and Judge Tipton concurred, held as follows:

> ". . . The important thing is that the hired lawyer's interposition in the trial, the court's treatment of him, and the court's ruling with respect to his objections were certainly not conducive to the orderly administration of justice and for that reason this defendant is entitled to a new trial."

Irrespective of the right and wrong of this question this much remains clear, the court's ruling in this case with reference to the amicus curiae actively engaging in the trial of a criminal case representing neither the defendant nor the state opens a good many tactical problems for both the state's attorney and the defendant. A situation can be thought of when a prosecuting witness friendly to the state might be represented by a counsel whose conduct in the trial while not being error would greatly enhance the state's chance of obtaining a verdict of guilty from the jury. Also, it could be imagined that an amicus curiae appearing and representing a prosecuting witness who has "cooled off" could play certain havoc with the state's case.

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1. State v. Klink, 363 Mo. 907, 921, 254 S.W. 2d 650, 659 (1953).

In the case of *State v. Boyd*,[2] it appeared that at the beginning of the trial the defendant was brought into the court room in hand cuffs. The supreme court had previously held that a defendant has a right to be present at his day in court without shackles of any sort unless his conduct at the trial is such that there appears to be reasonable grounds for shackling him. In this case the court ruled that since the defendant's attorney made no objection to this procedure it would not be error. Since once the prisoner has appeared before the jury in the corridors or court room in shackles most of the harm is done and a subsequent objection might only emphasize the shackles, it appears that defendant's attorney must anticipate such a possibility and place his objections with the court before his client is even brought to the place of trial.

II. TRIAL

A. *Evidence*

1. Proof of Prior Conviction Under Habitual Criminal Act

There were several interesting points raised under the Habitual Criminal Act.[3] In one case the state offered in evidence a "work house card" from the St. Louis Workhouse as proof that defendant had served his sentence and had been discharged. This was received by the trial court and properly so according to the supreme court's ruling.[4] In the same case a certified copy of the records of the state penitentiary were held admissable and sufficient if the name of the defendant and that on the record are the same to make a prima facie case of identity.

The court emphasized in one case the importance of the state following the exact language of the statute in the information concerning the habitual criminal charge. In *State v. Franck*,[5] the information charged that the defendant had been convicted of two prior felonies and that he was duly imprisoned in the penitentiary and was subsequently "duly discharged." The key words of the statute in question are that the defendant has been convicted, imprisoned and discharged "upon pardon or upon compliance with the sentence." These words must not be omitted from the information or it is defective under the *Franck* case.

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2. 256 S.W. 2d 765 (Mo. 1953).
3. Mo. REV. STAT. § 556.280 (1949).
4. State v. Hands, 260 S.W. 2d 14 (Mo. 1953).
5. 260 S.W. 2d 52 (Mo. 1953).

Another pitfall into which the state can fall is made apparent in the case of *State v. St. Clair.*[6] In the *St. Clair* case the defendant was convicted of first degree robbery. He was also charged under the habitual criminal act. At the trial it was shown that the defendant had been convicted in Arizona of forgery and sentenced to from one to five years in the penitentiary and that he subsequently escaped while working as a trusty. It was also shown that in Texas the defendant had been convicted of burglary and sentenced was subsequently released on a bench warrant. There was no entry of discharge. There was also competent evidence showing the defendant had been convicted, sentenced, imprisoned and duly discharged upon compliance of sentence upon two felony matters in Missouri.

It was the defendant's position on the appeal that the Arizona and Texas records were not admissable since they did not prove any relevant fact. Since they did not show "discharge upon compliance with sentence" this was easily found to be true by the appellate court. However, it was the contention of the state that there was no error requiring reversal since the instruction submitting the habitual criminal act required a finding of conviction, imprisonment and discharge upon compliance of all of the felonies above mentioned, Arizona, Texas and the two Missouri felonies, and since the two Missouri felonies themselves would have been sufficient there was no harm because the jury must have found the defendant had been duly discharged from the two Missouri felonies. The state's argument appeared to follow the civil rule that if negligence is submitted in the conjunctive and there is sufficient evidence to submit any one of the alleged acts of negligence the plaintiffs verdict will not be disturbed. However, the court reached a different conclusion in the criminal case and reversed and remanded it, saying:

> "Under these circumstances, we may not say that this inadmissable evidence did not influence the jury in its determination of the guilt of the defendant of the crime charged."

A verdict in a rather unusual form was held sufficient under the habitual criminal act in one case.[7] The defendant was found guilty of larceny from a building under the habitual criminal act. The verdict was as follows:

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6. 261 S.W. 2d 75, 78 (Mo. 1953).
7. State v. Kelly, 258 S.W. 2d 611 (Mo. 1953).

"We the jury in the above entitled cause find the defendant guilty of Larceny from a building. Second Offense, as charged in information and assess his punishment at imprisonment in the State Penitentiary for a term of five (5) years.

Geo. L. Roberts, Foreman."

It has been previously held that a verdict under the habitual criminal act must contain a specific finding of a prior conviction and discharge rather than a finding of "Second Offense".[8] However, here the court held that by reference to the information the verdict was sufficiently clear in form and substance.

2. Confessions and Admissions

The supreme court has let it be known in one case that there is a limit beyond which the state's representative may not go in eliciting from defendant a confession.[9] In the *Bradford* case the court held that where statements of the defendant appeared to have been to some extent coerced by a promise of protection and intermittent daily interrogation over a long period of detention statements so procured would be violative of the procedural standards contemplated by the due process clause of the Fourteenth Amendment to the United States Constitution.

The use of a prosecuting attorney's secretary as a witness to show admission amounting to a confession was proper. The secretary used her shorthand notes to refresh her memory at the time of her testimony.[10]

B. *Argument of Counsel*

In one case the state's attorney in his final argument stated among other things:

"and what's on his side of the scale—empty."

The defendant contended on the appeal that this was a clear comment on defendant's failure to testify. The court held that under the circumstances of this particular case, where the records did not show what objection was made, this would not constitute reversable error as being a comment on defendant's refusal to testify.[11]

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8. State v. Humphrey, 357 Mo. 824, 210 S.W. 2d 1002 (1948).
9. State v. Bradford, 262 S.W. 2d 584 (Mo. 1953).
10. State v. Kaufman, 254 S.W. 2d 640 (Mo. 1953).
11. State v. Spradlin, 363 Mo. 940, 254 S.W. 2d 660 (1953).

The state's attorney in a grand larceny case in his argument referred to the defendant as a "spook" and "burglar". The trial court sustained an objection to this verbal abuse of the defendant but refused to grant a new trial and the trial court's action was approved by the supreme court.[12]

In making his opening statement, the state's attorney in the case of *State v. Miller*,[13] stated as follows:

> "Immediately after that takes place, the State will put on its case, all the witnesses that the State has. *Following that the defendant will put on his side of the case.*"

Against the charge that this was a comment calculated to bring to the jury's attention the fact that the defendant was not going to take the witness stand, the supreme court held that since the trial court had ordered the statement stricken it would not be reversable error.

C. *Conduct of Jury*

A practice which most attorneys engaged in trying criminal cases would probably agree is common has been held to be reversable error by the supreme court in *State v. Jones*.[14] The ruling of the court is based mostly upon Section 546.240 of *Missouri Revised Statutes* of 1949, which provides among other things that when the jury retires to deliberate upon its verdict, they are to be in charge of an officer, who is to keep them together and not permit any person to speak or communicate with them, nor do so himself unless by order of the court or to ask whether they have agreed upon a verdict. The "officer" referred to is commonly the sheriff or his deputy. It is certainly not uncommon for the "officer" in charge of the jury to talk with the jury at least briefly about matters about which he has knowledge though it may not be about the case in question. In the *Jones* case the sheriff, who had been a witness in the case, was seen talking with a juror in the hall outside the court room after all the evidence was in and the attorneys were preparing the instructions. The sheriff was relating his experience concerning some burglary and the case in question was a burglary case. There was absolutely no evidence that the sheriff was discussing the case being tried. On the other

12. State v. Rousllang, 258 S.W. 2d 627 (Mo. 1953).
13. 261 S.W. 2d 103, 109 (Mo. 1953).
14. 363 Mo. 998, 255 S.W. 2d 801 (1953).

hand, the state did not show that the sheriff was discussing some other unrelated matter.

In this state of the record the supreme court ruled that there was reversable error and that a mistrial should have been declared. The court cited with approval the United States Supreme Court case of *Mattox v. United States,*[15] holding as follows:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

In the future the state's attorney will have to be very careful to make a record showing that any conversation between a sheriff and a juror which is objected to was not in any manner related to the case and that defendant was not prejudiced.

D. *Instructions*

Great care must be taken in drafting instructions to be offered on behalf of the state concerning defenses and particularly the defense of self defense. In the case of *State v. Robinson,*[16] an instruction was given which was in part as follows:

> "But, before you acquit the defendant on the ground of self defense, *you ought to be satisfied* that defendant's cause of fear for his life or personal safety was reasonable. Whether the facts constituting such reasonable cause have been *established* by the evidence you are to determine, *and unless the facts constituting such reasonable cause have been established by the evidence in this case, you cannot acquit the defendant on the ground of self defense.*"

The court held that since the burden of proof as to the essential elements of a crime does not shift, any language requiring that the jury be satisfied as to defensive matters and referring to a matter of "when satisfactorily established" make the instruction subject to the objection that it casts or tends to cast upon the defendant the burden of proof.

Instructions concerning presumptions have caused the bar and judiciary considerable trouble both in the field of civil and criminal law.

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15. 146 U.S. 140 (1892).
16. 255 S.W. 2d 798 (Mo. 1953).

In one 1953 case,[17] the court ruled that the giving of an instruction which has been a common one in the past is reversible error. In the case in question the defendant was being tried for murder and was convicted of second degree murder. It was alleged that the defendant had struck the deceased with a knife.

The following is a part of instruction given by the trial court:

> "The Court instructs the jury that the law presumes that every person intends the natural and probable consequence of his own voluntary acts. And if he uses upon another a deadly weapon at a vital part of the body, he is *presumed*[18] to intend death or great bodily harm to the person against whom such weapon is used."

The above instruction was held to be reversable error for the reason that it in effect instructs the jury that the law conclusively presumes that one who intentionally uses a deadly weapon at a vital part of the body intends to kill. The court suggests that if the clause "in the absence of qualifying facts" or "in the absence of evidence to the contrary" had been added to the instruction it probably would be satisfactory.

E. *Cross Examination*

The court has again warned state's attorneys that they must not inquire of a defendant concerning his previous arrests.[19] The court bases its opinion on Section 491.050 of *Missouri Revised Statutes* of 1949.

III. Specific Offenses

A. *Rape*

Allegations in an information charging what is commonly termed statutory rape that defendant assulted the prosecutrix were held to be mere surplusages and the information sufficient under Section 559.260 of *Revised Statutes* of *Missouri* of 1949.[20]

In another case the court held that allegations of force in a statutory rape charge under Section 559.260 were surplusage and the information would be sufficient.[21]

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17. State v. Martin, 260 S.W. 2d 536, 538 (Mo. 1953).
18. Emphasis added.
19. State v. Rumfelt, 258 S.W. 2d 619 (Mo. 1953).
20. State v. Burks, 257 S.W. 2d 919 (Mo. 1953).
21. State v. Redd, 257 S.W. 2d 638 (Mo. 1953).

B. *Larceny*

In the case of *State v. Rohman,*[22] the defendant was charged and found guilty of grand larceny. On the appeal the defendant urged that there should be a new trial since the information alleged that the goods in question had been taken from the "Biederman Furniture Company" and that there had been no evidence that the company was a cooperative or a privately owned business. The supreme court ruled that absent objection a sufficient prima facia case was made without the proof of the legal existence of the company. The court indicated that had proper objection been made at the time of the trial evidence of ownership of the stolen furniture possibly should not have been admitted until the legal existence of the owner was been established.

C. *Exhibiting Weapon in a Rude and Threatening Manner*

An interpretation of a Missouri Statute[23] defining the crime of exhibiting a weapon in a rude and threatening manner has been given by the supreme court. The court held[24] that a deputy sheriff who was on business of his own hundreds of miles from a county where he was commissioned and authorized to act as a deputy was not within the exemption of the statute which prohibits exhibiting deadly weapons in a angry manner but which exempts legally qualified sheriffs.

IV APPEALS

If there is one significant point to be recognized from recent cases by those attorneys engaged in representing defendants charged with crimes in the supreme court it is this: The motion for new trial in a criminal case must adhere strictly[25] to the statutory requirement that the motion for new trial "set forth in detail and particularity" wherein error was committed. In countless cases the court refused to rule upon matters of evidence, procedure and the correctness of instructions for the simple reason that the error was alleged in general terms only as is done in civil cases.

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22. 261 S.W. 2d 69 (Mo. 1953).
23. Mo. REV. STAT. § 564.610 (1949).
24. State v. Owen, 258 S.W. 2d 662 (Mo. 1953).
25. State v. Gaddy, 261 S.W. 2d 65 (Mo. 1953); Mo. REV. STAT. § 547.030 (1949).

In the case of *State v. Kornegger*[26] the defendant's motion for new trial stated among other things that a certain instruction was erroneous because it:

> ". . . improperly states the law and is not a complete or accurate statement of the law and for the further reason that it is a comment on the evidence and urges and emplores the jury to convict the defendant, and improperly leads the jury to believe that the court feels that there is evidence which would justify the finding of guilty. . . ."

The court ruled that the above motion with respect to the instruction in question was insufficient to preserve matters for review.

In another case[27] the defendant's motion for new trial alleged that instructions were erroneous,

> ". . . as said instruction did not properly declare the law of the case."

The court held this assignment of error to be too indefinite.

EVIDENCE

JACKSON A. WRIGHT*

Thirty-nine cases during the year 1953 have been deemed worthy of note for the purpose of consideration here. In all of these cases, the generally well established rules of evidence have been followed by the Supreme Court.

JUDICIAL NOTICE

In the case of *Romandel v. Kansas City Public Service Company,*[1] the supreme court took judicial notice, again, that the average man's ordinary walking speed is from two to three miles per hour. The court

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26. 255 S.W. 2d 765, 769 (Mo. 1953).
27. State v. Bledsoe, 254 S.W. 2d 618 (Mo. 1953).

*Attorney, Mexico. B.S., University of Missouri, 1940, LL.B., 1944.

1. 254 S.W. 2d 585 (Mo. 1953).

also took judicial notice in *DeLay v. Ward*,[2] that exclusive of reaction time, an automobile with good brakes, going at ten miles an hour, could be stopped within nine feet.

In an action for damages against an airline for injuries to the plaintiff caused when a plane hit a downdraft, *Cudney v. Mid-Continent Air Lines*,[3] the supreme court took notice of the fact that downdrafts which may vary in effect on airplanes are not uncommon. The court, however, refused to take judicial notice of the political public reputation of an individual in *Lorenz v. Towntalk Publishing Company*.[4]

Competency in General

The case of *Chamberlain v. Thompson*[5] was an action against a railroad for damages for the wrongful death of plaintiff's husband. The question arose as to whether or not there was sufficient evidence with regard to the giving of a warning. The only evidence that no warning was given was the testimony of a witness who was located some 700 feet from the crossing where the accident occurred. His testimony was in answer to a question, "Mr. Stewart, do you know whether or not the whistle blew or the bell rang on any train on that line of that morning?" Answer, "No, I did not." The court held that such was not substantial probative evidence, stating, "A negative fact must ordinarily be demonstrated by negative evidence; and negative evidence may be invested with positive probative force. But negative evidence such as, 'I did not hear', is probative and of substantial probative force or value in a situation where it is reasonably certain that the witness could and would have heard; that is, where it is shown that a witness was in close proximity to the track, in a position or situation to have heard the whistle (or bell) if it was sounded, and was attentive to whether the whistle was in fact sounded. . . ." The court held that the evidence in this case did not show the necessary surrounding facts to give the negative evidence probative force. The same problem was presented in *Thompson v. Economy Hydro Gas Co.*,[6] which was an action for damages arising out of an explosion of butane-propane gas against the retail supplier and the wholesaler, in regard to the negative testimony of three witnesses. They testified that

2. 262 S.W. 2d 628 (Mo. 1953).
3. 363 Mo. 922, 254 S.W. 2d 662 (1953).
4. 256 S.W. 2d 952 (Mo. 1953).
5. 256 S.W. 2d 779 (Mo. 1953).
6. 363 Mo. 1115, 257 S.W. 2d 669 (1953).

they smelled no gas. This was held to be substantial evidence tending to show that whatever gas had become defused in the atmosphere had no discernible odor. While it was not specifically set out in the opinion, apparently there was testimony that two of the witnesses were possessed with a normal sense of smell. The court further states that assuming that the third witness had a normal sense of smell, his testimony that he did not smell any gas would have probative force.

Parol Evidence Rule

The parol evidence rule was considered in only one case, *Amos-James Grocery Company v. Canners Exchange, Inc.*[7] This was an action for a breach of contract to furnish blackberries. The plaintiff-buyer contended that the defendant had offered to sell Number 2 water-packed blackberries which conformed to government specifications. The plaintiff contended that the berries furnished did not so conform. The defendant denied that there was any agreement to conform to government specifications and the question arose with regard to the introduction of parol evidence of a part of the alleged contract. In evidence in the case was a letter offering to sell 2200 cases of berries, and offering to furnish samples. No mention was made of government specifications. The court held that there was no ambiguity in the letter, and therefore parol evidence could not be used to vary the terms of the written instrument. The fact that the written offer was orally accepted does not change the situation.

Cross Examination

The court reaffirmed the long established rule in a number of cases[8] that the scope of cross examination is largely within the discretion of the trial court, and will not be held error by the upper court unless there is abuse of the discretion of the trial court. In the case of *Gray v. St. Louis-San Francisco Railway*,[9] which was an action for damages for personal injuries, cross examination of the plaintiff relative to prior arrests and convictions was allowed by the trial court. The upper court

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7. 256 S.W. 2d 803 (Mo. 1953).

8. State v. Brooks, 254 S.W. 2d 642 (Mo. 1953); State v. Klink, 363 Mo. 907, 254 S.W. 2d 650 (1953); State v. Duncan, 254 S.W. 2d 628 (Mo. 1953); Gray v. St. Louis-San Francisco Railway Co., 363 Mo. 864, 254 S.W. 2d 577 (1953); Anderson v. Woodward Implement Company, 256 S.W. 2d 819 (Mo. 1953); Warner v. Terminal Railway Association of St. Louis, 363 Mo. 1082, 257 S.W. 2d 75 (1953).

9. 363 Mo. 864, 254 S.W. 2d 577 (1953).

held that such was not error, since the plaintiff on direct examination had been asked if he had not been in some "scrapes" at West Plains in the city court. This was held to have opened up the subject so that the defendant could cross examine to show other "scrapes" in other places on the ground of testing the credibility of the witness. The court states, however, that the general rule is that it is only proper to show convictions of crime for the purpose of affecting the credibility of the witness, unless, as here, the plaintiff has gone into it and opened up the question. This same matter was considered in *State v. Duncan*,[10] and the supreme court stated that it was improper to cross examine the defendant's witnesses about previous charges of crime against the defendant. However, in this case, the defendant was in no position to complain because the defendant brought the matters up on direct examination of his own witnesses, and could not complain about the cross examination of the same or related subjects.

In *Anderson v. Woodward Implement Company*,[11] which was an action for personal injuries sustained by the plaintiff, one of the plaintiff's witnesses on cross examination was examined concerning prior law suits in which the witness had been a party. After denial that he had been a party to any but one previous law suit, the defendant's attorney handed to the witness certain exhibits for the purpose of refreshing his memory, and offered to, and was allowed to, cross examine regarding numerous specific prior law suits in which the witness had been and finally admitted to being, a party. The plaintiff objected to the cross examination. The objection was held without merit, the supreme court stating that the admissibility of specific acts tending to impeach or disparage the testimony of a witness is largely within the discretion of the trial court. Since the collateral matters and exhibits in this instance were tendered, not as evidence in the case, but for the purpose of refreshing the recollection of the witness, and the cross examination was for the purpose of discrediting and impeaching the witness, it was within the discretion of the trial court, and no abuse of such discretion was shown. It was also held proper cross examination in *Warner v. Terminal Railway Association of St. Louis*,[12] a federal employer's liability case, for the plaintiff's attorney to cross examine a doctor testifying on the part of the defendant relative

10. 254 S.W. 2d 628 (Mo. 1953).
11. 256 S.W. 2d 819 (Mo. 1953).
12. 363 Mo. 1082, 257 S.W. 2d 75 (1953).

to whether or not the doctor had forwarded copies of his examinations to the claim department of the defendant. The court held that such was proper, since the forwarding of such reports would tend to show some motive, interest or bias of the witness in favor of the defendant. Likewise, in *Pierce v. St. Louis Central Railway,*[13] when the trial court refused to allow cross examination of the plaintiff relative to a prior marriage, the plaintiff's home environment and marital life, the court held such refusal to be a proper application of the trial court's discretion, especially in the absence of any evidence that such home environment could have produced any of the conditions of which the plaintiff complained.

In *Jones v. Terminal Railroad Association of St. Louis,*[14] however, the court did hold the trial court's refusal to permit cross examination to be reversible error. This was an action under the Federal Employer's Liability Act in which the plaintiff claimed damages and injuries to his back and to both of his legs. The defendant on cross examination sought to question the plaintiff regarding the fact that the plaintiff had made no complaint of injury to his back on a former trial of the same case. Upon objection of the plaintiff, the court did not permit such cross examination. The supreme court held this to be reversible error, stating that the extent of the plaintiff's injuries is one issue on which there should be wide latitude in the matter of cross examination and that self-impeachment is perhaps the most devastating form of impeachment to be encountered. The court held that it was no answer to the exclusion of the evidence to say that the defendant might have introduced the previous record into evidence in this case, saying that the defendant was entitled to show, if possible, by admissions, the inconsistency of the plaintiff's testimony on the two trials.

In *State v. Kaufman,*[15] the court reaffirmed the rule that in a criminal case in which a defendant testifies in his own behalf on practically the whole issue involved, that upon cross examination he can be questioned about all phases of the issue in detail and is not just limited to re-examination about the exact matters testified to on direct examination.

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13. 257 S.W. 2d 84 (Mo. 1953).
14. 363 Mo. 1210, 258 S.W. 2d 643 (1953).
15. 254 S.W. 2d 640 (Mo. 1953).

WITNESSES

The point was raised in *Trzecki v. St. Louis Public Service Co.*,[16] regarding the availability of witnesses to the parties. In this case, during the course of the original trial, the plaintiff's counsel had argued that the plaintiff's attending physician was equally available as a witness to the defendant. The argument was that the plaintiff had waived her physician-patient privilege of confidence, and that her physician, therefore, became equally available as a witness for the defendant. The court rejected this argument, and in discussing the question as to when a witness is "available" to one or the other of the parties, the court points out that to be "available" means that one party has superior means of knowledge of the existence and identity of the witness, the nature of the testimony the witness would be expected to give in the light of his previous statements or declarations, and the relationship borne by the witness to the particular parties as the same would be reasonably expected to affect his personal interest in the outcome of the litigation, and to make it natural that he would be expected to testify in favor of one party against the other. In rejecting the plaintiff's contention that the waiver of the patient-physician privilege made the physician equally available, the court realistically points out that the physician would be more available to the patient, and that if called by the adversary party, the adversary would be compelled to vouch for the credibility of the physician and would also be deprived of the right of cross examination.

In *State v. Smith*,[17] which was a prosecution for second degree murder, the supreme court held it proper to allow an eight year old witness to testify, even though the witness was only seven years of age at the time of the shooting. The court held that the weight to be given to such testimony would be for the jury.

The problem of impeachment of one's own witness arose in an interesting way in the case of *Hayes v. Kansas City Southern Railway*.[18] The plaintiff, about five months prior to trial, had taken the deposition of a fellow employee. Upon taking the deposition, when the employee did not testify as he had indicated in a prior written statement, the plaintiff's attorney claimed surprise, and had introduced into the deposition the prior written statement of the witness. At the trial, the deposition was

16. 258 S.W. 2d 676 (Mo. 1953).
17. 261 S.W. 2d 50 (Mo. 1953).
18. 260 S.W. 2d 491 (Mo. 1953).

offered in evidence, over objection that such use of the prior statement was an attempt by the plaintiff to impeach his own witness. This objection deposition was held to be error. The court pointed out that the plaintiff could not claim surprise at the time of the trial, because he had known for some five months (since the taking of the deposition) of the testimony of this witness, and in spite of such knowledge, the plaintiff had chosen to vouch for the testimony of the witness by introducing the deposition.

Admissions and Confessions

In *Wilt v. Moody*,[19] the court points out the two established exceptions to the rule that depositions may not be used in the trial of a case when the deponent is present in court and available as a witness. These two exceptions are for the purpose of the impeachment of the testimony of the witness, and secondly when they are introduced as an admission against interest. In this case, it was held error for the trial court to refuse to allow the plaintiff to introduce in evidence and read to the jury parts of the defendant's deposition in the plaintiff's case. The error was not cured by the fact that the same testimony was covered on cross examination of the defendant in the defendant's case.

The same rule holds true with regard to prior statements, as pointed out in *State v. Anderson*.[20] This was an action by the Attorney General against the defendant to prevent and restrain the defendant from violation of the law relating to monopolies, discriminations, and conspiracies. A witness testified as to conversations he had with two defendants, and as to statements made by them to him which, if competent and believed, would show conspiracy and an agreement to control, regulate and maintain prices. The court held these admissions against interest to be competent evidence of the existence of the facts which they tend to establish.

An interesting point was raised in *Lammers v. Greulich*,[21] which was an action for fraud against real estate brokers. After a directed verdict in favor of the defendants in the trial court, the question arose on appeal as to whether or not alleged admissions of the defendants found in the defendants' answers could be considered as evidence for the purpose of making a submissible case. The court held that such could not be con-

19. 254 S.W. 2d 15 (Mo. 1953).
20. 254 S.W. 2d 609 (Mo. 1953).
21. 262 S.W. 2d 861 (Mo. 1953).

sidered unless the answers had been introduced in evidence as an admission. In this connection, the court points out that the pleadings in a case are ordinarily not for consideration of the jury. However, where they contain admissions, they may be introduced in evidence, the same as other admissions.

PRESUMPTIONS

The matter of presumptions and their effect on the trial of a case is well pointed out in *Duff v. St. Louis Mining & Milling Corporation.*[22] This was a Workmen's Compensation proceeding for the death of Jess Duff. The referee denied compensation on the evidence that Duff was working on a runway about fourteen feet above the ground when he was last seen; that a thud was then heard; that Duff was then found dead on the ground, with a broken jaw and blood on his face. An autopsy by the corner found acute right heart dilation following cardiac enlargement. The coroner testified that the broken jaw was not severe enough trauma to embarrass the heart. On appeal to the commission, the referee's finding was overruled. The court of appeals affirmed the commission's holding, but such was reversed by the supreme court, stating that the presumption that, "When an employee charged with the performance of a duty is found injured at a place where his duty required him to be, a presumption arises that he was injured in the course of his employment" is rebuttable, and "When substantial evidence is introduced by party against whom a presumption operates controverting the presumed fact, then its existence or non-existence is to be determined from the evidence, exactly as if no presumption had ever been operative in the case. In other words, such presumptions are procedural (placing the burden upon the party denying their truth to produce evidence) and not for the consideration of triers of the facts who have the function of determining what facts are proved by the evidence produced." When the substantial evidence was produced that Duff's death resulted from disease rather than accident, the "presumption" of accident could not be weighted against that substantial evidence, and with no other evidence of accident being shown, the employer could not be held.

EXPERT AND OPINION

The court again was called upon to consider the scope of an expert's

22. 363 Mo. 944, 255 S.W. 2d 792 (1953).

testimony as it relates to history given to a doctor in *Holmes v. Terminal Railroad Ass'n of St. Louis.*[23] This was an action against the defendant under the Federal Employer's Liability Act for injuries sustained by the plaintiff while employed by the defendant. In the trial of the case, one of the plaintiff's physicians, in giving his opinion as to the injuries to the plaintiff, stated "Well, from what I can gather of the description of his fall, he came down on his tail bone. . . ." Another doctor testified that the plaintiff had hold him about the accident, and upon a question based upon his examination and from the history given, he testified that in his opinion the plaintiff had suffered from a sprain of his lower back and a contusion of the coccyx or tail bone. The court held that these two instances of testimony were improper. The general rule is affirmed regarding expert opinion, that a physician in stating his expert opinion on a patient's condition may testify as to what he personally observed, and also as to what the patient said (an exception to the hearsay rule) concerning his *present, existing* symptoms and complaints. However, he may not base his opinion on or testify to statements of the patient with respect to *past* physical conditions, circumstances surrounding the injury, or the manner in which the injury was received. The court in *Lesch v. Terminal Railroad Association of St. Louis,*[24] when the same question was presented, indicates that while it is necessary, in some instances, for a physician of a patient to make some inquiry as to the cause of the condition for the purpose of intelligent treatment, such inquiry, so far as his testimony is concerned, does not extend to a narrative of the facts attending the injury.

The supreme court held in *DeLay v. Ward,*[25] that it was not necessary to have expert testimony regarding the speed at which a three year old child would cross a hard surface highway. The court pointed out that his was a matter of common knowledge and not a question with which experts could materially assist the jury.

In *Gaddy v. Skelly Oil Company,*[26] the verdict for the plaintiff was reversed on appeal. The trial court had held a submissible case had been made upon the testimony of an expert. This was an action for the wrongful death of the plaintiff's husband as the result of an explosion of

23. 363 Mo. 1178, 257 S.W. 2d 922 (1953).
24. 258 S.W. 2d 686 (Mo. 1953).
25. 262 S.W. 2d 628 (Mo. 1953).
26. 259 S.W. 2d 844 (Mo. 1953).

a gas hot water heater. An expert for the plaintiff had testified that in his opinion the regulator on the equipment furnished by the defendant was defective, and in his opinion caused the explosion. The supreme court, in reviewing the testimony of the expert, held that an expert's opinion must not be a mere guess or conjecture, but must be based upon adequate data and be supported by facts and testimony which will give it sufficient probative force to be substantial evidence. The court held that whether or not there were sufficient facts to support the expert's opinion was a matter of law. In this case, the court found that there were not sufficient facts to justify the opinion of the expert.

HEARSAY

Hearsay evidence was discussed in two cases, both of which concern the introduction of evidence which was alleged to be admissible under the Uniform Business Record as Evidence Law, *Missouri Revised Statutes,* Sections 490.660—490.690 (1949). In *Holloway v. Shepardson,*[27] which was an action for damages for assault, the defendant and other witnesses were allowed to testify from a monthly statement of account sent to the defendant from a lumber company. the court discusses the Uniform Business Records Act, and concludes that the monthly statement introduced in this case was a narrative of past events, and not the business records which the Act contemplated. The exhibit was held to be written hearsay. The exhibit was shown to be copies of entries appearing in the ledger, and there was no showing that they were true copies of the ledger. The court distinguishes this case from those involving carbon copies of original records, which have been held to be properly admitted in evidence.[28]

In the other case, *Gary v. St. Louis-San Francisco Railway,*[29] which was an action for damages for injuries received when the plaintiff was allegedly pushed from the moving train of the defendant, the trial court granted a new trial on an alleged error in the exclusion of the hospital records. The defendant had objected on the same grounds that the records were self serving, hearsay, and not required to be kept by law. Portions of the hospital records were later offered and received in evidence, but the trial court stated that material parts were not later

27. 258 S.W. 2d 656 (Mo. 1953).
28. See Reinecke v. Mitchell, 54 N.M. 268, 221 P. 2d 563, 21 A.L.R. 2d 770 (1950).
29. 363 Mo. 864, 254 S.W. 2d 577 (1953).

received. In considering the matter, the supreme court held that the records were not a part of the records required to kept by law under Section 193.270, *Missouri Revised Statutes* (1949), and therefore, since they were hearsay, they were only admissible if they fall within the rule of the Uniform Business Records as Evidence Law. The court points out that such law requires proof of (1) the custodian to identify the records; (2) the mode of preparation of the record; (3) that the record be made in the regular course of business; (4) at or near time the act takes place; (5) if, in the court's opinion, the sources of the information, the method and time of preparation were such as to justify admission. The evidence in this particular case was held only to be a summary of events, made fourteen days after the events, with no evidence that it was made either in the regular course of business, or that they were necessary business entries.

Dead Man's Statute

In *Stoops v. Stoops*,[30] the question of the application of the dead man's statute was presented. This was an action by the former wife of a decendent against the second wife of the decendent to set aside two deeds. The first deed was from the plaintiff in this action and the decendent to a third party, and the second deed was from said third party to the decendent and the second wife. In the trial of the case, the trial court refused to permit the plaintiff to testify concerning the first deed on the grounds of the dead man's statute. In considering the matter, the supreme court ruled that since the plaintiff is a party to the cause of action, and the suit is primarily between the plaintiff and the decedant husband (in effect) the dead man's statute applies. The court distinguishes between the competency of a husband or wife to testify against the other party, pointing out that one spouse may testify against the other spouse where the issue is fraud as between them. However, this does not affect the incompetency of the dead man's statute. The court pointed out that had the plaintiff brought her suit prior to the death of the decedent husband, that she would have been a competent witness.

Binding Evidence

The Court in *Kellinger v. Kansas City Public Service Company*,[31] reaffirmed the well established rule that the plaintiff in an action is

30. 363 Mo. 1075, 259 S.W. 2d 833 (1953).
31. 259 S.W. 2d 391 (Mo. 1953).

not bound by the testimony of his own witnesses insofar as such testimony is contradicted by the plaintiff's other evidence. In this case, an action against a public service company for personal injuries, plaintiff's witnesses testified regarding whether or not the streetcar on which the plaintiff was injured was caused to make an emergency stop to avoid an automobile. Some of the plaintiff's witnesses so testified, but this testimony was contradicted by that of the plaintiff, and also the motorman of the streetcar, who was called as a witness by the plaintiff. The court held, under these circumstances, that the plaintiff was not bound by the adverse testimony. However, in *Barnum v. Hutchens Metal Products, Inc.*,[32] the opposite result was reached. This was an action for a real estate commission for the sale and lease of property. The plaintiff, having the burden of proof, introduced in evidence the testimony of another broker regarding the sale of the property by such other broker. The trial court held that no case was made for the jury, which was upheld by the supreme court. The court pointed out in this instance that there was no conflict in the evidence, and the plaintiff was bound by the uncontradicted testimony of his own witnesses.

THE HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.

[*Editor's Note.* Mr. Becker has already reviewed the 1953 cases in this field in the January issue of the *Review* (19 *Missouri Law Review* 48). A summary of more recent developments will appear in the January, 1955 issue.]

INSURANCE

ROBERT E. SEILER*

In 1953, the Supreme Court handed down only one decision dealing primarily with insurance, which is much less than the usual number. The

32. 255 S.W. 2d 807 (Mo. 1953).

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case was *State Mutual Life Assurance Co. of Worcester v. Dischinger.*[1] There the insurance company contended the policies (life insurance policies which included disability benefits), which had been pledged as collateral security for policy loans obtained by the insured, had been automatically cancelled under the terms of the loan agreements, because the total indebtedness, with interest, exceeded the cash surrender value of the policies. The insured's beneficiaries contended the insured became totally and permanently disabled, that due proof of disability was made to the insurer and that disability benefits had accrued which the insurer, under the policies, should have credited against the interest due on the policy loans, so that the insurer had no right to cancel the policies. The policies provided that if the insured should furnish due proof of disability the insurer would pay one percent of the face amount of the policy, and a like amount each month thereafter during continuance of disability; also that the first payment should be made six months after receipt of such proof and then only if it appear that the insured is still totally and permanently disabled. The cancellations occurred before the expiration of the six months after due proof of disability. The disability continued until the death of the insured two and a half years later.

The court did not find any contradiction or ambiguity in the above policy provisions and held that due proof of disability and a waiting period of six months thereafter during continuance of disability were conditions precedent to the insurer's ability to make the initial payment and no indebtedness accrued during the six months. Hence, there was no indebtedness of the insurer to the insured available for application to the discharge of the interest on the policy loans, prior to the automatic cancellation of the policies under the provisions of the policy loan certificates.

The decision is in accord with the weight of authority on the question. In a few jurisdictions the result might have been otherwise, on the theory that liability attached when proof of loss was made, that the rights of the parties became fixed at a time before sufficient interest had accrued on the loan to cause automatic cancellation and that the provision for waiting six months before the first disability payment was a condition of the satisfaction of the debt, not of its creation.

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1. 263 S.W. 2d 394 (Mo. 1953).

LABOR LAW

AUSTIN F. SHUTE*

In the past year and a half, very few labor cases have arisen to vex the appellate courts of the State of Missouri. The cases which have arisen have been decided on settled law, with one or two possible exceptions.

The case of *Mayfield v. Thompson*[1] was a suit by a railroad brakeman against his former employer for an alleged wrongful discharge. Plaintiff admitted that he had failed to exhaust his administrative remedies under the collective bargaining agreement with defendant, but claimed that on the basis of *Moore v. Illinois Central Railroad Company*[2], he did not have to exhaust his administrative remedies before seeking relief in the court.

The *Moore* case involved a collective bargaining agreement entered into in the State of Mississippi. In Mississippi, the state law did not require exhaustion of administrative remedies prior to seeking judicial relief. The United States Supreme Court stated in the *Moore* case, that it could find nothing in the Railway Labor Act[3] which proported to take away from the courts the jurisdiction to determine a wrongful discharge controversy or requiring exhaustion of administrative remedies as a prerequisite to filing any lawsuit in court.

Plaintiff, in the *Mayfield case,* had judgment in the circuit court, and defendants appealed. The Supreme Court of Missouri reversed the finding of the circuit court, on the basis of the case of *Transcontinental and Western Air Inc. v. Koppel.*[4] The *Koppel* case was a case which arose in Missouri and involved an alleged unlawful discharge of the plaintiff. Plaintiff failed to exhaust his administrative remedies prior to seeking judicial relief.

The United States Supreme Court held that where the carrier was subject to the Railway Labor Act then the petitioner could either proceed on his administrative remedy or alternatively, if the state law allowed him to do so, he could have his judicial relief. Under the substantive law of Missouri, however, a petitioner is required to exhaust his adminis-

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1. 262 S. W. 2d 157 (Mo. App. 1953).
2. 312 U.S. 630 (1941).
3. 45 U.S.C.A. § 151 *et seq.* (1953 Supp.).
4. 345 U.S. 653 (1953).

trative remedies prior to seeking judicial relief. The substantive law of the State would rule, then, even though the carrier was one subject to the Railway Labor Act. Thus, holds the *Koppel* case, petitioner must exhaust his administrative remedy prior to seeking judicial relief.

On the basis of this case, then, and on the older case of *Reed v. St. Louis Southwestern Railway Company*,[5] the Supreme Court of Missouri held that the rule of law is that a plaintiff must exhaust his administrative remedy prior to coming into the state court seeking judicial relief.

The case of *Junkins v. Local Union N. 6313*,[6] involved an injunction suit brought by a member of the defendant union seeking to enjoin defendant from taking disciplinary action against petitioner. The petitioner, against union custom, had accepted a job transfer from cable repairman to test board man without notice to the union.

Under union custom, the employer must post notice of the job opening so that all employees may have the opportunity to bid on the job on the basis of seniority and job qualification. When the petitioner accepted the lateral move without notice, the union voted to take disciplinary action against him. The lower court issued the injunction ordering defendants to refrain from attempting to hold a trial of any character involving the plaintiff or from threatening to punish plaintiff in any way for violating the custom. Appeal was taken to the Supreme Court of Missouri.

There were a number of alleged constitutional questions in the appeal. The supreme court held: ". . . There can be no doubt that these 'due process' provisions are for the protection of life, liberty and property as against State governmental action through executive, legislative, judicial or administrative authority, and are not applicable herein to the rights of individuals affecting the rights of other individuals. . . ."[7] The court then held that the constitutional questions alleged were specious only and transferred the case to the Springfield Court of Appeals.

In *Donahoo v. Thompson*[8] plaintiff sued to recover damages for an alleged wrongful discharge. Although plaintiff admittedly had failed to exhaust his administrative remedies before seeking judicial relief, he received a verdict in the lower court. The defendant appealed. The court

5. 95 S.W. 2d 887 (Mo. App. 1936).
6. 263 S.W. 2d 337 (Mo. 1954).
7. *Id.* at 340.
8. 270 S.W. 2d 104 (Mo. App. 1954).

considered only one ground on the appeal, and that was defendants allegation that the lower court erred in over-ruling defendant's motion for a directed verdict.

The defendant relied upon the case of *Mayfield v. Thompson.*[9] That case was a similar suit for damages for an alleged wrongful discharge brought by a plaintiff who admittedly had failed to exhaust his administrative remedies. The plaintiff in that case had waited almost five years prior to filing suit, and the court sustained defendant's motion for a directed verdict.

In the case at bar, however, the plaintiff had followed his grievance procedure as contained in the collective bargaining agreement to a certain point and then had failed to pursue his appellate administrative remedy, but had come into court. There was nothing in the collective bargaining agreement which provided that such appeal must be taken within a certain specified period. Since no time was stated, the court said that it would imply that a reasonable time would be allowed. Since, under the court's determination, a reasonable time to appeal administratively had not elapsed at the time plaintiff's suit was filed, then defendant was not entitled to a directed verdict.

The court held that the plaintiff's action was premature since he admittedly had not exhausted his administrative remedies. The case was reversed with directions to the trial court to dismiss the petition without prejudice.

The case of *Richardson v. Ozark Airlines,*[10] involved a suit for specific performance of a contract of employment. Plaintiff was an airline pilot and had entered the service of defendant on January 10, 1951. He was discharged January 1, 1952. His petition requested that defendant be ordered to restore him to his former position with his seniority rights unimpaired and for judgment for loss of pay in the amount of $9,200.00. Defendant's motion to dismiss was sustained, and plaintiff appealed.

During the time that plaintiff worked for defendant, there was in effect an agreement between the defendant and the Airlines Pilots Association, plaintiff's union, which was made in accordance with the

9. 262 S.W. 2d 157 (Mo. App. 1953).
10. 270 S.W. 2d 8 (Mo. 1954).

Railway Labor Act.[11] This agreement set up grievance procedures and also certain procedures for the discipline and dismissal of pilots. Plaintiff failed to exhaust his administrative remedy under this collective bargaining agreement.

The supreme court stated: "It is a familiar and well established doctrine that courts of equity will not exercise jurisdiction to grant a decree of specific performance of a contract for personal services. . . ."[12]

Thus the decision of the trial court was sustained.

There are two other labor cases which have been decided by the Supreme Court of Missouri, neither of which has yet appeared in the written reports. The first of these is *Tallman Company v. Latal.*[13] This was an action brought to enjoin picketing. The employees of a certain plumbing supply firm organized by the defendant union were on strike, but this union did not represent any of plaintiff's employees. A picket line had been placed around plaintiff's shop, customers and employees were threatened, and plaintiff's business suffered substantial loss thereby. The purpose of the picketing was held to be to force plaintiff into forcing its employees to join the defendant union. Under the settled law of Missouri such picketing was unlawful.[14] After the case was taken under advisement, the National Labor Relations Board certified another union as bargaining agent for plaintiff's employees and the pickets were withdrawn. The appellate court held that while the trial court had the discretion to deny any injunction because of the mootness of the picketing issue, it was error to dismiss the petition. The judgment was reversed and remanded with directions to determine the issue as to damages.

The second case is that of *Cooper Transport Company v. Stufflebean.*[15] This was an action to enjoin picketing which was alleged to be for the purpose of compelling the defendant trucking company to recognize as the exclusive bargaining agent of its maintenance employees a union not selected by a majority of such employees. Under the National Labor Relations Act such picketing is an unfair labor practice.[16] Thus, under recent decisions of the Supreme Court of the United States holding

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11. *Supra,* note 3.
12. 270 S.W. 2d 8, 10 (Mo. 1945).
13. Div. 2, Leedy, J., Mar. 8, 1954—(No. 43437).
14. See Shute, *A Survey of Missouri Labor Law,* 18 Mo. L. REV. 93-184 (1953).
15. Div. 2, Westhues, C., June 14, 1954—(No. 43706).
16. 29 U.S.C. § 158 (a) (1) & (b) (1) (1947).

that the N. L. R. B. has sole jurisdiction in cases involving unfair labor practices, then the injunction was reversed for lack of jurisdiction of the Missouri courts.[17] And this, even though such unfair labor practice is also in violation of Section 29, Article I of the Missouri Constitution, which grants employees the right to organize and to bargain collectively through representatives of their own chosing.[18]

This last case is a very important case in the line of decisions which have been handed down since the recent case of *Garner v. Teamsters.*[19] It seems to state that if an unfair labor practice is involved, even though the act may also be a violation of state law, then still the rule of exclusion of state action as laid down in the *Garner* case will apply.[20] Without having the full report available, however, it is difficult to make any positive statement as to the meaning of this *Stufflebean* case.

The full impact of the *Garner* case has not yet been felt in the Missouri decision due to the scarcity of cases wherein that jurisdictional problem has arisen. In the year to come, however, it will be interesting to note the manner in which Missouri labor law will be affected by this decision.

PROPERTY

WILLARD L. ECKHARDT*

LIFE TENANT'S PURCHASE OF FEE—EFFECT ON REMAINDER

In *Muzzy v. Muzzy,*[1] the testator devised Blackacre to his widow, *W*, for life, with vested remainder in fee to his son, *C*. *C*, on his own account and for his own benefit, mortgaged his remainder. At a trustee's foreclosure sale after *C*'s default, *W* purchased the remainder. The court, in an able and lucid opinion by Coil, C., rejected the contention that *W* purchased for the benefit of *C*, and held that *W* after purchase could hold

17. Garner v. Teamsters, 74 Sup. Ct. 161, 98 L. Ed. 161 (1953).
18. MO. CONST., Art, I, § 29 (1945).
19. *Supra,* note 17.
20. See Shute, *State v. Federal Jurisdiction in Labor Disputes: The Garner Case,* 19 Mo. L. REV. 119-137 (1954).

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1. 261 S.W. 2d 927 (Mo. 1953).

the remainder for her own account. The court recognizes the quasi-fiduciary relationship that exists between life tenant and remainderman. For example, if the life tenant breaches his duty to pay taxes and then purchases the fee at a tax sale, the remainder is not affected; the life tenant by his purchase simply has performed his duty to pay taxes. If the life tenant purchases an outstanding encumbrance superior to both life estate and remainder, the purchase inures to the benefit of the remainderman if he makes contribution. The court correctly distinguishes the principal case from the several other types of cases.

Transactions Reserving Life Estate and Power Over Fee

In *St. Louis County Nat. Bank v. Fielder*,[2] a 1953 case of great importance, the court in an able opinion by Hyde, J., overruled *Goins v. Melton* [3] insofar as that case indicated that a limited power of disposition in the grantor made an instrument in the form of a deed testamentary in character. The court upheld the validity as a deed of an instrument in the form of a deed which contained the provision. "The said party of the first part hereby reserves a Life Estate in and to said property, with power to sell, rent, lease, mortgage or otherwise dispose of said property during his natural lifetime," and where the grantor did not attempt to exercise any of the powers. This case and related problems were discussed more fully last year in the present writer's review of 1952 cases.[4]

Adopted Children[5]

Wailes v. Curators of Central College[6] holds that a child adopted under the 1917 adoption act[7] cannot take by intestate descent from his natural parents. Presumably the same rule applies to a child adopted under the 1948 adoption act,[8] because the pertinent provisions of the two acts are substantially the same with reference to this problem. This case

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2. 260 S.W. 2d 483 (Mo. 1953).
3. 343 Mo. 413, 121 S.W. 2d 821 (1938).
4. Eckhardt, *Work of Missouri Supreme Court for 1952—Property*, 18 Mo. L. Rev. 366, 374-376 (1953).
5. For citations to many law review notes, comments, and articles on the effect of adoption in Missouri, see Eckhardt and Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 V.A.M.S., pp. 57-48, § 64, nn. 99, 1-4.
6. 363 Mo. 932, 254 S.W. 2d 645 (1953).
7. Mo. Laws 1917, p. 194; Mo. Rev. Stat. § 9614 (1939). See Historical Note to V.A.M.S. § 453.090.
8. Mo. Laws 1949, Vol. 2, p. 217, emergency, eff. May 21, 1948; Mo. Rev. Stat. § 453.090 (1949).

settles what long had been an open question. A recent case note in the *Missouri Law Review* discusses the principal case and the problem of inheritance as between adopted children and their natural parents.[9]

In the principal case the children were adopted in 1936 and ca. 1937 under the 1917 adoption act. The court applies to them not the provisions of the 1917 act, Section 9614, *Missouri Revised Statutes* (1939), but rather the provisions of the 1948 act, Section 453.090, *Missouri Revised Statutes* (1949). This may have been inadvertent, and it would seem to be immaterial which section was applied in resolving the specific issue, because the two sections are substantially the same with reference to this issue. But it would be hazardous to assume that the provisions of the 1948 act will be applied to children adopted under the 1917 act where the problem is one other than inheritance. In one respect at least the two acts are diametrically opposed to each other, in the case of property expressly limited to the "heirs of the body."

The adoption act of 1917, Section 9614, *Missouri Revised Statutes* (1939), provides: ". . . Said [adopted] child shall thereafter [after adoption] be deemed and held to be for every purpose, the child of its parent or parents by adoption, as fully as though born to them in lawful wedlock . . . *Provided, however,* that neither said adopted child or said parents by adoption shall be capable of inheriting from or taking through each other property expressly limited to heirs of the body of such child or parent by adoption."

The adoption act of 1948, Section 453.090(4), *Missouri Revised Statutes* (1949), provides: "Said adopted child shall be capable of inheriting from and taking through his parent or parents by adoption property limited expressly to heirs of the body of such parent or parents by adoption."

The case apparently intended to be covered is the limitation by deed or will to *B* for life, remainder to the heirs of the body of *B*. If *B* adopts a child who survives *B*, can the adopted child take by way of purchase under the limitation as an "heir of the body of *B*"?[10] The above hypo-

9. Lewis, *Adoption—Descent and Distribution—Right of Adopted Child to Take From Natural Parent Under Pretermitted Heir Statute,* 19 Mo. L. Rev. 86-88 (1954).

10. The 1917 proviso and the 1948 substitute therefor are both obscure insofar as they refer to "inheriting from and taking through," because in the hypothetical case above the heirs of the body neither "inherit from" nor "take through" B, the life tenant, but take directly by purchase from the grantor or testator.

thetical may present numerous separate and distinct problems by reason of different combinations of significant dates, depending on whether the child was adopted prior to 1917, during the 1917-1948 period, or during the period from 1948 to date, depending on the effective date on the deed if the limitation is by deed, or depending on either the date of the execution of the will or the death of the testator if the limitation is by will. For example, *B* adopts a child in 1916 by deed; *T* executes a will in 1946 limiting property as above; and then *T* dies in 1950.

A type of case not expressly covered by either the 1917 or the 1948 statutes, but a case where the different answers are suggested by analogy by the two statutes, is the limitation over on failure of heirs of the body. *A* conveys to *B* and his heirs, but if *B* dies without issue him surviving, over to *C* and his heirs. If *B* is survived only by an adopted child, does *C*'s shifting executory interest fail? Again numerous separate and distinct problems exist, depending on the dates of the significant events.[11]

In view of the uncertainties as to the effect of the several adoption laws on express limitations of property, it is advisable for a grantor or testator who creates future interests in children, issue, or heirs of the body, etc., expressly to include or to exclude adopted children. And if one is dealing with a limitation to "heirs of the body" or "issue," terms covering more than one generation, it would be well expressly to cover adopted children of adopted children.

Possession as Notice of Rights of Party in Possession

Karszina v. Kelsey,[12] relying on *Squires v. Kimball*,[13] states that "one who buys real estate in the visible possession of a third person is chargeable with notice of the title and rights of that person in the premises; . . ." This case thus falls into the first of the two lines of cases in Missouri, one using broad general language which would impute notice to the purchaser of land whether he actually knew of the possession or not, and the other following the words of the recording act and requiring actual knowledge of the possession before he is put on inquiry. Bruce A. Ring has considered the problem of possession as notice in two studies

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11. In addition to the type of case discussed in this paragraph, there are many other types of cases presenting a similar problem. For example, is an adopted child a "lineal descendant" under the lapse statute. Mo. Rev. Stat. § 468.310 (1949).

12. 262 S.W. 2d 844, 846 (Mo. 1953).

13. 203 Mo. 110, 119, 106 S.W. 502, 504 (1907).

published in the *Missouri Law Review*.[14] *Karsznia. v. Kelsey* was concerned with possession as notice of homestead rights, and can be distinguished from the cases concerned with possession as notice of rights under an unrecorded instrument. *Karsznia v. Kelsey* is the subject of a recent case note in the *Missouri Law Review*.[15]

WATERCOURSES—HUNTING AND FISHING

Elder v. Delcour,[16] opening a portion of the upper Meramec River to fishermen, on the theory that the watercourses is a public highway even though non-navigable, is a case of great interest not only to lawyers but also to the public at large. A student comment on this case and its ramifications appears elsewhere in this issue of the *Missouri Law Review*.[17]

TAX TITLES—JONES-MUNGER

Section 140.590, *Missouri Revised Statutes* (1949), the three year limitation statute on attack on a collector's tax deed, was enacted in 1872.[18] This section had a somewhat erratic history in the cases in the following years, and was omitted in the 1879, 1889, and 1899 Revisions. This section has been included in the Revisions from 1909 to date, and although it was noticed in a case in 1942 and in several later cases, its real rediscovery was in 1951 when two reported cases applied the statute.[19]

The Title Examination Standards Committee of The Missouri Bar started working in 1949 on a title standard covering the problem of tax titles, and in 1952 the Committee recommended what is now Title Examination Standard No. 26.[20] This Standard provides for approving a tax title on the basis of adverse possession for twenty-seven years, or on

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14. *Comment, Possession as Notice Under Missouri Recording Act*, 16 Mo. L. REV. 142-150 (1951); *Note, Property—Adverse Possession Under Unrecorded Deed*, 16 Mo. L. REV. 461-466 (1951).

15. Strong, *Note, Real Property—Homestead—Possession as Notice*, 19 Mo. L. REV. 183-185 (1954).

16. 269 S.W. 2d 17 (Mo. 1954), *reversing* 263 S.W. 2d 221 (Mo. App. 1953).

17. Gardner, *Water and Watercourses, Navigability of Streams in Missouri*, 19 Mo. L. REV. 401 (1954).

18. Mo. Laws 1871-1872 (Adj. Sess.), p. 130, § 222.

19. Granger v. Barber, 236 S.W. 2d 293 (Mo. 1951); and Pettus v. City of St. Louis, 242 S.W. 2d 723 (Mo. 1951) [the opinion carefully traces the history of this section]. See also Byrnes v. Scaggs, 247 S.W. 2d 826 (Mo. 1952).

20. 9 J. Mo. BAR. 187 (Sept. 1953); 1953 Pamphlet Reprint, p. 15; 23 V.A.M.S., 1954 Pocket Part, p. 20.

the basis of a quiet title action or equivalent (although an examiner in the exercise of sound discretion need not necessarily require either of the above). This Standard was drafted prior to the two 1951 opinions and consequently the text was not affected by any opinion as to the possible effect of Section 140.590; a preliminary examination of the two cases before the Standard was adopted did not indicate any reason to change the text of the Standard. In November, 1952, the present writer published in the *Missouri Law Review* his analysis of the effect of Section 140.590 on tax titles insofar as a title examiner is concerned,[21] and the substance of that analysis is now included in the Comment to Title Examination Standard No. 26. The conclusion reached was that by reason of Section 140.590 one who holds under a collector's tax deed is in a much stronger position to *defend* his title than formerly was assumed, but that Section 140.590 does not substantially improve his position with reference satisfying his obligation to furnish a marketable title under a contract calling for such title. This is due in part to the express exception stated in Section 140.590, and due in part to the requirement, among others, that the tax deed not be "void on its face." In the absence of a large body of case authority, no title examiner can be sure whether a particular tax deed will be held to be void on its face.

Costello v. City of St. Louis[22] is important in indicating the probable course of decision when the issue is whether a tax deed is void on its face so that the three year bar of Section 140.590 is inapplicable. The tax deed in question was held to be void on its face by reason of a defective description. This ground would seem to be sound enough, although the description might be held to be sufficient in a contract for the sale of land. The tax deed was held to be void on its face for the additional reason that the recited consideration of $4.75 was so grossly inadequate as to render the sale inherently void (the sale price was less than two tenths of one percent of the reasonable value of about $3500). This ground would seem to be of more doubtful soundness because nothing on the face of the tax deed indicated whether the property was improved or indicated what its reasonable value might be; it is conceivable that $4.75 was a fair price at a forced sale. This case, and *Liese v. Sackbauer*,[23]

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21. Eckhardt, *Work of the Missouri Supreme Court for 1951—Property*, 17 Mo. L. REV. 398, 401-402 (1952).

22. 262 S.W. 2d 591 (Mo. 1953).

23. 222 S.W. 2d 84 (Mo. 1949) [setting aside a collector's tax deed under the

indicate that regardless of Section 145.590 the courts probably will continue to set aside tax deeds if the price paid at the tax sale is grossly inadequate. The problem as to when a tax deed is void on its face will be considered at length in a student comment to be published early in 1955 in the *Missouri Law Review.*

MORTGAGES—TWENTY YEAR LIMITATION ON FORECLOSURE

Section 516.150, *Missouri Revised Statutes* (1949), is the special statute of limitation on mortgage foreclosures. Title examiners generally pass an unreleased mortgage or deed of trust that comes within the terms of the twenty year provisions where no affidavit appears of record, even though there may be some question as to whether the statute is one of repose or one of extinguishment. *Oehler v. Philpott*[24] lends support to the view that the statute is one of extinguishment, in that the mortgagor was given affirmative relief against foreclosure (the case was one where an affidavit was filed but the note itself was barred by limitation). The case is discussed at length in a recent number of the *Missouri Law Review.*[25]

MECHANICS' LIENS

The Missouri statutes on mechanics' liens, Chapter 429, *Missouri Revised Statutes* (1949), need a thorough revision. Lawyers sometimes overlook distinctions too "nice" for practical purposes, and occasionally even a court overlooks a fine point. Two cases in the Courts of Appeals point up the problem. Section 429.080, in providing time limits for filing liens, begins as follows: "It shall be the duty of every original contractor within six months, and every journeyman and day laborer within sixty days, and every other person seeking to obtain the benefit of the provisions of sections 429.010 to 429.340 within four months, after the indebtedness shall have accrued, to file with the clerk of the circuit court," etc. The statute seems to be clear enough that the period for filing is six months in the case of original contractors, sixty days in the case of

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Jones-Munger act, recorded in 1937, in a suit commenced in 1945, eight years later, on the ground the price was so inadequate as to constitute fraud, even though the court had in view Section 140.590; there also were special circumstances giving rise to an estoppel against the purchaser under the tax deed].

24. 263 S.W. 2d 201 (Mo. 1953); see also, 253 S.W. 2d 179 (Mo. 1952) [transferring case to court of appeals], and 255 S.W. 2d 90 (Mo. App. 1953) [opinion, and order transferring case to supreme court for reexamination of existing law].

journeymen and day laborers, and four months in the case of every other person (including a materialman). In *Davidson v. Fisher*[26] the court said that a materialman who deals directly with the owner has only four months in which to file his lien, citing the above section. But in *E. C. Robinson Lumber Co. v. Baugher*[27] the court applied the correct rule and held that a materialman who deals directly with the owner is an "original contractor" and has six months in which to file instead of the four months allowed for materialmen as included in "every other person." The court also held that a laborer who deals directly with the owner is an "original contractor" and has six months to file instead of the sixty days allowed for "journeymen and day laborers."

In Missouri where so much real estate is held by entireties, mechanics' liens often cannot be established because the contract for the improvement was with the husband or with the wife and not with both husband and wife. *Roper v. Clanton*[28] is typical of this class of cases. An apartment house was owned by husband and wife as tenants by the entirety. The husband and an electrical contractor entered into an oral contract for rewiring the building, the wife not being present. There was no evidence of any contract, actual or constructive, between the wife and the electrical contractor. It was held that although the husband was personally liable for the work performed, the wife was not personally liable and no mechanic's lien could be established against the real estate. An attorney who has contractors, materialmen, or laborers for clients should advise these clients to make sure that contracts or accounts are with both husband and wife, not only so that mechanics' liens can be established against entireties property, but also so that in the case of a personal judgment there can be levy of execution against entireties property.

Liquidated Damages or Penalty

A deposit for liquidated and stipulated damages is provided as a matter of course in contracts for the sale of land, and often is provided

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25. Strom, *Recent Cases, Mortgages—Twenty-year Limitation on Foreclosure,* 19 Mo. L. Rev. 186-188 (1954).

26. 258 S.W. 2d 297 (Mo. App. 1953), at p. 304, col. 1. The plaintiff failed in a suit to establish a mechanic's lien because of insufficient proof that the lumber furnished, and for which a lien was claimed, was used to build or repair buildings on the property in question.

27. 258 S.W. 2d 259 (Mo. App. 1953).

28. 258 S.W. 2d 283 (Mo. App. 1953).

for in other instruments. The danger is that the clause will be construed as a provision for a penalty, in which case the injured party will be limited to, and must prove, damages actually suffered, thus frustrating the basic purpose of the "liquidated damages" clause.

Proper drafting helps to avoid a penalty construction. Although it is obvious that the words "penalty" or "forfeiture" never should be used in drafting a liquidated damages clause, many forms in common use in Missouri have the word "forfeiture," which starts the clause with two strikes against it. The following simple clause is recommended for a contract for the sale of land: "If this contract shall not be closed for the fault of the Buyer, the money in escrow shall be paid to the Seller as liquidated damages, it being agreed that actual damages are difficult if not impossible to ascertain." This simple clause is sufficient because failure to close for the fault of the purchaser is a total breach; we do not have the problem of many potential breaches, ranging from the very trivial to the very significant. There is a further factor in the real estate sales situation, viz., that the usual 10% liquidated damages in small transactions ordinarily leaves very little clear for the vendor after he has paid half to his broker as commission and has paid his other expenses; in other words, the stipulated liquidated damages often are less than the actual damages.

Abrams v. St. Louis County Library Dist. Board[29] involved a ten year lease of an automobile salesroom at $1375 per month. With reference to liquidated damages the lease provided (emphasis added): "4. It is hereby understood and agreed that the sum of [$20,000 deposited with Lessor] shall be considered as security for the payment of rent reserved by this lease, and also, as security for the performance by the Lessee of the covenants, conditions, and agreements of this lease; and also, for any damage which the Lessor may sustain by reason of any act of the Lessee. The Lessee agrees that if it vacates or surrenders the premises or if it violates *any* of the terms and conditions of this lease then in that event, the [$20,000] deposited as security shall be retained by the Lessors as liquidated and stipulated damages." The $20,000 deposit was about 12.2% of the total rent reserved. The court held this clause provided a penalty rather than liquidated damages, inasmuch as

29. 253 S.W. 2d 672 (Mo. 1953).

it stated that the deposit could be retained for *any* breach no matter how trivial.

No doubt a liquidated damages clause for the lease in question could be drafted, but a difficult problem is presented. The clause might provide that the deposit should serve to cover actual damages for certain minor breaches, and to cover specified liquidated damages for certain major breaches, but even as to major breaches the problem is not easy. For example, retention of a deposit of 12% of the total rent reserved might be reasonable as liquidated damages for abandonment by the tenant during the first year of the term; it clearly would be unreasonable as liquidated damages for abandonment by the tenant six weeks before the end of the term when only one month's rent remained unpaid. In view of the difficulty in providing the necessary flexibility in a lease with reference to liquidated damages, the safer practice would seem to be to provide that the tenant's deposit shall be held by the landlord to pay actual damages, with a return of any balance.

TAXATION

ROBERT S. EASTIN*

There were no particularly noteworthy decisions of the Supreme Court in 1953 in this field. Summarized, however, by subject matter, they were as follows:

I. SUBJECTS AND INCIDENCE OF TAXATION

A. *Excise Taxes*

Supplementing the 1952 decision in *General American Life Insurance Company v. Bates*,[1] it was held that though the provisions of Section 148.370[2] respecting premium taxes on life insurance companies were invalid to the extent that they provided that the same should be in lieu of intangible personal property taxes, this did not render unconstitutional or void the entire gross premium tax on life insurance companies, since the "in lieu" provision was the only change made by a repeal and re-

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1. 363 Mo. 143, 249 S.W. 2d 458 (1952).
2. MO. REV. STAT. (1949).

enactment of the section imposing the tax. In such a case the repeal provision also falls with the rest of the Act, so that the prior law imposing a premium tax without the "in lieu" provision remains in full force and effect.[3]

The St. Louis Earnings Tax adopted pursuant to the authority of Missouri Laws, 1951, page 334, was upheld.[4] In the course of the opinion it was held: (1) The fact that the act was limited to special charter cities having a population of over seven hundred thousand as shown by the last decennial census did not make the Act special legislation though it expired by its terms in the year 1954 and the City of St. Louis was the only city to which the Act could possibly apply (in this connection the decision of the court in *Reals v. Courson*[5] to the contrary was overruled); (2) Rule 44 of the State Senate requiring the listing of the number of committee members present and the number voting for or against a bill is a sufficient compliance with Article III, Section 22, of the 1945 Constitution, requiring that "the recorded vote of the members of the committee shall be filed with all reports on bills"; and (3) the fact that the Earnings Tax ordinance permitted persons engaged in independent businesses to deduct business expenses and did not permit such deductions by wage earners, etc., was not discriminatory but was a reasonable and proper classification.

The provisions of Section 94.280[6] which authorizes cities of the fourth class to levy a poll tax do not give to the taxpayer the right to elect to perform work on the streets in lieu of payment of the poll tax in cash and the city council may, in its discretion, levy such tax which is payable only in money.[7] Certain procedural defects which were alleged to inhere to the ordinance in question were held to be violations of directory provisions of the statute only.

B. *General Real Estate Taxes*

Three apartment buildings owned by a non-profit educational institution and used to house students and faculty members (and the families of the latter) were exempt from taxation as property used for

3. Missouri Insurance Co. v. Morris, 255 S.W. 2d 781 (Mo. 1953) *(en banc)*.
4. Walters v. City of St. Louis, 259 S.W. 2d 377 (Mo. 1953) *(en banc)*.
5. 349 Mo. 1193, 164 S.W. 2d 306 (1942).
6. Mo. Rev, Stat. (1949).
7. City of Berger *ex rel.* Dieterle v. LaBoube, 260 S.W. 2d 527 (Mo. 1953).

purposes purely charitable and by a school or college within the exemption granted by Article X, Section 6, of the 1945 Constitution.[8] The fact that these particular buildings were not located on a campus of the school and were at some distance from the buildings in which the educational functions of the school primarily took place was held immaterial where the students studied, had conferences with faculty members and among themselves and performed other functions of the school in the buildings in question. While the court did not mention it, historically, of course, the housing of students has been an integral function of schools and colleges for many years and property used for the purpose forms as much a part of the school or college as property used for instructional purposes only.

The exemptions from taxation contained in the early laws relating to William Jewell College[9] were held to exempt from taxation property purchased by the college from a corporation and leased back to the corporation, where the entire rentals were used solely for the purpose of the support and maintenance of the college.[10] Such property constitutes "lands granted or devised to said college . . . for the benefit of education".

C. *Special Taxes*

The easements of a pipe line company and pipe lines laid therein may be assessed with benefits by a drainage district only if such easements and property were described in the proceedings leading up to the organization of the district.[11] The fact that the servient estates and their owners were described in such proceedings is not sufficient to permit the assessment of benefits against the easement owner.

Sewer tax bills are not rendered void because: (a) the minutes of the city council meeting at which the ordinance authorizing the tax bills was initially passed did not originally contain the names of the particular members voting "aye" and "nay" where the minutes did disclose the number of councilmen voting "aye" and "nay" and where the court had

8. Midwest Bible & Missionary Institute v. Cestric, 260 S.W. 2d 25 (Mo. 1935).
9. Mo. Laws, 1849, p. 232 and Mo. Laws, 1851, p. 64.
10. State *ex rel.* Bannister v. Trustees of William Jewell College, 260 S.W. 2d 479 (Mo. 1953) *(en banc)*.
11. Farmers Drainage District of Ray County v. Sinclair Refining Co., 255 S.W. 2d 745 (Mo. 1953).

permitted the amendment of the minutes *nunc pro tunc*; (b) where the city had no person designated as a "City Engineer" but where the city had another qualified officer who performed the duties of the City Engineer in the particular instance and who did everything that was required of the City Engineer; and (c) where in addendum to the specifications contained a guarantee that the tax bills would be sold by the city without loss to the contractor, where the provisions of the addendum were never enforced and where in no event would the interest of a property owner against whom tax bills were assessed by prejudiced thereby.[12]

II. Tax Sales and Titles

Cabiness v. Bayne,[13] involving the Jackson County Land Tax Collection Act, appears very complicated but actually merely stands for the proposition that a person who "settled" taxes in suit under the Act and procured the dismissal of the proceedings thereunder obtained no benefit thereby, and is in the same position as one who voluntarily paid the taxes, so that the title of such person was inferior to that of the purchaser at a sheriff's sale under a special tax bill which went to judgment prior to the commencement of any proceedings under the Act, but which was not sold until after the proceedings thereunder were dismissed. In the course of the opinion, the court held that under Section 141.350, *Missouri Revised Statutes* (1949), the holder of a judgment which was rendered prior to proceedings under the Act was not required to join in that proceeding in order to enforce his judgment.

The description of a tract as "E 27-W 28" in the notice of sale, certificate of purchase, etc., under the Jones-Munger Act was not a sufficient description of what was in fact the East Twenty (20) feet of Lot Twenty-Seven (27) and the West Ten (10) feet of Lot Twenty-Eight (28) of a certain subdivision. This fact, plus the fact that in the tax deed the property was described in the wrong subdivision and the fact that the deed showed a consideration of only $4.75 for property which was worth at least $3,000,000 which was so inadequate as to constitute a fraud, made the tax deed void upon its face and the three-year statute of limitation[14] was not applicable.[15]

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12. Cunningham v. City of Butler, 256 S.W. 2d 767 (Mo. 1953).
13. 257 S.W. 2d 626 (Mo. 1953) *(en banc)*.
14. Mo. Rev. Stat. § 140.590 (1949).
15. Costello v. City of St. Louis, 262 S.W. 2d 591 (Mo. 1953).

While not strictly a tax case, reference should be made to *Wieser v. Linhardt*[16] for an analysis of certain recent cases in which tax sales have been set aside by reason of inadequacy of consideration amounting to fraud. The court shows that in these cases bids running from 2.08% to 8.5% of the actual value of the property were deemed to be so inadequate as to justify a finding of fraud.

III. Taxing Districts

A. *Organization and Reorganization*

School Districts. The rule of priority with respect to territory, applying to annexations by cities, etc., now applies to school districts. In *State* ex inf. *Taylor* ex rel. *Oster v. Hill*,[17] a proceeding was commenced before the Superintendent of Schools of Caldwell County to organize a consolidated school district in that county which would include three common school districts in Ray County. At the same time, the Ray County Board of Education had been organized and was in the process of preparing but had not completed or filed its plan of reorganization under the 1947 Reorganization Law.[18] It had, however, adopted a resolution assigning the particular common school districts in question to a reorganized district in Ray County. Under such circumstances the Caldwell County proceeding was held to be first in time and the Consolidated District had jurisdiction over this territory, since the jurisdiction of the Ray County Board did not attach until it had completed its final plan of reorganization.

Once it is organized, a Reorganized School District may annex all of the territory of another school district by the vote of the electors in the latter district pursuant to Section 165.300.[19] Under such circumstances the consent of neither county nor state boards of education is required as the provision for annexation is broad enough of itself.

The rule of the *Rogersville* case, decided in 1952,[20] that the time provisions contained in the 1947 School Reorganization Law, *supra*, are

16. 257 S.W. 2d 689 (Mo. 1953).
17. 262 S.W. 2d 581 (Mo. 1953) *(en banc)*.
18. Mo. Rev. Stat. §§ 165.657-165.707, inclusive (1949).
19. Mo. Rev. Stat. (1949).
20. State *ex rel.* Rogersville Reorganized District R-4 of Webster County v. Holmes, 363 Mo. 760, 253 S.W. 2d 402 (1952) *(en banc)*.

directory and not mandatory was reaffirmed in *State* ex. inf. *Smoot* ex-rel. *Kugler v. Boyer.*[21]

Other Districts. The requirement that all property against which benefits are to be assessed in a drainage district be fully described in the course of its organization is emphasized in *Farmers Drainage District of Ray County v. Sinclair Refining Company,*[22] since no valid benefits can be assessed against land not so described.

B. *Use of Funds and Finances*

A school district may elect to come within the Workmen's Compensation Act and purchase insurance in order to insure its liabilities thereunder.[23] The use of the school district funds for such purpose does not constitute a grant of public money for private purposes prohibited by Section 23 or 25 of Article VI of the Constitution of 1945 although the beneficiaries would be the employees of the school district, both because the "teachers pension" proviso of Section 25 of Article VI of the Constitution is broad enough to include workmen's compensation and because the whole scheme of workmen's compensation is a matter of public welfare so that the adoption of workmen's compensation by a school district is merely an acknowledgment of and acquiescence in a program based upon the public welfare.

The supreme court has adopted a very rigid rule about the use of public funds of school districts for any purpose other than the operation of *public schools.* For instance, in *McVey v. Hawkins*[24] the directors of a school district were prohibited from transporting pupils to a parochial school in the school bus although it caused no excess mileage and though authorized by statute.[25] This statute, so far as it authorizes the use of public school moneys to transport pupils to private or parochial schools is unconstitutional and in violation of Sections 3 and 5 of Article 9 of the Constitution of 1945 which require that public school money shall be used for the support of the free public schools. Transportation of the pupils to parochial schools is not "the support of the free public schools." Like-

21. 259 S.W. 2d 375 (Mo. 1953).
22. 255 S.W. 2d 745, *supra* note 11.
23. Hickey v. Board of Education of City of St. Louis, 363 Mo. 1039, 256 S.W. 2d 775 (1953).
24. 258 S.W. 2d 927 (Mo. 1953) *(en banc).*
25. Mo. REV. STAT. § 165.143 (1949).

wise in *Berghorn v. Reorganized School District No. 8 of Franklin County*[26] the use of Catholic nuns to teach public schools was again frowned upon although many of the practices which the court previously condemned in the earlier case of *Harfst v. Hoegen*[27] had been eliminated. The court is insistent that public schools should not be controlled or under the direction in any way of any religious society or order and it will be extremely difficult, in the light of this decision, to develop any scheme by which Catholic nuns will be enabled to teach in the public schools. In this last case, in response to the argument that the plaintiffs, as taxpayers of the school district were not prejudiced, due to the fact that the use of Catholic nuns reduced the cost of operating the public schools, it was held that a taxpayers' suit may be brought to enjoin the unlawful expenditure of funds by any taxpayer at any time and the proof of such illegal expenditure is sufficient to show the private pecuniary loss necessary to give the plaintiff an interest and to entitle the plaintiff to an injunction.

Section 432.070[28] requires that contracts of cities, counties, school districts, etc., must be in writing. In *Bride v. City of Slater*,[29] there was a contract for the purchase of fuel oil at "seller's market price". It was held that under this agreement, while it was in writing, the important element of price was left undetermined, or at least determinable by the unilateral action of the vendor, and that the contract did not comply with the requirements of the section and was void. As a result the contractor could not recover for fuel oil delivered which had not been paid for. However, at the same time, it was held that under all the circumstances the city could not recover back moneys paid for fuel oil since such payments were made voluntarily and since there was no actual fraud involved.

TORTS

GLENN A. MCCLEARY*

Although the number of cases which were appealed to the Missouri Supreme Court in this branch of law during this period shows a steady

26. 260 S.W. 2d 573 (Mo. 1953).
27. 349 Mo. 808, 163 S.W. 2d 609 (Mo. 1942) *(en banc)*.
28. MO. REV. STAT. (1949).
29. 263 S.W. 2d 22 (Mo. 1953).

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increase in the work of the court, relatively little law was made that had not been decided in former decisions. Most of the cases were appealed for alleged errors in the instructions or for submitting cases to the jury on insufficient evidence. The humanitarian cases are discussed elsewhere in this issue of the *Review* by Mr. Becker.

In the opinion of the writer, the most significant decision of the cases of this period in the field of Tort law was *Steggall v. Morris,*[1] in that an advance was made in the class of potential plaintiffs. This was an action by parents under the Wrongful Death Statute to recover damages from a tort-feasor for the death of a child shortly after birth, as a result of prenatal injuries sustained in an automobile collision. It was alleged that, at the time of the accident, the deceased was a viable infant *en ventre sa mere* and was capable of living outside his mother's uterus. The trial court had sustained a motion to dismiss the plaintiffs' petition on the theory that no cause of action had been stated, for the reason that a viable child *en ventre sa mere,* injured through the negligence of mother, later born alive, and dying as a result of the injuries, was not a "person" within the meaning of the Wrongful Death Statute, and, therefore, the parents could not maintain a suit in damages for the child's death.

On appeal, the court stated that "The precise question before us is whether a viable child en ventre sa mere injured through the negligence of another, may, after it is born, maintain an action for damages against the tort-feasor." In a well written opinion, in which the court *en banc* carefully examined the reasons which had been advanced against the recognition of a case of action in this type of case, the court held "that a viable child, injured while en ventre sa mere, born alive, may after its birth maintain a tort action against the tort-feasor for the injury inflicted." It then follows that the tort-feasor is liable under the Wrongful Death Statute if the injury caused the death of such child after birth, for the "The statute plainly provides that a tort-feasor who would be liable to a person for injuries inflicted shall 'in every such case' be liable in damages, if death results from such injuries. We cannot read into the statute any exception." The plaintiff's petition was held to state a cause of action, the judgment of the trial court was reversed and the cause remanded for trial.[2]

1. 363 Mo. 1224, 258 S.W. 2d 577 (1953) *(en banc),* noted in 19 Mo. L. REV. 81 (1954).

2. For a full discussion of the question prior to this decision, see Cason and Collins, *May Parents Maintain an Action for the Wrongful Death of an Unborn Child in Missouri,* 15 Mo. L. REV. 211 (1950).

I. NEGLIGENCE

A. *Duties of Persons in Certain Relations*

1. Railroads and Other Carriers

Under certain circumstances it may be negligence in failing to furnish a reasonably safe place for work by reason of inadequacy or insufficiency of ventilation. In *Wann v. St. Louis-San Francisco Ry.*,[3] the action was brought under the Federal Employers' Liability Act for injuries sustained when the plaintiff employee fell from a Diesel engine he was servicing, after having been overcome by smoke and fumes allegedly resulting from the employer's failure to provide proper ventilation. There was no evidence by either appellant or respondent as to the relative standards of ventilation of engine work shops or of Diesel engines on this or other railroads. However, the defendant's new Diesel shop adjoining the old shop which was the place of the accident, in addition to its doors and windows, was equipped with suction fans. There were no suction fans or other ventilating devices in the old shop. At shop safety meetings there had been reports of smoke in this shop. The court held that a jury question was presented as to whether the employer had been negligent in furnishing a place unsafe for work by reason of the inadequacy or insufficiency of ventilation.

Since the Federal Employers' Liability Act deprives the employer of the defenses of contributory negligence and assumption of risk, the case of *Jones v. Illinois Terminal R. R.*[4] is instructive in drafting a sole cause instruction which does not inject the above mentioned defenses into the case. The action was under the Act for injuries sustained by a railroad engineer when the switchman allegedly failed to give the firemen, who was operating the locomotive at the time, a proper "easy" signal prior to the coupling of cars, resulting in the engineer who was standing in the locomotive to lose his balance because of the rough coupling. After a verdict for the railroad, the trial court sustained the engineer's motion for a new trial, and the railroad appealed. It was held that an instruction to the effect that every person is required to use the care of a reasonably prudent person under the circumstances, and if the locomotive and caboose were not being moved in a negligent manner and the engineer had assumed an unsteady position, by reason thereof he was

3. 263 S.W. 2d 376 (Mo. 1953).
4. 260 S.W. 2d 487 (Mo. 1953).

caught off balance and was thereby negligent and the injury resulted solely from such negligence, the verdict should be against the engineer, was not erroneous as a matter of law.

The liability of a railroad for injuries sustained by one engaged in checking freight to be unloaded was raised in *Lesch v. Terminal R. R. Ass'n. of St. Louis.*[5] The action was brought by an employee of a drayage company for injuries sustained when the door on the refrigerator car, in which the employee was checking freight to be unloaded, was shut to keep the freight from falling down on the tracks, making it completely dark in the car, and the car was moved. The switching operation took six to eight minutes and included nine starts and stops. The plaintiff had crawled over cartons, stacked to within two and one-half and three feet of the roof of the car, to the end of the car when the door was slammed shut. Since the plaintiff was an invitee of the defendant, the court held under the evidence that "there was a duty on the defendant to find out and to know whether persons were in or about the car before moving it, and in such circumstances negligent ignorance has been considered equivalent to actual notice." Furthermore, it was for the jury to say, whether, if defendant's employee looked into the car and could not see the ends of the car, ordinary care required that he also call into the car.[6]

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5. 258 S.W. 2d 686 (Mo. 1953).

6. Other cases may be noted involving carriers but not presenting new problems. Where a person is boarding a bus, any movement of the vehicle before the passenger has a reasonable opportunity to reach a place of safety therein is negligence which renders the carrier liable for resulting injuries. In Hofman v. St. Louis Pub. Serv. Co., 255 S.W. 2d 736 (Mo. 1953), the passenger was in the act of movement and was literally on the bus, had not as yet reached a place of safety thereon when the movement occurred.

In Gurley v. St. Louis Pub. Serv. Co., 256 S. W. 2d 755 (Mo. 1953), the passenger fell under a bus on alighting from the bus. The evidence was that the passenger was not hurt until the bus wheels passed over his leg. Having been warned by others that the passenger was under the bus, the evidence justified a finding by the jury that the bus driver was negligent in not ascertaining for himself, before moving the bus forward, the position of the passenger with reference to the bus.

The Vigilant Watch Ordinance of St. Louis requires the motorman in charge of each streetcar to keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving toward it, and on the first appearance of danger to such persons or vehicles to stop the car in the shortest time and space possible. In Johnson v. St. Louis Pub. Serv. Co., 255 S.W. 2d 815 (Mo. 1953), in an action brought by an eight year old automobile occupant for injuries received in intersectional collision involving the automobile and streetcar, an instruction to find for the streetcar company if the streetcar operator did not fail to keep a vigilant watch was prejudicial for failing to instruct upon the operator's duty to stop the streetcar at first approach of danger. The court held that "In short, the ordinance requires 'watch and stop' not just 'watch'".

In Peterson v. Kansas City Pub. Serv. Co., 259 S.W. 2d 789 (Mo. 1953), in an action for injuries sustained by an alighting passenger, when the door of defendant's

2. Automobiles

A defendant may be liable for injuries sustained by the driver of an automobile which had stopped, because the defendant's truck was blocking the road, when the stopped automobile was struck by an over-taking automobile negligently driven, if the defendants were negligent in failing to warn of the blocked highway. In *Champieux v. Miller*,[7] plaintiff had stopped her car because the defendant's truck was completely aross the paved portion of the highway. It was a dark, rainy night, there were no lights of any kind burning on the truck, and the taillights, headlights and dome light of plaintiff's car were burning. The right wheels of her car were off on the right shoulder as far as she felt it safe to have them, due to the muddy condition of the shoulders and adjacent ditches, so that probably one-half of the car was on the pavement and one-half off. The vehicles had remained in these positions for a period of 20 to 30 minutes when, without warning, an overtaking automobile ran into the rear of plaintiff's automobile causing the injuries complained of. On the contention of the defendant that the negligence of the driver of the overtaking automobile was "a new, independent and intervening cause," and thus became the proximate cause of the plaintiff's injuries, the court held that it could not be said as a matter of law that the negligence of the

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bus was allegedly closed on her foot and the bus moved forward with the passenger's foot caught in the door, throwing her against the bus, the evidence was held sufficient to take to the jury the question of whether a malignant cancerous growth which later necessitated removal of the passenger's breast resulted from such injury.

A submissible case was made in Holmes v. Terminal R.R. Ass'n. of St. Louis, 363 Mo. 1178, 257 S.W. 2d 922 (1953), in an action under the Federal Employers' Liability Act, for injuries sustained by a mail and baggage handler when his feet slipped out from under him while pulling a truck, where negligence was predicated on failure to lubricate the truck, in failing to furnish additional help to move the truck, and in failing to furnish a reasonable safe place to work by removing ice which caused the plaintiff's fall.

In the first appeal in Stone v. New York, C. & St. L. R.R., 260 S.W. 2d 532 (Mo. 1953), the Missouri Supreme Court had reversed a judgment for the plaintiff on the ground that he had not made out a submissible case. The United States Supreme Court reversed the Missouri judgment. In the former review, the court did not examine alleged errors in the instructions given for the plaintiff. At this point in the case, it became necessary to consider that contention. The plaintiff was seriously injured in his back while working as a section hand on the defendant's track. In his action under the Federal Employees' Liability Act, he submitted three theories of negligence: ordering plaintiff to overexert in removing a tie, failing to furnish additional help to remove the tie, and failing to jack up the rails higher so as to free the tie and spike. The judgment was reversed and cause remanded because plaintiff's instructions did not require a finding of negligence, and the facts hypothesized in submitting the theories did not necessarily constitute negligence as a matter of law on either theory.

7. 255 S.W. 2d 794 (Mo. 1953).

driver of the overtaking automobile was "so extraordinary as to have made it not reasonably foreseeable, nor such as to break the chain of causation between defendant's negligence and injury to plaintiff." A jury could reasonably find that but for the failure to place flares plaintiff would have sustained no injury and, "viewing the transaction after the event, the jury could reasonably find that plaintiff's injury was a probable consequence of defendant's failure to take precautionary measures to warn."

Block v. Rackers[8] should be noted on submitting speed as the issue of negligence without any guide as to what particular speed would sustain a finding of negligence. The action was against the owner and driver of a tractor and trailer for the wrongful death of the driver of a road grader which was struck on a level highway by the tractor and trailer approaching from the rear. The court distinguished *Yates v. Manchester*,[9] and the decisions following that leading decision on this question, on the ground that the jury could still find for the plaintiff on the issue of negligent speed, regardless of what particular evidentiary facts the jury might believe from such conflicting evidence as was offered. The evidence as to the speed of the truck immediately before the collision varied from 45 to 70 miles per hour, and there was a conflict of evidence as to whether or not another car at this place and time was traveling in the opposite direction. But the court said "if some of the jurors believed that the speed of the truck was 45 miles per hour and there was no automobile traveling in the opposite direction and the other jurors believed the speed of the truck was 70 miles per hour and there was an automobile traveling in the opposite direction, or believed any other combination of speed and circumstances as shown by the evidence, and all found for the plaintiff, the facts would still be sufficient to sustain a finding for the plaintiff on the issue of negligent speed." Therefore, the further submission of evidentionary facts as to speed and circumstances was not necessary. Referring to *Yates v. Manchester, supra,* and subsequent cases based on that case, the court pointed out that in those cases "there were directly conflicting factual theories shown by the evidence. Under only one of

8. 256 S.W. 2d 760 (Mo. 1953).

9. 358 Mo. 894, 217 S.W. 2d 541 (1949). Also see Oshins v. St. Louis Pub. Serv. Co., 254 S.W. 2d 630 (Mo. 1953), where defendant in a converse instruction may require finding as to excessive speed without further hypothesizing the facts as to speed.

these theories was the evidence sufficient to authorize a finding of negligent speed, but no factual theory was submitted."

The court *en banc,* in *Hooper v. Conrad,*[10] attempted to clarify the rule as to the hypothesizing of facts in instructions in negligence cases in view of its strict requirement in the recent case of *Yates v. Manchester, supra.*[11] The action in the principal case was for injuries sustained by the infant plaintiff while the plaintiff and others were playing on the shoulder of a highway approximately 50 feet from the intersection of the highway with a dirt road, when a pickup truck, which was crossing the highway at the intersection, collided with a tractor-trailer which was traveling on the highway and was pushed toward the children, with the result that the children, including the plaintiff, were struck. The defendants contended that the plaintiff's instruction failed "to comply with the clear mandate of the recent case of *Yates v. Manchester.*" The court distinguished the situations of the two cases and deduced the following general rule applicable to verdict-directing instructions in negligence cases: "Where the evidence presents two or more divergent sets of essential facts, under one or more of which plaintiff would be entitled to recover and under one or more of which he would not, then a verdict-directing instruction or instructions given in his behalf should hypothesize, either by recital or by reference to other instructions, the facts essential in law to support the verdict. In like manner, verdict-directing instructions in behalf of the defendant should recite on their fact or by reference to other instructions any essential fact or facts shown or not shown which will defeat plaintiff's right of recovery. Where there is no divergence in or denial of the essential facts, then the ultimate issue of the negligence pleaded and its being the proximate cause of the injury or damage alleged may be submitted by reference to the facts and circumstances shown by the evidence without specific hypothesization in the instructions. And, we may add, that if either of the parties deems a hypothesized fact or situation not to have been clearly or sufficiently hypothesized in any instruction, he should offer a clarifying or amplifying instruction."

Where a defendant traveling on a four-lane highway had entered the inside lane for the purpose of making a left turn, when he observed

10. 260 S.W. 2d 496 (Mo. 1953) (*en banc*). Also see companion case Hyde v. Conrad, 260 S.W. 2d 503 (Mo. 1953) (*en banc*).

11. 358 Mo. 894, 217 S.W. 2d 541 (1949), also cited above in footnote 7.

two automobiles rapidly overtaking him, one of which was in each lane on his side of the road, it was held in *Stutte v. Brodtrick*[12] that the defendant was not negligent in failing to move back into the outside lane and could not be responsible when one of the overtaking automobiles passed on the wrong side of the road and struck an oncoming vehicle, since the defendant was not bound to anticipate such movement on the part of the overtaking automobile.[13]

3. Municipal Corporations

It is well settled law that the duty resting upon a city to exercise ordinary care to maintain its streets in a reasonably safe condition for travel is nondelegable. Therefore, in an action by a pedestrian against the city, in *Fosmire v. Kansas City*,[14] to recover for injuries sustained when a pedestrian tripped over a protruding rail of a streetcar track, the admission of a city ordinance, providing that the street railway company should keep the streets between the tracks in good condition and repair, was prejudicial error, since it was an attempt to relieve the city of its duty by an agreement with a third party. A judgment adverse to the pedestrian was reversed and the cause remanded.

In *Guy v. Kansas City*,[15] in an action against the city for damages suffered by a pedestrian when she alighted from a bus, stepped on a broken curbing, and fell, a judgment for the pedestrian was reversed and the cause remanded for prejudicial error in submitting an instruction which did not submit and require an essential finding that the defective curbing rendered the way not reasonably safe for use and was dangerous. The phrase "negligence if any" in the instruction "if you find that her

12. 259 S.W. 2d 820 (Mo. 1953).
13. There were many other decisions in this period having to do with liability for injuries arising out of automobile accidents, but they do not raise new developments, either on the facts or the law. In Stroud v. Masek, 262 S.W. 2d 47 (Mo. 1953), in an action for wrongful death of plaintiff's husband, when tractor-trailor was backed into a house trailer occupied by the plaintiff and her deceased husband, the death of plaintiff's husband was allegedly due to the aggravation of a heart condition occasioned by the shock and excitement. The deceased had been suffering from high blood pressure and from a heart impairment for many years. He had been bedfast for many months and at the time in question he was in bed at the rear of the house trailer. When the house trailer was struck by the tractor-trailer, various objects were knocked from the shelves and fell on the deceased's head, face and arms, causing him to become very frightened and nervous. The following day he became unable to talk and he died 9 days after the accident.
14. 260 S.W. 2d 252 (Mo. 1953).
15. 257 S.W. 2d 665 (Mo. 1953).

fall and injury, if any, were the direct result of negligence, if any, of the defendant" did not submit this essential finding.

4. Malpractice

The law requires that a physician or surgeon who undertakes to treat a patient possess that degree of skill and learning which is ordinarily possessed and exercised by members of his profession who practice in the same or similar localities, and that he use reasonable care and diligence in the exercise of his skill and in the application of his learning. In *Sibert v. Boger,*[16] the question was whether the physician gave heed to the symptons present when he examined the plaintiff-appellant, whether he made such an examination of her as her symptons would indicate should be made and whether he prescribed such method of treatment as a physician of ordinary skill and learning would have done under the same circumstances. When the appellant went to see the respondent she complained of pains in her shoulder, front portion of her chest and hip, resulting from injuries received in an automobile accident. The only visible signs of injury were bruises on the back of her hip and a small bump on her shoulder. At this time she did not complain of injuries to her back and there were no visible signs of injury to her back or vertebrae. The specific charge of negligence in regard to the respondent's examination and diagnosis was that he neglected to have an X-ray taken of her alleged fractured bones, and, in regard to his treatment of her, the alleged negligence was that he failed "to prescribe proper splints, braces, casts or other supports for such injured members as she then had, or to have directed plaintiff to remain abed, as he should have done under the conditions and circumstances." A directed verdict by the trial court for the physician was affirmed, on the ground there was no evidence that under these circumstances a physician of ordinary skill in that locality would have taken an X-ray to have discovered any fracture of her spine, or that he did not employ the same methods followed and approved by physicians of his school of medicine in good standing in the locality where he practiced his profession.[17]

16. 260 S.W. 2d 569 (Mo. 1953).

17. While not strictly speaking a malpractice case, yet the fundamental rules relating to malpractice were generally applicable to the facts in Stallman v. Robinson, 260 S.W. 2d 743 (Mo. 1953). This was an action against the operators of a private hospital who were specialists in the care and treatment of the mentally ill, for the death of plaintiff's wife who had previously twice tried to commit suicide, and who entered the defendant's hospital as a patient and committed suicide by hanging or

5. Imputed Negligence

An interesting question was before the court in *Glynn v. M.F.A. Mutual Insurance Co.*,[18] as to whether a soliciting agent of a fire insurance company in making an inspection of property to be insured, was an independent contractor or an employee of the company. The action was against the company for injuries sustained when the plaintiff was struck by an automobile driven by the soliciting agent, while he was on his way to secure an application for a fire insurance policy and to make an inspection of the dwelling. The application was secured and the inspection was made. The application and inspection report were mailed to the office of the company, and the company accepted the application and issued its policy of insurance. The liability of the company for the injuries turned on whether the requirement that the insurance agent make an inspection of the property to be insured, a report of which was to be sent with the application, took him out of that class of insurance agents who are not considered employees. Since no control was exercised, nor did the petition state that the defendant had the right of control over the soliciting agent as to the manner in which he did his work, the court *en banc* held that he was an agent pertaining to the accomplishment of a final result, namely the bringing about of contractual relations between the insurer and the insured to which the doctrine of *respondeat superior* does not apply. The court sustained the dismissal of the plaintiff's petition for failure to state a cause of action against the defendant company.

In *Hooper v. Conrad*,[19] it was held to be a jury question whether the driver of a tractor-trailer, involved in an accident which caused injury to the plaintiff, was an independent contractor or an employee or agent of the corporate defendant, for which he was transporting a load of frozen fish. The evidence was that the driver owned the tractor-trailer which was leased to the corporate defendant, and that the corporate defendant lacked control over the way the truck was driven, but it could tell the driver the direction to go on trips for the corporate defendant and what roads to travel, and that the driver was paid by the trip but was

strangling herself with strips of cloth torn from her nightgowns and fastened to a water pipe in the bathroom. A submissible case was made under the evidence on the question whether the defendants breached their specific duty reasonably to safeguard and protect the patient from injuring herself and committing suicide. Furthermore, expert testimony was not necessary where the question was whether the patient was reasonably safeguarded and protected in the circumstances in view of her known condition, for the jury as laymen were competent to determine this question.

18. 363 Mo. 896, 254 S.W. 2d 623 (1953) *(en banc)*.

19. 260 S.W. 2d 496 (Mo. 1953) *(en banc)*.

guaranteed a minimum amount of pay weekly regardless of whether he made any trips during the week for the corporate defendant.[20]

6. Humanitarian negligence

Due to the significance of the humanitarian doctrine in the Missouri decisions, it has been thought desirable to give special emphasis to the decisions predicated upon this doctrine in a separate topic to be found elsewhere in this issue of the *Review*.[21]

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20. Other cases involving the problem of imputed negligence: Brown v. Scullin Steel Co., 260 S.W. 2d 513 (Mo. 1953), was an action by an employee against a former employer for permanent injury, allegedly resulting from negligence in directing and permitting the employee to do work which the employer knew or should have known the employee could not do with reasonable safety because of his heart condition. The action of the trial court in directing a verdict for the employee was affirmed, on the ground that the evidence was insufficient for the jury on the question whether the opinion of the employer's industrial physician, that the employee could do the work he was permitted to do without injury other than that which he would suffer regardless of whether he worked, was contrary to recognized medical opinion and practice. The employer could not be negligent unless the industrial physician was negligent.

Leidy v. Taliaferro, 260 S.W. 2d 504 (Mo. 1953), holds that the driver of a pick-up truck, owned by a corporation, may be an employee of the corporation and may be receiving workmen's compensation for his injuries, yet at the time of the accident he may have in fact been the personal agent of the president and majority stockholder of the corporation, to render the latter liable to an occupant of the truck for injuries allegedly caused by the negligence of the driver. A verdict directed by the trial court for the defendant was erroneous.

21. Other negligence cases may be noted. A retailer-supplier of liquefied petroleum gas to the ultimate consumer and who had purchased the commodity from the producer or manufacturer, may be found negligent by the jury, if he fails to test the gas to see if it has been odorized and in failing to odorize it, where it was shown to have become the custom and practice of the petroleum industry artifically to odorize such gases so that they will smell in order that a timely warning may be had of the presence of gas. The decision in Thompson v. Economy Hydro Gas Co., 363 Mo. 1115, 257 S.W. 2d 669 (1953) follows the earlier and leading case of Winkler v. Macon Gas Co., 361 Mo. 1017, 238 S.W. 2d 386 (1951), on the question of liability.

In Wolfmeyer v. Otis Elevator Co., 262 S.W. 2d 18 (Mo. 1953), the action was for injuries to an employee of a tenant of part of a building, as a result of falling into the shaft of a freight elevator maintained by the defendant elevator company under a contract with the defendant building owners. The plaintiff recovered a judgment in the trial court. On appeal by the defendant, the court held that a provision of the maintenance contract, that employees of the elevator company would use all reasonable care to maintain the elevators in the building in proper and safe operation condition, imposed no duty on such company to observe, report and replace or repair a dangerous condition due to the fact that the closing and interlocking device on a shaftway gate at the floor, from which the plaintiff fell, permitted the gate to be raised when the elevator car was not at such floor, where such condition was not due to any defect in a spring loaded latch, by which plaintiff opened the gate after reaching over the top thereof, or any part of the elevator as it existed when the elevator company began to furnish maintenance service. The contract did not provide for any service except service to the elevator "as it was" when defendant began to furnish its maintenance service.

B. *Res ipsa Loquitur*

An ingenious argument made in *Warner v. Teminal Ry. Ass'n. of St. Louis,*[22] throws light on the relative importance of the considerations upon which the doctrine *res ipsa loquitur* is predicated. The older cases, in listing the various reasons as to why specific negligence need not be pleaded or proved, seemed to emphasize the consideration that the defendant was, and the injured plaintiff was not, in position to know just what caused the accident. The defendant appellant in the above case contended that the sections of Code of Civil Procedure, relating to the production of documentary evidence on the taking of depositions, interrogatories, and the production of documents, *et cetera,* have now made the evidence of the true cause of an accident as accessible to the plaintiff as to the defendant, and that the *res ipsa loquitur* doctrine should now be abolished in Missouri. The court recognized that these sections of the Civil Code "are of great utility to a plaintiff in enabling him to state his claim," and that "the use of the process provided by these sections in many cases should enable a plaintiff to state and prove a claim on specific negligence, although before he would have been obliged to rely upon a res ipsa loquitur inference," but the court held that the doctrine "*res ipsa loquitur* is a part of the law of evidence," and that these sections have nothing to do "with what facts are essential to state a claim or with what evidence is sufficient to justify the submission of a plaintiff's case." Furthermore, the court did not believe that, because of these Sections, "full knowledge or information relating to the evidence tending to show the causes of all casualties has now become as accessible to a plaintiff as to a defendant. . . . And assuming a defendant was in all ways frank and sincere in making disclosures as contemplated by the stated Sections, a plaintiff could not always know what fact was known by whom and how, by interrogation or discovery or inspection process, the full disclosure of all the evidence supporting material and essential facts could be effectively induced."

The argument made by the defendant-appellant in this case does force a more careful analysis of the basis of the doctrine, and reduces this consideration, not infrequently emphasized in the cases, to a very subordinate position. Thus the court states the analysis to be made, in

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22. 363 Mo. 1082, 257 S.W. 2d 75 (1953) (Division 1), and followed by Division 2 in Jones v. Terminal R.R. Ass'n. of St. Louis, 258 S.W. 2d 643 (Mo. 1953).

determining whether the doctrine is applicable, in this order: "In general the res ipsa loquitur doctrine does not apply except when (a) the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care; (b) the instrumentalities were under the management and control of the defendant; (c) and the defendant possesses superior knowledge or means of information as to the cause of the occurrence."

A new application of *res ipsa loquitur* was attempted in *Cudney v. Midcontinent Airlines*,[23] in an action against the airlines and the pilot for injuries received when the airplane in which the plaintiff was riding suddenly lurched and threw her out of her seat. The trial court had directed a verdict for the pilot, but had submitted the liability of the airlines to the jury upon the basis of the passenger-carrier relationship and the circumstances that " 'said airplane suddenly and violently, and in a very unusual manner, jerked, lurched and moved through the air,' thereby causing the plaintiff to be thrown from her seat and injured." The jury returned a verdict for the airlines. On appeal by the plaintiff, the respondent airlines contended that the *res ipsa loquitur* doctrine was not applicable to the occurrence and attendant circumstances, and that the trial court should have directed a verdict for the airline as well as for the pilot, since there was neither pleading or proof of specific negligence. The court based its decision on the first step in the analysis set forth in the *Warner* case, discussed in the preceding paragraph above, "whether the occurrence, the sudden and violent jerking, jolting drop of the plane, causing the plaintiff to be thrown from her seat, was one which ordinarily does not occur in the absence of negligence." The court recognized that *res ipsa loquitur* is applied to certain aviation accidents, such as crashes, since crashes are not the ordinary perils of travel by air, but "it is not possible at this date, as it may be in another day to say that it is not the common experience of mankind that commercial liners do not lurch and drop for some distance except for negligence in the operation of the plane." Therefore, the plaintiff was not entitled to submit her cause on this doctrine. Since, however, this was the first decision by the court on this question, and since there were some circumstances in the record from which inferences of specific negligence might be drawn, the cause was reversed and remanded so that the plaintiff may plead specific negligence,

23. 254 S. W. 2d 662 (Mo. 1953) *(en banc)*, noted in 18 Mo. L. REV. 326 (1953).

if she is so advised. Three members of the court concurred in a separate opinion by Judge Tipton in which the thought was held that, if the appellant was using her seat belt and was thrown from her seat and injured, a *res ipsa loquitur* case would have been made, even if the airplane was caused to jerk by a downdraft, as the jury could say that the injury was caused by a defective belt.[24]

C. *Defenses in Negligence Cases*

The court continues to adhere to the view that one is not contributorily negligent as a matter of law solely because he drives at a speed which prevents his stopping within the distance that his headlights make visible objects ahead of him. In some states the courts apply an inflexible standard to measure negligence by what is known as the assured clear distance rule. In *Johnson v. Lee Way Motor Freight*,[25] the action was by an automobile driver for damages sustained in a collision which occurred when the driver, after emerging from a patch of fog, ran into the defendant's tractor-trailer which was parked on the highway. All witnesses other than the plaintiff testified that the lights were burning on the rear of the trailer at the time of the accident. Plaintiff's evidence was that he had

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24. Other cases decided in this period involving aspects of the *res ipsa loquitur* doctrine previously ruled upon by the court may be noted. In Lindsey v. Williams, 260 S.W. 2d 472 (Mo. 1953), a submissible case under the doctrine was made in an action for injuries sustained by a guest passenger, when an automobile, owned by the defendant and operated by a third party under defendant's immediate supervision, left the highway and collided with a tree. In Cooper v. 804 Grand Bldg. Corp., 257 S.W. 2d 649 (Mo. 1953), the defendant's negligence concurring with an abnormal action of a force of nature in causing an injury may be established under the doctrine. In Jones v. Terminal R.R. Ass'n. of St. Louis, 363 Mo. 1210, 258 S.W. 2d 643 (1953), the doctrine was appliable to an action under the Federal Employers' Liability Act for injuries allegedly resulting to a union station mail and baggage handler, employed by the defendant, from an unusual, violent and sudden jerk of defendant's elevator on which the handler was descending, and the sudden, unexpected and unusual ascent thereof while the handler was hanging helplessly from the station platform and entrapped by a safety gate which he had grabbed to avoid falling.

Whether the plaintiff has pleaded and proved conclusions and results, and not the specific facts of negligence, in the situation where a passenger sustained injuries when the bus driver allegedly caused the bus to jerk forward while the passenger was boarding the bus, was presented in White v. St. Louis Pub. Serv. Co., 259 S.W. 2d 795 (Mo. 1953) *(en banc)*. In Killinger v. Kansas City Pub. Serv. Co., 259 S.W. 2d 391 (Mo. 1953), the same problem was presented where the passenger sustained injuries when the defendant's motorman caused speed to slacken and the streetcar to stop with a sudden jolt. A more helpful study of this problem was contained in a group of 1952 decisions, discussed in the survey of the work of the Missouri Supreme Court for 1952. See, McCleary, *The Work of the Supreme Court for the Year 1952—Torts*, 18 Mo. L. REV. 399 (1953).

25. 261 S.W. 2d 95 (Mo. 1953).

reduced his speed to 40 miles per hour as he emerged from a small patch of fog and saw the back end of the parked truck about 30 to 35 feet ahead. He had started to pass to the left around the truck but, to avoid hitting persons standing on the pavement opposite the truck, he swerved back and ran into the rear of the truck. The court held it to be a jury question whether the plaintiff was contributorily negligent under the particular circumstances.

In crossing a street at an intersection with the "walk" light, a pedestrian has the right to assume that vehicles approaching against the light will stop. In *Romandel v. Kansas City Public Service Co.*,[26] a pedestrian, seeing no vehicles in the street intersection when she looked to her right after the traffic signal changed to "walk", was held not guilty of contributory negligence as a matter of law, barring her recovery for damages for injuries sustained when she was struck by defendant's streetcar approaching from her right, in failing to look again toward the car before reaching the track on which it was approaching while crossing the street on such light with other pedestrians, as her duty to look again was relative and not absolute. The fact that the pedestrian was walking from 6 to 12 inches outside the crosswalk in violation of city ordinances did not bar her recovery, as such violation did not contribute to cause the collision with the streetcar which had entered and crossed beyond the crosswalk, since she would have been struck an instant sooner had she been walking inside or along the crosswalk's unmarked boundary on the side of the approaching vehicle.[27]

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26. 254 S.W. 2d 585 (Mo. 1953).

27. Other cases presenting defenses of contributory negligence: Ezell v. Kansas City, 260 S.W. 2d 248 (Mo. 1953), was an action by the occupant of an automobile against the city for injuries sustained when the wheel of the automobile went into a hole in the city street. An instruction that if the occupant knew, or by the exercise of ordinary care could have known, of the condition complained of in the street in time to have warned the driver of its existence, so that he could have stopped the automobile or altered its course and could have avoided striking the hole, by the exercise of the highest degree of care, but the occupant negligently failed to do so and was injured by reason of such failure, was held to be prejudicially erroneous for failure to submit that the occupant had actual or constructive knowledge that the condition complained of was dangerous. In Bryan v. Sweeney, 363 Mo. 1024, 256 S.W. 2d 769 (1953), in an action for injuries sustained by the plaintiff while making electrical connections, in a fall from a ladder as a result of an electrical shock, a verdict directed for the defendant was affirmed on the ground that the plaintiff, an experienced electrician, was contributorily negligent as a matter of law when he for the third time mounted a ladder, supplied by the defendant, which was wet, and consequently a conductor of electricity, notwithstanding the contention that plaintiff had failed to notice the visible wet condition.

II. LIBEL AND SLANDER

In *Lightfoot v. Jennings*,[28] it was alleged, while the plaintiff was talking to a group of persons, that the defendant approached and in the presence of approximately one hundred persons said, "you are not going to talk here you damned communist." It was further alleged that these words were intended to mean and were "understood by those present to mean that the plaintiff was a member of the Communist Party and advocated, abetted, advised, taught or encouraged the duty, necessity, desirability or propriety of overthrowing or destroying the Government of the United States, a crime under the laws of the United States." It was held, as against a motion to dismiss the petition, that the petition stated a cause of action for slander, in view of the innuendo to the effect that the plaintiff was charged with the violation of a federal statute governing the destruction of government by force. The case of *Lorenz v. Towntalk Publishing Co.*,[29] should be compared with the *Lightfoot* case, in which the petition was held not to state a claim for libel, where the words by innuendo were alleged to "portray the plaintiff as one of Communist affiliation and conviction, using such alleged tactics as an opportunity to do missionary work for the Communist cause, under the guise and pretext of inviting . . . as a 'guest speaker', whereas in truth and fact, plaintiff was doing missionary work for the Communist cause, in a stealthy and underground manner. . . ."[30]

To publish of an attorney that he was soliciting business at the scene of an accident was held in *Moritz v. Kansas City Star Co.*[31] by the court *en banc* to be libelous, since it charged him with unprofessional conduct, exposed him to ridicule or contempt, and tended to injure him or disgrace him as a member of his profession. The court further held, in so far as the newspaper articles reported actions and activities of police officers, including the details and reasons for the arrest of the plaintiff on the ground that he was interfering with the officers at the scene of the accident, that they were qualifiedly privileged. However, the privilege was lost where the publisher undertook to state additional facts based on the publisher's own investigation which were false. The argument was also made by the defendant that an instruction defining libel must include the element of falsity or a requirement that the libelous

28. 363 Mo. 878, 254 S.W. 2d 596 (1953).
29. 261 S.W. 2d 952 (Mo. 1953).
30. For a more complete analysis of the Lightfoot case, see 19 Mo. L. REV. 91 (1954).
31. 258 S.W. 2d 583 (Mo. 1953) *(en banc)*.

words were untrue. The court reaffirmed its position that an instruction abstractly defining "libel" in the language of the statute without including the element of falsity was not prejudicially erroneous.[32]

III. Inducing Breach of Contract

The court gave recognition to the right to perform a contract and to reap the benefits therefrom and the right to performance by the other party, in *Downey v. United Weather-Proofing, Inc.*,[33] where these were held to be property rights entitling each party to the fulfillment of the contract by performance, and the intentional interference with the contractual relation without just cause, as to effect a breach of the contract, was held to constitute a wrong for which the wrongdoer may be made accountable in damages. The parties were competitors as suppliers of weatherproofing materials. The plaintiffs had entered into an agreement in writing with a third person whereby the plaintiffs agreed to furnish insulation material and install the same in a house owned by the third person. The plaintiff alleged that the defendants, with full knowledge of the existing contract between the plaintiffs and the third person, and with the intention to injure, destroy and otherwise interfere with the plaintiffs' business, maliciously persuaded the third person to repudiate and cancel the said contract with the plaintiffs, and induced the third person to enter into a contract with the defendant for the installation of insulating material in his house. It was further alleged that the defendants represented to the third person in effect that plaintiffs were unreliable, insolvent and unable to furnish the goods and services contracted for, and by agreement in writing undertook to protect and indemnify the said third person against any and all liability he might incur by reason of the breach of the said contract which he had theretofore entered into with the plaintiffs. It was alleged further that the third person would not have breached the contract with the plaintiffs but for the wrongful conduct of the plaintiffs. On appeal by the plaintiff, the action by the trial court in dismissing the plaintiffs' petition was reversed and the cause remanded, the court holding that the plaintiffs' petition stated a claim upon which legal and equitable relief could be granted for the

32. In Fitch v. Star-Times Pub. Co., 263 S.W. 2d 32 (Mo. 1953), in a libel suit against a newspaper which had published a statement of an assistant prosecuting attorney respecting the plaintiff's attitude, co-operativeness and behavior as a witness in a criminal trial, the evidence was held to justify a finding that the article complained of was not, under the circumstances, libelous, and, if libelous, that it was true.

33. 363 Mo. 852, 253 S.W. 2d 976 (1953).

alleged interference by the defendant with the plaintiffs' business and contractual relations.

In an earlier Missouri case, referred to in the opinion, there was language to the effect that the actionable wrong is not committed by mere persuasion, but only where breach of the existing contract is induced by means of fraud, deceit or coercion. This, held the court in the instant case, should be held to be non-essential to a recovery for inducting the breach of an existing contract, if "there is alleged (and demonstrated) that the alleged wrongdoer maliciously, that is, with knowledge of the contract and without justifiable cause, induced the breach. . . . And our change of view has been brought about by a present belief that rights of the parties to an existing contract are of such importance in the business world that such rights should be protected from intentional and unjustifiable interference by a third person."

The opinion should be carefully read for here is a definite advance in the protection which will be given in this area of business enterprise.[34]

34. Other cases involving tort liability may be noted although they do not raise new questions: In Baker v. Baker, 263 S.W. 2d 29 (Mo. 1953), in a suit by a 15 months old infant against the father for damages sustained when the father backed his automobile out of the home-driveway over the infant, it was alleged in the petition that the defendant was fully insured by a named insurance company for any liability and for any judgment against the defendant. The court followed well settled law in Missouri that an unemancipated minor child cannot maintain an action against its parents on negligence. The action of the trial court in granting defendant's motion to dismiss the petition was affirmed.

In Sandler v. Schmidt, 263 S.W. 2d 35 (Mo. 1953), in an action by a wife for criminal conversation of the defendant with the plaintiff's husband, a judgment for the defendant was affirmed. With respect to the alienation of her husband's affections, the plaintiff was required to show the enticing of her husband, and that the wrongful acts of defendant were the cause of the interference complained of, and an instruction to that effect and to the effect that if the jury found that the plaintiff's husband voluntarily bestowed his affections upon the defendant, who did nothing wrongful to gain such affections, was proper.

An employee of defendant, a dealer in television sets, was asked by the police to accompany them to the plaintiff's home to attempt to identify a stolen set. He requested the police to take the set to a police station where the set could be more readily identified, and nodded his head when the police made a statement that if the set was taken the plaintiff would also be required to go to the station. This evidence was held, in Heinold v. Muntz T.V. Inc., 262 S.W. 2d 32 (Mo. 1953), to be insufficient to show that the arrest was instigated by him.

In an action for malicious prosecution by a civil suit against plaintiff by the defendant insurance company for the amount of its loss under an automobile theft policy, because of plaintiff's theft of an insured automobile, the trial court, in Hughes v. Aetna Ins. Co., 261 S.W. 2d 943 (Mo. 1954), had directed a verdict for the defendant. On appeal by the plaintiff, the evidence on the issue of want of probable cause for the prosecution of the first suit was held sufficient to warrent submission to the jury. The defendant was held responsible, not only for facts which he knew when he caused the institution of the first suit, but also for all other facts pertinent to the suit which he could have ascertained by due diligence or reasonable inquiry before causing the institution thereof.

WILL, TRUSTS AND ADMINISTRATION

GEORGE W. SIMPKINS*

The Supreme Court of Missouri had before it relatively fewer cases (fourteen in all) involving this general subject than in some recent years. On the other hand, several of the cases involved matters of first impression in Missouri.

The case of *St. Louis County National Bank v. Fielder*[1] (decided by the court *en banc*) rules that a deed reserving to the grantor not only a life estate but also the power to sell, rent, lease, mortgage or otherwise dispose of the property during the grantor's life, was not testamentary in character. The court points out that under the common law of England such a reservation was invalid as being repugnant to the grantor arising out of a transfer made by feoffment and livery of seisin, but that the modern recording statute providing for the recordation of instruments affecting real estate makes the old common law rules no longer applicable, since a recorded deed is notice of the rights of revocation so reserved. The earlier case of *Goins v. Melton*[2] is distinguished on the ground that in the *Goins* case there was not only the power of disposition but the deed provided that at the death of the grantor "the title to all or whatever part thereof remains unsold, to pass to and vest in the grantee."

In *Wailes v. Curators of Central College,*[3] the court *en banc* determined that grandchildren (whose parents were deceased) were not pretermitted children of their natural grandparent where they had been adopted by others pursuant to the present Missouri statute. The court construes Section 453.090, *Missouri Revised Statutes* (1949), and holds squarely and definitely that children so adopted cannot inherit from their natural parents or from the ancestors of such natural parent. Although the court approves of the results in the earlier case of *St. Louis Union Trust Company v. Kaltenbach*[4] and *Mississippi Valley Trust Company v. Palms,*[5] it disapproves of certain of the dicta therein contained which would lend support to a result contra to that reached in the pre-

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*Attorney, St. Louis. A.B. Harvard, 1930; J.D., Washington University, 1933.
1. 260 S.W. 2d 483 (Mo. 1953).
2. 343 Mo. 413, 121 S.W. 2d 821 (1938).
3. 363 Mo. 932, 254 S.W. 2d 645 (1953).
4. 353 Mo. 1114, 186 S.W. 2d 578 (1945).
5. 360 Mo. 610, 229 S.W. 2d 675 (1950).

sent case. The earlier ruling to the same general effect in *Shepherd v. Murphy*[6] is reaffirmed.

Another decision[7] of the court *en banc* involved a situation where the evidence clearly showed by a separate written document that a woman had attempted to change her will by the simple expedient of marking out provisions therein and inserting in longhand other provisions, being, apparently, unaware of the fact that wills must be witnessed. The court applied the doctrine of dependent relative revocation and found that there was no intent to revoke the will unless the new provisions were effective, and hence allowed the probate of the will in its original form so far as ascertainable.

Where a will provided that the testatrix left all of her property to the party or parties, whoever they may be, who took care of her during her last sickness, the court ruled[8] that the circuit court might properly apportion such residue two-thirds to one person and one-third to another, and that the rule of law that where plural beneficiaries are named or described by reference it is implied that they are to take equally, per capita, does not apply to such a bequest, which is, basically, a payment of compensation.

Muzzy v. Muzzy[9] involved a will where testator left a life estate in certain property to his wife and then provided that at her death it should pass to his two sons. The court followed the earlier Missouri authorities that the use of the phrase "at the death" does not prevent the sons taking a vested estate but merely applies to the time when they may enjoy possession of the property.

Although recognizing that under proper circumstances equity will enforce a contract to make joint wills and prevent the revocation of such will by the survivor, nevertheless, in the particular case before the court[10] it found that there was controlling evidence that the parties did not intend that the particular property in question (a house held as tenants by the entirety) should pass under such joint will.

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6. 332 Mo. 1176, 61 S.W. 2d 746 (1933).
7. Woodson v. Woodson, 255 S.W. 2d 771 (Mo. 1953).
8. Ray v. Nethery, 255 S.W. 2d 817 (Mo. 1953).
9. 261 S.W. 2d 927 (Mo. 1953).
10. Hart v. Hines, 263 S.W. 2d 13 (Mo. 1953).

In a suit[11] seeking to recover from the decedent's estate the reasonable value of personal services rendered to the decedent, it was held reversible error for the circuit court to have admitted evidence as to declarations made by the decedent that his relatives did not and would not help him and that decedent did not desire that they inherit his property. The court ruled that these were obviously prejudicial to the defense against the claim.

In *Michaelson v. Wolf*,[12] suit had been brought by two daughters against their brother to recover two thirds of the money transmitted to the brother by check shortly before the decedent's death, it being contended by the daughters that the check was not intended as a gift. The court held that since the estates of the decedent and his wife had both been finally settled it was not necessary to appoint an administrator de bonis non, pointing out that the requirement that the administrator or executor be a party to such suit made in *Odom v. Langston*[13] should be limited to situations where the administration of the estate is pending and has not been finally settled.

Saracino v. St. Louis Union Trust Company[14] involved two separate issues: (1) whether or not the widow could by a separate proceeding in the circuit court after final settlement had been made recover against the executor because all of the federal estate tax had been paid out of the estate. As to this it was held that the final settlement was conclusive. (2) The other issue involved a question of the trustees' powers. Real estate held in the testamentary trust had been damaged by fire. The trustees collected $9,289.20 on policies of fire insurance and used not only said amount but also $872.71 of current rental income to restore the premises to tenantable condition. The widow claimed dower rights in the full amount of the insurance and a dower right in the rents. The court held that since the money was used merely to restore the building she had no claim thereto.

In *Campbell v. Webb*[15] the court uses the doctrine of a constructive trust to follow money into the hands of the widow individually who had received it in part out of her husband's estate, even though the court

11. Daugherty v. Maddox, 260 S.W. 2d 732 (Mo. 1953).
12. 261 S.W. 2d 918 (Mo. 1953).
13. 351 Mo. 609, 173 S.W. 2d 826 (1943).
14. 254 S.W. 2d 600 (Mo. 1952).
15. 363 Mo. 1192, 258 S.W. 2d 595 (1953).

rules that the plaintiffs were barred in their claim against the estate as such, and against the widow in her capacity as administratrix thereof, by the one-year statute of nonclaim.

Page v. Joplin National Bank & Trust Company[16] involved a case where a plaintiff alleged that decedent had orally promised to devise to him certain real estate provided plaintiff would waive his claim arising out of allegedly having acquired silicosis while in the employ of a corporation owned by decedent. Since the contract was oral it was barred by the Statute of Frauds. The court refused to stretch the doctrine of constructive trusts so as to apply to such a situation, pointing out that the doctrine of constructive trusts cannot apply where the property is already owned by the person against whom the constructive trust is to be created.

The case of *Bolles v. Boatmen's National Bank*[17] is another in a long series of cases involving the estate of Hugh Thomasson, the court pointing out in a footnote that either the Thomasson Estate or Thomasson's own unfortunate experiences had been before appellate courts nineteen prior times. In the instant case it was ruled that certain annuities were payable only out of the income of the trust estate and that if there were no income then nothing was payable to the annuitants. It held, however, that where the income had been applied to pay off debts, taxes and claims, then when corpus was sold the proceeds thereof could be used to pay, but without interest, such annuities which had been earned, but had not been previously paid. The case also determines the source of payment of certain expenses and attorneys' fees under conditions which are not likely to be repeated.

Aronson v. Spitcaufsky[18] points out and actually applies the doctrine that to establish a constructive or resulting trust the evidence must be so unquestionable in character, so clear, cogent and convincing that no reasonable doubt can be entertained as to its truth and the existence of a trust. The court held that in this particular case the evidence did not measure up to this test. On the other hand, in *Collins v. Shive,*[19] the court found the evidence to be sufficient to justify declaring a constructive trust.

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16. 363 Mo. 1008, 255 S.W. 2d 821 (1953).
17. 363 Mo. 949, 255 S.W. 2d 725 (1953).
18. 260 S.W. 2d 548 2d (Mo. 1953).
19. 261 S.W. 2d 58 (Mo. 1953).

THE NEW GENERAL CODE FOR CIVIL PROCEDURE AND SUPREME COURT RULES INTERPRETED

CARL C. WHEATON*

OBJECTIVES OF CODE

Our civil code is designed to secure a just, speedy, and inexpensive determination of controversies upon their merits.[1]

PARTIES

a. *Action on Claim Based on Law of Another State*

In view of the fact that the Kansas Death Statute authorizes a personal representative of the deceased to sue, the personal representative of the deceased who had been a resident of Kansas could sue a Missouri corporation in Missouri for a wrongful death sustained in a motor vehicle collision in Kansas.[2]

b. *Indispensable Parties*

The most fundamental and controlling doctrine of equity procedure is that no decree will be entered which will materially and necessarily affect any person's interest in the property involved in the litigations, unless he has been made a party to the suit and afforded the opportunity to be heard in defense of his rights. This doctrine has given rise to the rule that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all.[3]

In an action to try title to realty, one who has given a quit-claim deed to that property is not a necessary party to the action.[4]

Where an Arkansas attorney contracted with a client to represent him in a condemnation proceeding, and the Arkansas attorney employed

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1. Brown v. Stroeter, 263 S.W. 2d 458 (Mo. App. 1953).
2. McElroy v. Wichita Forwarding Co., 263 S.W. 2d 17 (Mo. 1953).
3. Schaeffer v. Moore, 262 S.W. 2d 854 (Mo. 1953).
4. *Ibid.*

a Missouri attorney to act as local counsel, and the Arkansas attorney, not his client, was responsible for the Missouri attorney's fee, an action by the Arkansas attorney against his client to recover an attorney's fees and expenses was properly brought by the Arkansas attorney alone without joining the Missouri attorney as plaintiff, since the Missouri attorney was not a "joint obligee".[5]

c. *Permissive Joinder*

In a recent case, the Supreme Court of Missouri, in referring to Section 570.040 of our revised statutes, said, "The statute treats of 'occurrences' and 'transactions' in the disjunctive and as having separate meaning, as of course they do. It is true that the word 'transaction' has been given a very broad meaning in the case law of this state. But the fact remains that the word 'occurrence' and the word 'transaction' are not synonymous or interchangeable."

Where plaintiffs brought actions against the alleged wrong-doers for damage caused by blasting and against an insurer on explosion policies, it was held that they could not be joined under Section 507.040, which permits joinders of defendants in cases arising from the same cause of action.

In support of this view, the court said, "The damages which the plaintiffs in each suit seek to recover from relators are predicated upon trespass and resultant destruction of property, clearly an occurrence. The damages sought against the insurance companies arise out of insurance contracts and nonperformance, clearly transactions. Note that the statute permits joinder only when the right to relief arises out of the same transaction, the same occurrence, or a series of transactions *or* occurrences; not a series of both. Situations arise, however, in which a transaction and an occurrence become so intermingled and interdependent that the occurrence becomes an integral part of the transaction or *vice versa,* so as to make joinder permissible under § 507.040.

"In the suits here involved there is no connection or interdependence between the insurance contracts issued by the insurance companies and the cause of action in tort alleged against relators. It is true that the cause of action plaintiffs have against each of the insurance companies and the cause of action they have against relators spring from the same

5. Denton v. Mitchell, 262 S.W. 2d 639 (Mo. App. 1953).

event, to wit: the explosion, and, by coincidence, present common questions of law and fact, yet each cause of action arises out of a separate legal right, neither of which is dependent upon the other for its existence."[6]

The writer respectfully disagrees with this view, believing that the wording of this statute should be interpreted to allow the joinder of parties whose claims or obligations arose out of connected occurrences and transactions. The court's reliance on the fact that the word "or" is used between "transactions" and "occurrences" does not seem to be significant. It should be noticed that, in the section referred to above, when the singular of these words occurs, there is no use of "or" but that, where the plural thereof occurs, it is necessary as a matter of good English to employ the word "or". The use of the word "and" would not be appropriate, as it might indicate that the causes to be joined would have to arise out of both an occurrence and a transaction.

Where an automobile theft policy did not cover the loss of personal belongings contained in a stolen vehicle, it is proper for the insurer and the owners of the personal belongings to join their actions. These facts do not present a case of the splitting of a cause of action, but rather of two causes of action.[7]

One may also notice that only the original parties to a divorce suit are proper parties to a motion to modify a decree of divorce, and no other person, even a grandparent, can properly litigate a modification of a divorce decree.[8]

d. *Class Actions*

The supreme court has recently said: "Section 507.070, of the Revised Statutes of Missouri, 1949, uses this language: 'If persons constituting a class are very numerous *or* it is impracticable to bring them all before the court, * * *,' (italics ours.) This language makes plain that either reason is sufficient, that is, either that the parties are very numerous, *or* that it is impracticable to bring them all before the court. It seems apparent, however, that the determination of how many people there need be before they may be said to be 'very numerous' must depend upon the circumstances in a given case. In determining whether persons

6. State *ex rel.* Campbell v. James, 263 S.W. 2d 402 (Mo. 1954).
7. Helderman v. Von Hoffman Corp., 260 S.W. 2d 333 (Mo. App. 1953).
8. Wilson v. Wilson, 260 S.W. 2d 770 (Mo. App. 1953).

constituting a class are 'very numerous', one circumstance to be considered is whether the very *number* of parties makes it impracticable to bring them all before the court. Parties may be so numerous that their number alone may furnish a sufficient basis for a determination that the parties are 'very numerous' within the meaning of Section 507.070. But 'impracticability' is always to be considered in determining whether parties are 'very numerous' ".

The court also stated that the persons bringing the action shall fairly insure the adequate representation of all of those on behalf of whom they sue; and that facts showing such adequate and fair representation must be alleged and proved.[9]

Plaintiffs who are residents and taxpayers of the state of Missouri and of their respective school districts, have the right and legal capacity to bring and maintain an action for themselves and on behalf of all others similarly situated to enjoin the unlawful expenditure of public funds. In such a case, proof of illegal and unconstitutional expenditure of such public funds is sufficient to show private pecuniary injury, because of the taxpayer's equitable ownership of such funds and of his liability to replenish any deficiency resulting from the misappropriation.[10]

e. *Joinder to Complete Determination of Controversy*

A trial judge was held to have acted properly when he granted a motion permitting the contestants in a will contest to amend their petition to join as a defendant a minor beneficiary of the will.[11]

f. *Interpleader*

It was held that there could be an interpleader where the plaintiff held a fund to which it claimed no right or title and three different people had severally demanded its delivery. Thus, where a husband and wife had a joint bank account with the right of survivorship, and the name of the husband's daughter by a prior marriage was added to the account upon the husband's oral instruction, and the daughter and the administrators of the husband and wife each demanded delivery of

9. Campbell v. Webb, 258 S.W. 2d 595 (Mo. 1953).
10. Berghorn v. Reorganized School Dist. No. 8, 260 S.W. 2d 573 (Mo. 1953).
11. Machens v. Machens, 263 S.W. 2d 724 (Mo. 1954).

the fund, the bank which held a fund to which it claimed no right or title, was entitled to relief by a bill of interpleader.[12]

g. *Substitution of*

1. In Representative Suit

Where parties, who were among the plaintiffs allegedly representing a class, died, their administrators would not automatically become members of the class, and it was incumbent upon the administrators to obtain orders of substitution, within the prescribed period, if they wished to become parties in the case.[13]

2. Corporate Defendants

Under the statute which provides that judgments against corporations which are dissolved in the course of a suit shall have effect against the board of directors in a representative capacity, judgment against a corporation which made no appearance in a suit after its dissolution was valid even though the trustees or legal representatives of the dissolved corporation were not joined in the action.[14]

Pleadings

a. *Petition*

1. Exhibits

A copy of a contract may be considered in connection with allegations of a petition in determining whether the petition states a cause of action.[15]

2. Pleading Conditions Precedent

In an action on a policy of insurance to recover for the loss of a yacht, the petition alleged that the "plaintiff forthwith notified the defendant of the aforesaid sinking of the said yacht and the loss resulting therefrom, as required by the terms of the policy and the laws of this

12. Clay County State Bank v. Simrall, 259 S.W. 2d 422 (Mo. App. 1953).
13. Campbell v. Webb, *supra* note 9.
14. Murray v. United Zinc Smelting Corp., 263 S.W. 2d 351 (Mo. 1954).
15. Bride v. City of Slater, 263 S.W. 2d 22 (Mo. 1953).

state." Such a general allegation of compliance with the contract sued on is authorized by Section 509.170 of the *Missouri Revised Statutes*, 1949.[16]

3. Prayer

While it is true that the relief prayed for is no part of the plaintiff's cause of action, the prayer may be considered to show the intention of the pleader. Thus, where the plaintiff contended that he did not plead a charge of trade name piracy in his suit, since he so characterized it in the prayer his petition, he was deemed to have pleaded such a charge.[17]

4. Joinder of Causes

Under the present Sections 509.060 and 509.110 of our *Revised Statutes* considered together, a plaintiff can join in his petition as many claims as he may have against the defendant, as independent or as alternative, and whether legal or equitable, and he may set forth two or more statements of the same claim alternatively or hypothetically, in one or more counts, and, when stated in the alternative, the pleading is sufficient if anyone of the statements, if made independently, is sufficient.[18]

5. Joining Causes in a Single Count

Where a petition improperly joins two theories of recovery in one count, a failure of the defendant to move to compel the plaintiff to elect between remedies precludes the defendant from asserting an objection on that ground in the future.[19]

6. Insufficient Petition Cured by Answer

Where it was claimed that the plaintiff, in suing on a marine policy, had failed to allege a cause of action because he did not allege his ownership of the policy at the time of the loss, it was held that the point was waived in the defendant's answer where, in pleading that the loss was due to the plaintiff's want of due diligence, the defendant alleged "that

16. Palmer v. Security Ins. Co. of New Haven, Conn., 263 S.W. 2d 210 (Mo. App. 1953).
17. Meisel v. Mueller, 261 S.W. 2d 526 (Mo. App. 1953).
18. Goldman v. Ashbrook, 262 S.W. 2d 165 (Mo. App. 1953).
19. Kearns v. Sparks, 260 S.W. 2d 353 (Mo. App. 1953).

the supposed loss or damage mentioned in the petition resulted from want of due diligence on the part of the plaintiff, the *owner of the said yacht* and the insured under said policy of insurance."[20]

b. *Answer*

1. Putting in Issue Capacity of Administrator

If a defendant desires to question the plaintiff's capacity as an administrator to sue, this issue should be raised by a specific negative averment.[21]

2. Putting in Issue the Existence of a Corporation

A mere denial is not sufficient to put in issue the corporate existence of a plaintiff or its right to sue. If a defendant wishes to make an issue of such matters, he is obliged to do so by specific negative averments, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.[22]

3. Affirmative Defenses

The defense of advice of counsel is affirmative in nature.[23]

In an action based upon the breach of an implied warranty of fitness and upon an express oral warranty that a machine was capable of a certain performance, the defense that the parties expressly limited the extent of the warranty by an agreement in writing is special and affirmative, and must be pleaded if it is to be relied upon.[24]

4. Counterclaim

In an action in equity for the rescission of a contract for the purchase of a movable crane, for the cancellation of the note and mortgage given in part payment therefor, and for a refund of installments paid thereon, based upon a breach of warranty, it was held that any claim by the defendant against the plaintiff for the value of the use of the crane must have been pleaded as a compulsory counterclaim. The general denial of the defendant did not present such a claim.[25]

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20. Palmer v. Security Ins. Co. of New Haven, Conn., *supra* note 16.
21. McElroy v. Wichita Forwarding Co., 263 S.W. 2d 17 (Mo. 1953).
22. United Farm Agency v. Howard, 263 S.W. 2d 889 (Mo. App. 1954).
23. Hughes v. Aetna Ins. Co., 261 S.W. 2d 942 (Mo. 1953).
24. Witte v. Cooke Tractor Co., 261 S.W. 2d 651 (Mo. App. 1953).
25. *Ibid.*

c. *Reply*

The lack of a reply is waived if a defendant goes to trial on the issues as though a reply had been filed, and neither asks for a default judgment or for a judgment on the pleadings.[26]

d. *Amendment*

1. Interlineation

Although an interlineation adding a defendant's name was never written on the petition, as permitted by court order, but was written on another pleading in the file by inadvertence, since this defendant's interest in the suit appeared in his answer, the interlineation was effective. Further, since the original defendant made no objection to the interlineation when it was made, the petition should be considered as amended in accordance with the court's order.[27]

2. Departure in Amendments

The former rule against departure which confined the petition to the cause first stated has been held inconsistent with the new code, so a plaintiff may properly amend his petition even though it departs from the theory first relied upon.[28]

3. Time within Which to Amend

It was recently held in a personal injury case that the plaintiff's counsel had the right at the close of the defendant's evidence to request leave to amend a petition to increase the amount of damages.[29]

4. Issue Treated as Raised in Pleadings

The statute providing that issues not raised by pleadings, when tried by express or implied consent of parties to an action, shall be treated as if raised in pleadings is inapplicable in an administratrix's action for her intestate's wrongful death, since the allegations as to the existence of some one entitled to compensation and as to pecuniary loss suffered

26. Lix v. Gastian, 261 S.W. 2d 497 (Mo. App. 1953).
27. Machens v. Machens, 263 S.W. 2d 724 (Mo. 1954).
28. Kearns v. Sparks, *supra* note 19. In this case it was decided that the permission given to file a third amended petition, even though it changed the plaintiff's cause of action, was not error.
29. Peterson v. Kansas City Public Service Co., 259 S.W. 2d 789 (Mo. 1953).

by some one because of such death are jurisdictional, the plaintiff's recovery being based on a statute. The jurisdictional facts must be pleaded as well as proved.[30]

Motions in General

a. *Motion to Dismiss Replaces Demurrer*

A motion to dismiss under Section 509.300 of the *Revised Statutes* takes the place of the demurrer under the former practice.[31]

b. *Grounds for Motions*

The authority to plead res judicata as a ground of a motion is based upon the words "and other matters" contained in Section 509.290 of our *Revised Statutes.*[32]

c. *Speaking Motions*

The objection to a petition that it fails to state a claim upon which relief can be granted must appear on the face of the petition. That is, in such a case, a speaking motion is not permitted.[33] This is provided for by Section 509.300 of the *Revised Statutes.*

However, the contrary is true under Section 509.290. In cases of motions under that section, the trial court is authorized to receive proof of the new facts alleged in the *motion.*[34]

d. *Admissions of Allegations*

A motion to dismiss does not admit mere conclusions of a pleader.[35]

The allegation of an amended petition that it was the understanding of the parties that the instrument created a vendor's lien on the goods, furniture, and fixtures was a mere conclusion and the motion to dismiss did not admit it.[36]

A motion only admits facts well pleaded and does not admit the

30. Lynch v. St. Louis Public Service Co., 261 S.W. 2d 521 (Mo. App. 1953).
31. Goodrich v. Rhodes, 261 S.W. 2d 391 (Mo. App. 1953).
32. Meisel v. Mueller, 261 S.W. 2d 526 (Mo. App. 1953).
33. *Ibid.*
34. *Ibid.*
35. Goodrich v. Rhodes, 261 S.W. 2d 391 (Mo. App. 1953).
36. *Ibid.*

correctness of the ascription of a purpose to the parties when it is not justified by the language used.[37]

A motion to dismiss does not admit an unnatural, unfair, or forced construction of the words used.[38]

e. *Necessity of Writing*

A motion made during a hearing before a court which is in session need not be written.[39]

f. *Necessity of Notice*

An order amending an order previously made by the court in response to the motion of a party should not be made without notice to the parties affected by the amending order.[40]

g. *Effect of Setting Aside Order Based on Motion*

Where the contestants in a will contest moved to amend a petition to make a pastor, who was a minor beneficiary of a will, a party defendant, and the court overruled the motion, and, thereafter, the contestants filed another motion asking leave to file an amended petition making the pastor a defendant, and the court, before the second motion was considered, set aside its previous order overruling the first motion and ordered such motion sustained, the second motion would be considered withdrawn and the first motion would be considered as renewed.[41]

MOTION FOR DIRECTED VERDICT

Since the adoption of the Civil Code of Missouri, a motion for a directed verdict has been insufficient unless the movant has made known to the court his grounds therefor.[42]

A motion for a directed verdict offered at the close of all the evidence for the reason that under the law and the evidence the plaintiff was not entitled to recover insufficiently sets forth a ground for the motion.[43]

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37. *Ibid.*
38. Lorenz v. Towntalk Pub. Co., 261 S.W. 2d 952 (Mo. 1953).
39. Machens v. Machens, *supra* note 27.
40. Stutte v. Brodtrick, 259 S. W. 2d 820 (Mo. 1953).
41. Machens v. Machens, *supra* note 27.
42. Palmer v. Security Ins. Co. of New Haven, Conn., *supra* note 16.
43. *Ibid.*

Where a motion for a directed verdict was orally made, no objection was made because of that fact, immediately thereafter counsel for the appellants stated at length to the court the grounds upon which he based the motion, and counsel for the respondents also argued the motion on the merits, and the court was fully appraised of the grounds relied upon, the motion was sufficient.[44]

In an action at law upon a motion for a directed verdict, a defendant admits the truth of all the testimony, including testimony adduced by the defendant favorable to a plaintiff, and all legitimate inferences therefrom favorable to the plaintiff. A plaintiff's prima facie case is not destroyed by a defendant's rebutting testimony.[45]

It has also been held that, in determining the propriety of a directed verdict for the defendant, the supreme court, on appeal from a judgment thereon, will view the facts in evidence in the light most favorable to the plaintiff, giving him the benefit of all reasonable inferences therefrom.[46]

A verdict can be directed upon motion, which now takes the place of the old demurrer to the evidence and a request for a peremptory instruction, only when the facts in evidence and the legitimate inferences therefrom are so strongly one way as to leave no room for reasonable minds to differ.[47]

INTERROGATORIES

Interrogatories to a corporate defendant are directed to the corporation and the responsibility for answering them is imposed on it. A corporation has not complied completely with Section 510.020 of the *Revised Statues* when its general manager answers that he has no knowledge as to the facts inquired about in the interrogatories involved. An officer answering interrogatories for a corporate party "is answering for the corporation and not for himself", and it is immaterial that he does not know of his own knowledge the facts required to be stated. Of course, his personal knowledge may be called for under the supreme court's Rule 3.19, if that is desired. Material information, not privileged, which

44. Morton v. Simms, 263 S.W. 2d 435 (Mo. 1954).
45. Michaelson v. Wolf, 261 S. W. 2d 918 (Mo. 1953).
46. Hughes v. Aetna Ins. Co., 261 S.W. 2d 942 (Mo. 1953).
47. Shearrer v. Shearrer, 259 S.W. 2d 705 (Mo. App. 1953); United Farm Agency v. Howald, 263 S.W. 2d 889 (Mo. App. 1954).

the corporation has must be given when obtained by any of its officers, agents, or employees, including its attorneys.[48]

Interrogations concerning the names of a corporation's agents, who had, at the corporation's direction, made an inspection of certain premises and the cause of an explosion thereon, was not objectionable on the ground that the information sought was privileged and the general manager could not refuse to disclose the names of the agents on the ground that the information sought was hearsay, even though he had no personal knowledge as to who made the inspection, for he was answering for the corporation who had the knowledge concerning the facts.[49]

The liberalized and expanded discovery provisions of the New General Code for Civil Procedure have not destroyed the *res ipsa loquitur* doctrine by rendering the plaintiff's knowledge or means of knowledge touching facts on which an injury arises equal or superior to that of the defendant.[50]

Separate Trials

Trial courts, in furtherance of convenience and to avoid prejudice, are authorized to order separate trials of any claim, crossclaim, counterclaim, third-party claim or any separate issue.[51]

Case Tried Without a Jury

In an equity case the appellate court will review it *de novo* and, subject to the rule of deference, reach its own decision on the law and the evidence.[52]

In an action not in equity, but tried without a jury, on appeal the appellate court is under the same duty to review such matters as they are in any appeal in a case of an equitable nature; that is, to examine the whole record and reach its own conclusions, giving due deference to the finding of the trial judge who personnally saw the witnesses and heard them testify. The deference accorded the trial judge comes about when

48. State *ex rel.* Uregas Service Co., 262 S. W. 2d 9 (Mo. 1953).
49. *Ibid.*
50. Jones v. Terminal R.R. Ass'n. of St. Louis, 258 S.W. 2d 643 (Mo. 1953).
51. Weir v. Brune, 262 S.W. 2d 597 (Mo. 1953).
52. Clay County State Bank v. Simrall, 259 S.W. 2d 422 (Mo. App. 1953); Shrout v. Tines, 260 S.W. 2nd 782 (Mo. App. 1953); Likens v. Sourk, 268 S.W. 2d 462 (Mo. App. 1953).

there is conflicting testimony which, from his advantage in seeing and hearing the witnesses, he is better able to determine where the truth rests. However, when no question of veracity is involved the appellate court reaches its own conclusion on the whole record.[53]

This rule has been applied during the past year to an action to recover the value of services,[54] to a suit on a bond given to obtain the release of attached property,[55] to a proceeding to determine an interest in a tavern,[56] to an action to determine whether schools operated by the defendants were public schools entitled to tax money,[57] to a mechanic's lien suit,[58] and to divorce[59] and child custody proceedings.[60]

In equity cases where an appellant brings up the entire record, the appellate court will sift the testimony and separate the competent from the incompetent, regardless of the rulings of the trial court.[61]

Also, in those cases, where evidence excluded by the trial court is preserved in the record, it is the duty of the appellate court to admit or reject it as the law requires.[62]

It was recently held that Section 510.310 of our *Revised Statutes* is a mandatory statute and that it is the duty of the trial court in a civil case tried upon the facts without a jury, upon requests, to make a written statement of the grounds for its decision, and to include its findings on any of the principal controverted fact issues.[63]

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53. Stamm v. Desnoyers, 263 S.W. 2d 45 (Mo. App. 1953). In accord: Harrington v. Muzzy, 258 S.W. 2d 637 (Mo. App. 1953); Chamberlain v. Mutual Benefit Health & Accident Association, 260 S.W. 2d 790 (Mo. App. 1953); State of California *ex rel.* Houser, Atty. Gen. of California v. St. Louis Union Trust Co., 260 S.W. 2d 821 (Mo. App. 1953); Witte v. Cooke Tractor Co., *supra* note 24; Denton v. Mitchell, 262 S.W. 2d 639 (Mo. App. 1953); Stephenson v. Pfeiffer, 263 S.W. 2d 218 (Mo. App. 1953); Taubin v. Taubin, 263 S.W. 2d 466 (Mo. App. 1953). To the effect that the rule is the same where only a partial transcript of the testimony is before the appellate court, if the transcript contains all of the evidence relevant to the appeal, see Stamm v. Desnoyers, *supra* this note.

54. Stamm v. Desnoyers, *supra* note 53.

55. People to the Use of Wilson v. Mosley, 263 S.W. 2d 340 (Mo. 1953).

56. Stouse v. Stouse, 260 S.W. 2d 31 (Mo. App. 1953).

57. Berghorn v. Reorganized School Dist. No. 8, *supra* note 10.

58. Talbot-Quevereaux Const. Co. v. Tandy, 260 S.W. 2d 314 (Mo. App. 1953).

59. Wilson v. Wilson, 260 S.W. 2d 770 (Mo. App. 1953); Butler v. Butler, 262 S.W. 2d 330 (Mo. App. 1953); Thomason v. Thomason, 262 S.W. 2d 349 (Mo. App. 1953); Luckett v. Luckett, 263 S.W. 2d 41 (Mo. App. 1953).

60. Swan v. Swan, 262 S.W. 2d 312 (Mo. App. 1953).

61. Butler v. Butler, 262 S.W. 2d 330 (Mo. App. 1953).

62. *Ibid.*

63. Witte v. Cooke Tractor Co., *supra* note 24.

However, the court, in the same opinion, held that, where the record in a case tried on facts without a jury adequately disclosed the issues of fact that were before the trial court, and there was no particular need of findings of facts in order to decide the fact issues and the trial court's failure to comply with the request of counsel to make requested findings of fact did not impose an unnecessary burden on the appellate court, such failure was not reversible error.[64]

NEW TRIALS

a. *Necessity of Motion for Directed Verdict or for Judgment*

The trial court may sustain a motion for a new trial because of insufficiency of the evidence, even though the point was not saved by a motion for a directed verdict or for a judgment.[65]

b. *Grounds for*

When the substance of the plaintiff's motion for a new trial is that she requests the court to set aside the decree and judgment to give her an opportunity to prove a certain fact, and where ample opportunity was afforded the plaintiff to make such proof at the hearing, when, in fact she did present considerable evidence on that subject, her desire to reopen the case for further proof of the fact constitutes no ground for a new trial.[66]

The mere assertion in a motion for a new trial that a constitutional question is involved does not arise such a question.[67]

c. *Discretion of Court*

The trial court has a large degree of discretion in overruling or sustaining a motion for a new trial and it is only when there is a clear abuse of such discretion that an appellate court will interfere.[68]

Where the plaintiff had not sought by compulsory process to produce an attending physician as a witness in a personal injury action nor taken

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64. *Ibid.*
65. Shearrer v. Shearrer, *supra* note 47.
66. Perkins v. Perkins, 263 S.W. 2d 450 (Mo. App. 1953).
67. Nelson v. Watkinson, 260 S.W. 2d 1 (Mo. 1953).
68. York v. Daniels, 259 S.W. 2d 109 (Mo. App. 1953); Shearrer v. Shearrer, *supra* note 47.

his deposition, a comment by the defendants' counsel in his argument to the jury on the failure to produce the physician did not justify a reply by the plaintiff's counsel that the physician was equally available as a witness for the defendants, even if the plaintiff had waived his patient-physician privilege. There was evidence that the physician was not physically able to attend the trial for anyone. The granting of a new trial on the ground of failure to declare a mistrial because of such improper argument was not an abuse of discretion.[69]

If an instruction complained of in a motion for a new trial is not erroneous as to a matter of law or it is not fairly demonstrable upon the record that the instruction was misleading, or may otherwise have deprived the losing party of a fair trial, the granting of a new trial by the trial judge is not deemed to have been an exercise of judicial discretion, but such a grant constitutes a finding that the instructions were erroneous as a matter of law. The trial court has no authority to use its discretion in connection with a matter of law when passing on a motion for a new trial, but it must follow the law which is binding on it.[70]

Under Section 510.290 of the 1949 *Revised Statutes of Missouri,* which provides that if a verdict is returned the court on motion may allow the judgment to stand or it may reopen the judgment and either order a new trial or direct the entry of a judgment as if a requested verdict had been directed, the trial court, after directing a judgment for the plaintiffs, may grant a new trial because of insufficiency of evidence and then, to avoid the expense of a new trial, may enter judgment for the defendant.[71]

d. *Stating Reasons for Granting Motions*

Under Section 510.330 of the 1949 *Revised Statutes of Missouri,* a court, in granting a new trial, should specify of record the grounds for doing so.[72]

Where a trial court fails to do this, the supreme court's Rule 1.10 provides that the presumption is that the new trial was erroneously granted, and the burden of supporting that ruling is cast on the respondent beneficiary of that action.[73]

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69. Trzecki v. St. Louis Public Serice Co., 258 S.W. 2d 676 (Mo. 1953).
70. Warren v. Kansas City, 258 S.W. 2d 681 (Mo. 1953).
71. Mayfield v. Stoops, 262 S.W. 2d 299 (Mo. App. 1953).
72. Drake v. Hicks, 261 S.W. 2d 45 (Mo. 1953).
73. Drake v. Hicks, *supra* note 72; Hammond v. Crown Coach Co., 263 S.W. 2d 362 (Mo. 1954); Krueger v. Elder Mfg. Co., 260 S.W. 2d 349 (Mo. App. 1950).

This burden is met if the respondent demonstrates that the motion for a new trial should have been sustained on any of the grounds specified in the motion.[74]

The practice of courts of submitting memorandums as an aid or substitute for the statutory requirement that every order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted is to be discouraged.[75]

Hence, where it was not demonstrable that the plaintiff did not have a fair trial upon her own terms, there was no manifest injustice in declining to resort to a memorandum of the trial court in explanation of an order granting the plaintiff a new trial, which omitted to specify the grounds therefor.[76]

It has been held during the past year that, where a judgment against a defendant was set aside and a new trial granted on the defendant's motion, the court could, at any time within the ninety days it had in which to act on the motions originally, amend its order, as the judgment had not yet become final.[77]

The correctness of this ruling is doubtful as the supreme court's Rule 3.24 states that a judgment becomes final at the dispostion of the motion.

Other After-Trial Motions

a. *When Ruled on*

All after-trial motions are considered ruled on as of the same date as the motion for a new trial is ruled on [78]

Objections to Trial Errors

a. *Necessity for*

A matter not presented or ruled upon by a trial court, and not pleaded as a defense or raised in the trial of a cause or complained of in a motion for a new trial, can, as of right, not be considered on appeal.[79]

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74. Krueger v. Elder Mfg. Co., *supra* note 73.
75. Hammond v. Crown Coach Co., *supra* note 73.
76. *Ibid.*
77. Stutte v. Brodtrick, *supra* note 40.
78. *Ibid.*
79. Bennett v. Wood, 258 S.W. 2d 660 (Mo. 1953); Berghorn v. Reorganized School Dist. No. 8, *supra* note 10; Armes v. Missouri Ins. Co., 263 S.W. 2d 873 (Mo. App. 1954).

Thus, the invalidity of a statute cannot be asserted for the first time on appeal.[80]

Where a motion to dismiss a petition for the reason, among others, that parties necessary to the complete determination of the cause had not been joined was heard and overruled, and neither the motion to dismiss nor any action of the trial court with reference thereto was mentioned in the defendant's motion for a new trial, the trial court's ruling on the motion to dismiss was not preserved for review.[81]

In an action to try and determine title, the defendants' answer which set forth a claim to a perpetual easement in land involved as part of a private street was sufficient notice of the defendant's claim for consideration of the question on appeal, over the objection that it was an affirmative defense, in the absence of any attack upon such pleading in the trial court or of a request that it be made more definite or specific.[82]

Where an insurer recognized the issue of the damage to insured property, a motor boat, and that the measure of recovery therefor was the difference in its reasonable market value before and after its sinking, and accepted and adopted the theory of defense at the trial to recover on the policy, the insurance company could not be heard to complain on appeal that recovery could be had solely on the theory of the constructive total loss, nor could it complain that the measure of recovery was not the difference in the reasonable market values.[83]

A plaintiff, who made no objection as to the admissibility of certain evidence in the trial court, could not have such evidence reviewed on her appeal.[84]

Also, in connection with evidence, it has been decided that the trial court must be given an opportunity by a motion for a directed verdict to pass upon the sufficiency of the evidence to submit that issue to a jury in jury cases in order to preserve the question for review. When such a motion for a directed verdict or for a judgment is made, the court held that it preserved the point for appeal the same as would the raising of

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80. City of St. Louis v. Gruss, 263 S.W. 2d 387 (Mo. 1954).
81. Berghorn v. Reorganized School Dist. No. 8, *supra* note 10.
82. Larkin v. Kieselmann, 259 S.W. 2d 785 (Mo. 1953).
83. Palmer v. Security Ins. Co. of New Haven, Conn., *supra* note 16.
84. Sandler v. Schmidt, 263 S. W. 2d 35 (Mo. 1953). For a particular application of this principle, see Peterson v. Kansas City Public Service Co., *supra* note 29.

the point in a motion for a new trial.[85] However, it would be unwise not to raise the point again in any motion for a new trial.[86]

Likewise, one waives an objectionable closing argument by counsel when he fails to bring his objection thereto to the attention of the trial court.[87]

Again, where a motion for a new trial did not complain that the trial court should have limited its decree to such matters as might be adjudicated in the absence of allegedly indispensable parties, the question was not before the appellate court for decision.[88]

On the other hand, if a petition wholly fails to state a cause of action, the question can be raised for the first time on appeal.[89]

b. *Type of Objection*

A general objection is insufficient to preserve any definite evidence point for review.[90]

APPEAL

a. *Right Statutory*

The right of appeal is purely statutory.[91]

b. *Aggrieved Party*

An appellate court cannot convict a trial court of error where its rulings are not adverse to the party complaining.[92]

Hence, a defendant in a wrongful death action was not a party aggrieved by a judgment in favor of another defendant and an order granted the latter a new trial, and he could not maintain an appeal therefrom.[93]

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85. Shearrer v. Shearrer, *supra* note 47; Heninger v. Roth, 260 S.W. 2d 855 (Mo. App. 1953).
86. Marquand Development Corp. v. Maisak-Handler Shoe Co., 260 S.W. 2d 242 (Mo. 1953).
87. Stutte v. Brodtrick, *supra* note 40; Sandler v. Schmidt, 263 S. W. 2d 35 (Mo. 1953); Armes v. Missouri Ins. Co., *supra* note 79.
88. Berghorn v. Reorganized School Dist. No. 8, *supra* note 10.
89. Lavinge v. City of Jefferson, 262 S.W. 2d 60 (Mo. App. 1953).
90. Stutte v. Brodtrick, *supra* note 40.
91. Weir v. Brune, 262 S.W. 2d 597 (Mo. 1953).
92. Armes v. Missouri Ins. Co., *supra* note 79.
93. Stutte v. Brodtrick, *supra* note 40.

c. *Final Judgment*

In the absence of specific authority, an appeal does not lie from rulings on motions which do not constitute a final disposition of a claim or cause of action.[94]

A judgment in order to be final and appealable must dispose of all parties and all issues in the cause leaving nothing for future determination.[95]

Where a plaintiff brought an equitable mechanic's lien action against several defendants, some of whom moved for a dismissal, the granting of such motions and the overruling of the plaintiff's motions to set aside and vacate the orders of dismissal did not dispose of the cause as to the defendants who did not so move, and, therefore, there was no final, appealable judgment.[96]

The judicial unit for an appeal is the final determination of the issues arising from a set of facts involved in the same transaction or occurrence, and not the determination of an individual issue not disposing of the action. An order dismissing some of several alternative counts, each stating only one legal theory to recover damages for the same wrong, is not considered an appealable judgment while the other counts remain pending, because the counts are concerned with a single fact situation.[97]

Where a cause remains pending and undisposed of as to the third-party defendants, there is no final judgment.[98]

On the other hand, a judgment dismissing a petition on the ground that a prior judgment was *res judicata* of the issues presented by the pleadings was a final judgment from which an appeal was authorized.[99]

It should also be noticed that, broadly, our supreme court's Rule 3.29 authorizes the entry of a final judgment, in an appealable sense, when a separate trial of any "*claim counterclaim, or third* party claim" is ordered in any case.[100]

94. Weir v. Brune, *supra* note 51.
95. Weir v. Brune, *supra* note 51; Ladue Contracting Co. v. Land Development Co., 262 S.W. 2d 360 (Mo. App. 1953).
96. Ladue Contracting Co. v. Land Development Co., *supra* note 95.
97. Weir v. Brune, *supra* note 51.
98. Huber v. Solon Gershman Realtors, 263 S.W. 2d 858 (Mo. App. 1954).
99. Hammonds v. Hammonds, 263 S.W. 2d 348 (Mo. 1954).
100. Weir v. Brune, *supra* note 51.

d. *How Taken*

1. Notice of Appeal

(a) Error in Designation of What Is Appealed From

Where it appears that the defendants intended, and in good faith attempted, to appeal from a final judgment, but that the notice of appeal inadvertently designated the order overruling the motion for a new trial instead of the judgment rendered on the verdict as the order from which the appeal was to be taken, the appeal will be treated as having been taken from the judgment rendered on the verdict.[101]

2. Transcript

(a) Approval by Court

Where a transcript has been "settled and approved by the trial court," the appellate court is bound by it as settled and approved.[102]

3. Briefs

(a) Statement of Facts

Although a respondent may, if he is not satisfied with the statement of facts in the appellant's brief, in a concise statement, correct any errors in the appellant's statement, there is no authority for the filing by the respondent of a separate "Narrative Digest of the Testimony" consisting of over 150 printed pages, which made no attempt to correct any errors in the appellant's statement.[103]

(b) Points and Authorities

Under the supreme court's Rule 1.08, the points relied on should specify the allegations of error and should not consist merely of abstract statements of law. They should refer directly to specific provisions of the judgment or order appealed from.[104] The points should give the reason or reasons for claiming that the actions of the court are erroneous.[105]

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101. Boenzle v. United States Fidelity & Guaranty Co., 258 S.W. 2d 938 (Mo. App. 1953).
102. Peterson v. Kansas City Public Service Co., *supra* note 29.
103. Douglas v. Twenter, 259 S.W. 2d 353 (Mo. 1953).
104. Berghorn v. Reorganized School Dist. No. 8, *supra* note 10. See also State Mut. Assurance Co. of Worchester, Mass. v. Dischinger, 263 S.W. 2d 394 (Mo. 1953).
105. Daughtery v. Maddox, 260 S.W. 2d 732 (Mo. 1953).

It is insufficient to make a point by merely stating that the trial court erred in giving and reading to the jury instruction number one offered by the plaintiff or defendant.[106] It is likewise inadequate to state a point by saying that the trial court erred in not granting a new trial where the defendant failed to prove facts sufficient to establish a legal defense to the plaintiff's claim.[107]

However, it has been decided that the defendant's "point" that testimony "that none of deceased's relatives had ever done anything for him or come to see him, and that the deceased did not want any of his relatives to have any of his estate" was prejudicial and was erroneously admitted over the defendant's objections was sufficient to raise the issue that the testimony was inadmissible.[108]

It is improper and ineffective merely to state a point in one's argument,[109] or in his reply brief.[110] A point in an argument is deemed not a point but merely an argument.[111]

Though, heretofore our supreme court has overlooked many violations of its Rule 1.08 in relation to the drafting of briefs, so that cases might be decided on the merits, it has recently warned the bar that dismissals of appeals may become necessary in order to obtain compliance with the rule.[112]

e. *Changing Theories on Appeal*

An appellate court must determine a case on the same theory upon which the case was presented in the court below.[113]

Hence, in an action for injuries to the plaintiff who was thrown against the roof of the vehicle in which he was riding at the time the vehicle passed over a dip or depression in a street of the defendant city, wherein the plaintiff's formula instruction hypothesized the condition of

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106. See v. Wabash R.R., 259 S.W. 2d 828 (Mo. 1953); Daugherty v. Maddox, 260 S.W. 2d 732 (Mo. 1953).
107. Fitch v. Star-Times Pub. Co., 263 S.W. 2d 32 (Mo. 1953).
108. Daugherty v. Maddox, *supra* note 106.
109. Berghorn v. Reorganized School Dist. No. 8, *supra* note 10.
110. *Ibid.*
111. Lammers v. Greulich, 262 S.W. 2d 861 (Mo. 1953); Sandler v. Schmidt, *supra* note 84.
112. For an opinion in which this was done, see Fosmire v. Kansas City, 260 S.W. 2d 252 (Mo. 1953).
113. Schick v. Riemer, 263 S.W. 2d 51 (Mo. App. 1954).

the hole or depression as one over which vehicles could not safely travel when moving 10 to 15 miles per hour, giving of the defendant's formula instruction which, in effect, negatived the plaintiff's hypothesis by submitting facts compelling a finding that the condition was not unsafe for vehicles moving at speed up to 20 miles per hour was not error warranting a new trial, since the plaintiff was bound by the theory he voluntarily originated, and the defendant was entitled to negative it.[114]

f. *Matters Considered on Appeal*

It is well settled that a party to whom a new trial has been granted is not bound by the specific ground mentioned in the trial court's order granting the new trial, but may urge in support to the order any other points *properly preserved* by the assignments contained in the motion for a new trial. When the defendant's motion for a new trial contained a general charge of error with reference to each and every instruction given on behalf of the plaintiff, Instruction No. 1 might be assailed on appeal on any specific ground of error whether specifically stated in the motion or not.[115]

But one would be wise to put all of his grounds for error in his motion for a new trial.

On the other hand, it has been decided, on an appeal from a judgment upholding the constitutionality of a city ordinance levying an earnings tax, that the question whether the rules promulgated by the city collector in an effort to provide a uniform method of determining net profits subject to the tax were discriminatory was not before the supreme court for determination. The petition made no complaint against and sought no relief on account of such rules.[116]

Further, an appellate court reviews the case on the record made in the trial court, and can consider only the evidence which was admissible under the pleadings as they were made up in the trial court.[117]

Again, where the defendant failed to appear for a hearing on a motion for a new trial and on an appeal from an order overruling such

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114. McCormick v. Kansas City, 262 S.W. 2d 868 (Mo. 1953).
115. White v. St. Louis Public Service Co., 259 S.W. 2d 795 (Mo. 1953); State *ex rel.* Highway Commission v. Flynn, 263 S.W. 2d 854 (Mo. App. 1954).
116. Walters v. City of St. Louis, 259 S.W. 2d 377 (Mo. 1953).
117. Witte v. Cooke Tractor Co., *supra* note 24.

motion, there was presented to the appellate court certain unverified data touching the matter of the defendant's notice of the date and place of hearing on the motion. Such data was not a part of the record and would not be considered by the appellate court.[118]

Supreme Court Rule 3.27 permits an appellate court to review a plain error of a trial court, if it affects substantial rights, though it was not properly raised in the trial court or preserved for review thereafter.

Yet, where it appeared from the record that the evidence in a will contest was insufficient to support the giving of an instruction to a jury on the questions of testamentary incapacity and undue influence, it has been held that it would be an abuse of discretion on the part of the court of appeals on appeal to convict the trial court of error in sustaining the motion for a new trial because of the giving of such instructions.[119] This rule does not insure a review and in this case the trial court's ruling was correct.

Also, it was recently held that a defendant could not take advantage on appeal of a motion made at a *former* trial of the same case to strike portions of testimony elicited on the cross-examination of a physician at such trial and introduced in evidence at a later trial by the defendant by reading the transcript of the testimony at the former trial, including the motion to strike.[120]

An appellate court has recently refused to invoke Rule 3.27 as the basis for taking judicial notice of the distance within which an automobile traveling a certain speed can be stopped, when the point was not preserved for review.[121]

It has also been determined that Rule 3.27 must be read in connection with other supreme court rules.[122] Just what other rules would have an effect on Rule 3.27 is not pointed out.

An appellate court must, on its own motion, notice whether or not an appeal is premature. Presumably this is considered a jurisdictional matter.[123]

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118. Brown v. Stroeter, 263 S.W. 2d 458 (Mo. App. 1953).
119. Shearrer v. Shearrer, *supra* note 47.
120. Peterson v. Kansas City Public Service Co., *supra* note 29.
121. Arky v. Kessels, 262 S.W. 2d 357 (Mo. App. 1953).
122. Stroud v. Masek, 262 S.W. 2d 47 (Mo. 1953).
123. Ladue Contracting Co. v. Land Development Co., *supra* note 95; Huber v. Solon Gershman Realtors, *supra* note 98.

g. *Duty of Appellate Court*

1. In General

Section 512.160 (3) of our *Revised Statutes* provides, in part, that the appellate court shall, subject to the other sub-sections of this section, give such judgment as the trial court ought to have given, as to the appellate court "shall seem agreeable to law." Under that sub-section the appellate court can correct the error of an excessive judgment, when the amount of the excess is plainly manifest.[124]

Also thereunder, where it appeared that the defendant's pleading which was named a counterclaim was purely defensive in nature, and that the verdict for the plaintiff, in effect, actually disposed of all issues, it was decided that it was the appellate court's duty to give such judgment as the trial court ought to have given, or to direct the trial court to enter such judgment as it deemed agreeable to the law.[125]

That law also provides that an appellate court should dispose finally of a case before it, unless justice requires otherwise.[126]

2. In Connection with Pleadings

Where the sufficiency of a petition is questioned for the first time after a judgment, not only are the facts alleged to be considered as true for the purposes of the attack, but the petition is much more immune from attack than before verdict, and every reasonable intendment in favor of the petition will be indulged.[127]

3. As to Matters Involving Discretion of Court or Jury

The appellate court will not disturb a trial court's decision properly involving the use of discretion by the latter, unless there is an abuse of discretion. This doctrine has been applied during the year to the assessment of costs in an equity case,[128] and to the sustaining of a motion for a new trial on the ground that the verdict was contrary to the evidence.[129]

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124. Boenzle v. United States Fidelity & Guaranty Co., 258 S.W. 2d 938 (Mo. 1953); Krueger v. Elder Mfg. Co., 260 S.W. 2d 349 (Mo. App. 1953).
125. Memphis Bank & Trust Co. v West, 260 S.W. 2d 866 (Mo. App. 1953).
126. Mayfield v. Thompson, 262 S.W. 2d 157 (Mo. App. 1953).
127. Goldman v. Ashbrook, 262 S.W. 2d 165 (Mo. 1953); Lavinge v. City of Jefferson, 262 S.W. 2d 60 (Mo. App. 1953).
128. Amatin v. Izard, 262 S.W. 2d 353 (Mo. App. 1953).
129. State *ex rel.* State Highway Commission v. Flynn, *supra* note 115.

4. Weighing Evidence

An appellate court may not properly pass on the weight of evidence.[130]

h. *Tests Applied in Reaching Judgment as to Whether Submissible Case Has Been Made*

1. Substantial Evidence

It is usually held that an appellate court will, in determining whether or not a submissible case has been made, merely determine whether there was substantial evidence to support the case.[131]

It is interesting to notice a decision to the effect that a plaintiff, having assumed, in an instruction requested and granted, the existence of evidence to support a finding of the same facts as those submitted in an instruction requested by the defendants, could not complain that there was no evidence to support a finding of such facts.[132]

2. Evidence Considered and the Views Taken of It

On an appeal from a judgment for the plaintiff, the testimony is viewed in the light most favorable to the plaintiff,[133] and the plaintiff is accorded all reasonable inferences therefrom.[134]

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130. Gaddy v. Skelly Oil Co., 259 S.W. 2d 844 (Mo. 1953); State *ex rel.* State Highway Commission v. Flynn, *supra* note 115.

131. Gaddy v. Shelly Oil Co., *supra* note 130; Machens v. Machens, *supra* note 39; Van Hook v. Strassberger, 259 S.W. 2d 399 (Mo. App. 1953); State *ex rel.* State Highway Commission, *supra* note 115. Though differently stated, this is probably the holding in Bray v. St. Louis-San Francisco Ry., 259 S.W. 2d 132 (Mo. App. 1953). In the Gaddy case above, the court held that, in determining whether there was substantial evidence, it should decide whether or not the jury could infer from established facts further facts necessary to the plaintiff's cause, other than by guess on conjecture.

132. Miller v. Riss & Co., 259 S.W. 2d 366 (Mo. 1953).

133. Douglas v. Twenter *supra* note 103; Brown v. Scullin Steel Co., 260 S.W. 2d 513 (Mo. 1953); Sibert v. Boger, 260 S.W. 2d 569 (Mo. 1953); Bohle v. Sternfels, 261 S.W. 2d 936 (Mo. 1953); York v. Daniels, 259 S.W. 2d 109 (Mo. App. 1953); Shearrer v. Shearrer, *supra* note 47; Crews v. Illinois Terminal R.R., 260 S.W. 2d 765 (Mo. App. 1953); Lynch v. St. Louis Public Service Co., 261 S.W. 2d 521 (Mo. App. 1953); Davis v. McClanahan, 262 S.W. 2d 65 (Mo. App. 1953); De Lay v. Ward, 262 S.W. 2d 626 (Mo. App. 1953); Brown v. Pennsylvania Fire Ins. Co., Philadelphia, 263 S.W. 2d 893 (Mo. App. 1954).

134. Douglas v. Twenter, *supra* note 103; Brown v. Scullin Steel Co., *supra* note 133; Siebert v. Bogar, *supra* note 133; York v. Daniels, *supra* note 133; Shearrer v. Shearrer, *supra* note 47; Davis v. McClanahan, *supra* note 133; De Lay v. Ward, *supra* note 133; Brown v. Pennsylvania Fire Ins. Co., Philadelphia, *supra* note 133.

Where the sufficiency of evidence is raised on appeal by the defendant, the plaintiff's evidence is taken as true as is any of the defendant's evidence supporting the plaintiff's case.[135]

The defendant's evidence which does not aid the plaintiff's case is disregarded.[136]

i. *Appeals on Ground of Excessive or Inadequate Verdicts or Judgments*

1. Reluctance of Appellate Court to Interfere

The supreme court has again stated that the amount of damages for personal injuries is primarily the jury's function and prerogative, and, upon appeal after a remittitur, the court pays deference to the trial court's action in seriously considering and passing upon the excessiveness or inadequacy of verdicts, and is reluctant to disturb the judgment or to require a further remittitur. Nevertheless, each case must stand upon its particular facts and, when the circumstances plainly demand it, the court often requires a further remittitur.

Admittedly, there is no precise formula by which it may be determined whether and how much a verdict is excessive, and, despite the difficulties inherent in the problem, especially on appeal, each case is necessarily dependent on its own particular merits. The nature, extent, and permanency of the injuries are the paramount factors. Consideration is also given to changing economic factors and to the compensation awarded and approved in cases of similar or fairly comparable injuries.[137]

2. Excessiveness or Inadequacy Must Be Shocking

In the last analysis, the appellate court must always apply the test of whether the judgment appealed from is in such amount, the record facts considered, as to shock the judicial conscience or whether it is within the bounds of reason.[138]

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135. Carpentier v. Middlewest Freightways, 259 S.W. 2d 816 (Mo. 1935); Caswell v. St. Louis Public Service Co., 262 S.W. 2d 40 (Mo. 1953); Bray v. St. Louis-San Francisco Ry., 259 S.W. 2d 132 (Mo. App. 1953).

136. Gaddy v. Skelly Oil Co., *supra* note 131; Caswell v. St. Louis Public Service Co., *supra* note 135.

137. Larson v. Atchison, T. & S.F. Ry., 261 S.W. 2d 111 (Mo. 1953).

138. Peterson v. Kansas City Public Service Co., *supra* note 29.

3. Substantial Evidence

In considering the excessiveness of a verdict, the trial court has the right to weigh the conflicting evidence and to evaluate all of the evidence in the light of its opportunity to see, hear, and observe the plaintiff and all of the other witnesses. In reviewing the action of the trial court, an appellate court does not weigh the evidence, but it does examine the record to determine whether there is substantial evidence to support the ruling. If the evidence, viewed in the light most favorable to the ruling, affords reasonable and substantial support of it, then it must be sustained. It is only when the record viewed in the light most favorable to the trial court's ruling does not afford reasonable and substantial support of the ruling that the appellate courts will overrule the action of the trial court.[139]

Further, in determining whether a verdict is excessive, every presumption in favor thereof is indulged.[140]

4. Evidence Considered

Again, in determining whether or not a verdict is excessive, an appellate court should look to the whole record.[141] Also, the answer to this question is determined on appeal as of the time when the decision as to the amount due was made and is based upon what the record shows was before the hearing parties at that time.[142]

j. *Trial Court's Decision Presumed Correct*

The action of a trial court in sustaining a motion for a new trial is presumptively correct. The trial court has wide discretion in passing on such a motion and an appellate court will be liberal in upholding such action.[143]

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139. Wilhelm v. Haemmerle, 262 S.W. 2d 609 (Mo. 1953). See also Douglas v. Twenter, *supra* note 103; Lindsey v. Williams, 260 S.W. 2d 472 (Mo. 1953); Larson v. Atchison T. & S.F. Ry., *supra* note 137; State *ex rel.* State Highway Commission v. Flynn, *supra* note 115.

140. Lindsey v. Williams, *supra* note 139.

141. Bray v. St. Louis-San Francisco Ry., *supra* note 131. See also Brown v. Stroeter, *supra* note 1.

142. Brown v. Stroeter, *supra* note 1.

143. State *ex rel.* State Highway Commission v. Flynn, *supra* note 115.

k. *Judgment of Appellate Court*

1. Dismissal for Noncompliance with Rules of Court

Although the supreme court has, during the year, decided several cases on the merits, though the briefs of appellants have not complied with its rules relating to the form thereof, it has warned that dismissal of appeals may become necessary in order to obtain compliance therewith.[144]

2. Judgment Affirmed or Reversed

Judgments are not reversed because of error not prejudicial in the appellant.[145]

This principle has been applied during the year to problems relating to the introduction of evidence[146] and to the correctness of instructions[147] and judgments.[148]

Further, when a trial court sustains a motion for a new trial, an appellate court may be more liberal in upholding the court's action than it would in reversing a judgment on the same ground.[149]

3. Causes Remanded

Where prejudicial errors have been made by a trial court, the appellate may reverse the decision below and remand the cases for retrial with the right to amend pleadings, if it believes that a different result may be reached on amended pleadings.[150] In such cases, the court may order that, if the pleadings are not amended, judgment shall be rendered for the respondent.[151]

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144. Bennett v. Wood, 258 S.W. 2d 660 (Mo. 1953); Ezell v. Kansas City, 260 S.W. 2d 248 (Mo. 1953); Hughes v. Aetna Ins. Co., 261 S.W. 2d 942 (Mo. 1953). In one case, the appeal was entertained because of public interest in the subject matter. Berghorn v. Reorganized School Dist. No. 8, *supra* note 10.

145. Duffy v. Rohan, 259 S.W. 2d 839 (Mo. 1953); Johnson v. Lee Way Motor Freight, 261 S.W. 2d 95 (Mo. 1953); Talbot-Quevereaux, *supra* note 58; Mayfield v. Thompson, 262 S.W. 2d 157 (Mo. App. 1953).

146. Miller v. Riss & Co., 259 S.W. 2d 366 (Mo. 1953).

147. Douglas v. Twenter *supra* note 105; Killinger v. Kansas City Public Service Co., 259 S.W. 2d 391 (Mo. 1953).

148. Boenzle v. United States Fidelity & Guaranty Co., *supra* note 124.

149. Warren v. Kansas City, 258 S.W. 2d 681 (Mo. 1953); Shearrer v. Shearrer, supra note 47.

150. Sellers v. Swehla, 261 S.W. 2d 26 (Mo. 1953); O'Neal v. Mavrakos Candy Co., 263 S.W. 2d 430 (Mo. 1954); Lynch v. St. Louis Public Service Co., 261 S.W. 2d 521 (Mo. App. 1953).

151. O'Neal v. Mavrakos Candy Co., *supra* note 150.

Upon an appeal, it is a settled practice of appellate procedure that a case should not be reversed for failure of proof without remanding, unless the record indicates that the available essential evidence has been fully presented, and that no recovery could be had in any event. This rule is pertinent where the record indicates that other and additional evidence might be adduced in support of plaintiff's action and might enable him to make a submissible case.[152]

Where the trial court's ruling on an instruction was the basis of an appeal, and the appellate court found that the lower court's ruling was correct, the case was remanded and it was ordered that the verdict was to be reinstated.[153]

The appellate court may remand cases for a retrial of all of the issues therein when the bases for the remand involve each of them.[154] However, if no error occurred at the trial in connection with some issues, a retrial may be ordered of only those issues involving error on the part of the trial court.[155] A plaintiff who has abandoned a possible theory of recovery is not entitled to the remand of his case, which originally involved that theory, for a new trial thereon.[156]

e. *Transfer*

When a case is transferred to the supreme court, that tribunal determines it as it would decide it on an original appeal.[157]

152. Crews v. Illinois Terminal R.R., 260 S.W. 2d 765 (Mo. App. 1953).
153. McDonald v. Logan, 261 S.W. 2d 955 (Mo. 1953).
154. Crews v. Illinois Terminal R.R., *supra* note 152.
155. Bray v. St. Louis-San Francisco Ry., *supra* note 131; Daggs v. Patsos, 260 S.W. 2d 794 (Mo. App. 1953); Brown v. Shield Fire Ins. Co., 260 S.W. 2d 337 (Mo. App. 1953).
156. Smith v. St. Louis Public Service Co., 259 S.W. 2d 692 (Mo. 1953).
157. White v. St. Louis Public Service Co., *supra* note 115; Oehler v. Philpott, 263 S.W. 2d 201 (Mo. 1953).