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Work of the Supreme Court for the Year 1956 - Statistical Survey, The

Louis F. Cottey

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THE WORK OF THE SUPREME COURT FOR THE YEAR 1956

Statistical Survey

LOUIS F. COTTEY*

The statistical survey for 1956 shows that during the year 272 majority opinions were written by the judges and commissioners of the Supreme Court of Missouri. This number has been exceeded only twice since 1945: 291 opinions were filed in 1952 and 274 opinions were filed in 1954. The year's total showed an increase of one opinion over the preceding year.

In addition to the 272 majority opinions, there were 5 opinions concurring in result, and 5 opinions dissenting from the majority. There were 9 concurrences in result without opinion, 9 dissents without opinion, and 1 dissent in part without opinion. There were 9 opinions written on motions and attached to case opinions. The court was able to all concur in 238 decisions.

During the year seven justices wrote 120 majority opinions, 5 dissenting opinions, and 4 concurring opinions. The six commissioners wrote 148 majority opinions and 1 opinion concurring in result. Two special justices wrote 3 majority opinions. There was one per curiam opinion. Court of Appeals Judges Lyon Anderson, James W. Broaddus, Nick T. Cave, Samuel A. Dew, and A. P. Stone, Jr. served as Special Judges for brief periods. C. A. Leedy, Jr. resigned as Chief Justice November 19, 1956, and S. P. Dalton became Chief Justice November 20, 1956.

*Chairman, Board of Student Editors.

TABLE I

Number of Opinions Written by Each Division

En Banc	45
Division Number One	117
Division Number Two	110
Total	272

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

Abortion	1
Administrative Law and Procedure	1
Adoption	2
Appeal and Error	17
Arson	1
Assault and Battery	1
Attorney and Client	3
Attractive Nuisance	1
Automobiles	1
Banks and Banking	2
Brokers	1
Burglary	1
Cancellation of Instruments	1
Constitutional Law	6
Contracts	5
Corporations	2
Costs	1
Courts	9
Criminal Law	32
Damages	7
Deeds	5
Easements	2
Eminent Domain	9
Estoppel	2
Evidence (Rules)	12
Evidence (Sufficiency)	10
Executors and Administrators	1
False Imprisonment	1

False Pretenses	1
Fraud	1
Gifts	1
Highways	1
Homicide	2
Humanitarian Doctrine	8
Husband and Wife	1
Instructions	1
Insurance	4
Judges	1
Judgments	6
Jury	1
Labor Relations	5
Libel and Slander	1
Limitation of Actions	1
Mandamus	2
Marriage	1
Master and Servant	5
Municipal Corporations	5
Negligence	11
Negligence (Automobiles)	12
New Trial	1
Officers	1
Parties	2
Pleadings	1
Principal and Agent	1
Prohibition	1
Quo Warranto	2
Real Property	1
Reference	1
Reformation of Deeds	2
Rescue Doctrine	1
Res Ipsa Loquitur	3
Robbery	2
Schools and School Districts	1
Search and Seizure	1
Social Security	1
Specific Performance	2
States	1
Statutes	1
Street Railways	1
Trial	8
Trust	6
Vendor and Purchaser	2
Venue	1

Warehousemen	1
Wills	9
Witnesses	3
Workmen's Compensation	7
Total	272

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

TABLE III

Disposition of Litigation

Allowance to Plaintiff's Attorneys Affirmed and Allowance to Defendant's Attorneys Reversed	1
Alternative Writ Made Peremptory	3
Alternative Writ of Mandamus Discharged and Peremptory Writ of Mandamus Issued	1
Alternative Writ of Mandamus Made Peremptory and Preliminary Rule in Prohibition Made Absolute	1
Alternative Writ Quashed	1
Alternative Writ Quashed and Peremptory Writ Denied	1
Appeal Dismissed	7
Cause Remanded with Directions	2
Cause Reversed with Directions	1
Cause Transferred to Court of Appeals	7
Decree Affirmed	2
Decree Reversed and Cause Remanded with Directions	2
Judges Ousted from Their Office	1
Judgment Affirmed	131
Judgment Affirmed and Cause Remanded	1
Judgment Affirmed and Cause Remanded for Redetermination of Issues	1
Judgment Affirmed in Part and Cause Remanded for Amended Findings	1
Judgment Affirmed in Part and Remanded for Further Proceedings in Part	1
Judgment Affirmed in Part, Reversed in Part and Remanded	1

Judgment Affirmed in Part, Reversed in Part and Remanded with Direction	1
Judgment Affirmed on Condition of Remittitur, Otherwise Judgment Reversed and Cause Remanded	2
Judgment and Decree Affirmed	5
Judgment and Decree Reversed and Cause Remanded with Directions	2
Judgment and Sentence Affirmed	2
Judgment Modified and Affirmed	1
Judgment Reversed	8
Judgment Reversed and Cause Remanded	35
Judgment Reversed and Cause Remanded for Entry of Judgment in Conformity with Opinion	1
Judgment Reversed and Cause Remanded for Further Proceedings	2
Judgment Reversed and Cause Remanded for Modification and Further Proceedings	1
Judgment Reversed and Cause Remanded for New Trial	4
Judgment Reversed and Cause Remanded for New Trial in Accordance with Opinion	1
Judgment Reversed and Cause Remanded for Proceedings Not Inconsistent with Opinion	1
Judgment Reversed and Cause Remanded with Directions	12
Judgment Reversed and Order Granting New Trial Affirmed	1
Judgment Reversed and Original Judgment Affirmed on Condition of Remittitur	1
Judgment Reversed with Directions	1
Motion to Dismiss Appeal Denied and Judgment Affirmed	1
Order Affirmed	4
Order Affirmed and Cause Remanded	1
Order Allowing Attorneys' Fees Reversed, Otherwise Judgment Affirmed and Cause Remanded	1
Order and Judgment Affirmed	4
Order Granting New Trial Affirmed	2
Order Granting New Trial Affirmed and Cause Remanded	1
Order Granting New Trial Reversed, Cause Remanded with Directions to Reinstate Verdict and Judgment for Plaintiff	1
Order in Accordance with Opinion	2
Order Quashed	1
Order Reversed and Cause Remanded with Directions	1

Order Set Aside and Case Remanded with Directions to Reinstate Verdict	1
Preliminary Rule in Prohibition Quashed	1
Provisional Rule in Prohibition Made Absolute	1
Remanded with Directions to Modify the Judgment, and as Modified, Affirmed	1
Respondent Disbarred	1
Rule Made Absolute	1
Total	272

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 Before Court En Banc Denied	1
Motion for Rehearing or to Modify Opinion Denied	1
Motion for Rehearing or to Transfer to Court En Banc Denied	67
Motion for Rehearing or to Transfer to Court En Banc Denied and Motion to Modify Opinion Denied	1
Motion for Rehearing Overruled	1
Motion to Modify and for Rehearing Denied	1
Motion to Modify Judgment Denied	1
Motion to Modify Opinion and Motion for Rehearing Denied	1
Motion to Modify Opinion Denied	2
Motion to Transfer to St. Louis Court of Appeals Denied	1
Opinion Modified on Court's Own Motion	1
Opinion Modified on Court's Own Motion and Motion for Rehearing or to Transfer to Court En Banc Denied	1
Opinion Modified on Court's Own Motion and Rehearing Denied	2
Rehearing Denied	29
Total	110

Appellate Practice

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

In the year under review, the court transferred seven cases to the court of appeals for want of appellate jurisdiction in the supreme court and dismissed the appeal in the eighth case where the jurisdictional question arose. Of the seven cases transferred, six were on the ground that the amount involved was not within the supreme court's jurisdiction. The remaining transfer arose in the case of *In re Off-Street Parking Facilities, Kansas City,*[1] a condemnation proceeding where the issue involved was the right of the condemnor to take all or part of the landowner's conceded title. Holding that the jurisdictional amount did not affirmatively appear, and no claim involving a constitutional point being presented, the court ordered the case transferred to the proper court of appeals.

The case of *Scannell v. Fulton Iron Works Co.*[2] again illustrates the delays which constitute a serious by-product of this troublesome question of appellate jurisdiction. In this case, a workmen's compensation award had been entered in 1950 and in March 1953, it found its way to the circuit court. On June 14, 1955 the St. Louis Court of Appeals wrote its opinion[3] holding that because the compensation award was for $25.00 a week for three hundred weeks plus $309.00 medical and thereafter $14.98 per week for life, a case "obviously" was presented where the amount involved exceeded the jurisdiction of the court of appeals, and transferred the appeal to the supreme court. The latter court, however, noted that the payments were to be "subject to modification and review as provided by said law." Scannell, the compensation claimant, died in 1951 from a cause not connected with the occupational disease. He had taken no appeal, and none had been taken involving his rights before his death. After his death his widow was substituted, filed in the circuit court certified copies of the award, and had her award entered as a judgment. The employer filed a motion to set aside the judgment, attacking the jurisdiction of the circuit court. The appeal was from the order of the court

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1. 287 S.W.2d 866 (Mo. 1956).
2. 289 S.W.2d 122 (Mo. 1956).
3. 280 S.W.2d 484 (St. L. Ct. App. 1955).

denying the motion to set the judgment aside. The supreme court points out that the case does not involve a death benefit under the compensation law but only involves the right of the widow to collect installment payments. Out of the total amount allowed, the amount unpaid at the time of the judgment of the circuit court was considerably less than $7,500.00. The court ruled that it could not be said that in the circumstances of the record the award involved an amount within its appellate jurisdiction, and retransferred the case to the court of appeals.

Other cases so transferred include *Kansas City Terminal Railway Company v. Manion,*[4] a labor injunction suit in which no real constitutional question was involved and there was no affirmative showing as to the jurisdictional amount; *Crow v. Missouri Implement Tractor Company,*[5] a compensation case involving a claim for weekly benefits in excess of the jurisdictional amount for total permanent disability in which the ultimate amount was contingent upon the continued life of the claimant; *Hogue v. Wurdack,*[6] which involved the same situation as the previous case; *Haley v. Horwitz,*[7] in which an appeal from an order allowing attorney's fees in a partition suit was on a record which did not disclose evidence tending to show what lesser amounts than those allowed by the trial court were reasonable or should have been allowed, or to what extent it was contended that the allowances were excessive; and *Blair v. Hamilton,*[8] an unlawful detainer action, in which defendant was at all times tendering rent and the jurisdictional amount exceeded $7,500.00 only by virtue of the statute permitting the amount to be doubled in such an action. In the latter case, the court held that the only amount actually in controversy was an amount equal to the difference between a judgment for the rent alone and a judgment for the rent doubled, a difference inhering solely in the doubling of the rent, and that that difference was less than $7,500.00.

The final decision involving the court's jurisdiction was *Miller v. Police Retirement System.*[9] In this case, the court, after reviewing the record, determined that it had no jurisdiction on the asserted ground that constitutional questions were involved nor upon the claim that the

4. 290 S.W.2d 63 (Mo. 1956).
5. 292 S.W.2d 573 (Mo. 1956).
6. 292 S.W.2d 576 (Mo. 1956).
7. 286 S.W.2d 796 (Mo. 1956).
8. 292 S.W.2d 578 (Mo. 1956).
9. 296 S.W.2d 78 (Mo. 1956).

amount in dispute was in excess of $7,500.00. But, having reached the conclusion that it was without jurisdiction of the appeal, the court exercised jurisdiction by dismissing the appeal rather than transferring the case to the court of appeals. Actually, the case involved the right to challenge as unconstitutional certain statutory provisions vesting jurisdiction in the Board of Trustees of the Police Retirement System to hear and determine plaintiff's claim, and her complaint that if she availed herself of that procedure she would be denied due process because the statute fails to provide for the right to summon witnesses, administer oaths, or procure the production of documentary evidence. Pointing to the fact that plaintiff had not shown any injury entitling her to question the constitutionality of the statutes because she had not requested a hearing before the Board and had not been denied any rights, the court held that she had not been injured by the alleged defects in the statute and because of that had not been denied due process of law. It would seem that since the court did decide the constitutional question involved, it exercised its own appellate jurisdiction, and the order should have been the affirmance of the judgment below rather than a dismissal of the appeal.

The Right of Appeal

In *Adams v. Adams*[10] the suit was in equity to establish an interest in lands, obtain an accounting from defendants and declare a certain contract to be, in fact, a mortgage. After a trial the court entered an interlocutory decree declaring that plaintiffs were the equitable owners of the land subject to the amount due on the contract held to be a mortgage and appointing a referee to which the matter of an accounting was referred. A motion for new trial was filed and overruled, and the defendants appealed. Since the trial court had not ordered a separate trial of any issue as contemplated by the provisions of section 510.180-2, Missouri Revised Statutes (1949) and supreme court rule 3.29, the appeal was dismissed as being premature, no final judgment having been entered between the parties which disposed of all rights. A similar result was reached in *State ex rel. Highway Commission v. Hammel.*[11] This was a condemnation proceeding in which the owner of one of the tracts filed an answer and counterclaim in which he sought specific performance of

10. 294 S.W.2d 18 (Mo. 1956).
11. 290 S.W.2d 113 (Mo. 1956).

an alleged written contract with the Highway Commission for the construction of certain access service roads. The trial court dismissed the counterclaim and appointed commissioners. After a motion to vacate these orders had been overruled, the defendants appealed. The appeal was dismissed as premature because there was no final judgment on the issues presented by the Highway Commission's petition for condemnation or on the question of damages, and because of the long-established rule in this state that an order appointing commissioners is interlocutory in character.

The opinion of the court in *Pizzo v. Pizzo*[12] deals at some length with the court's construction of supreme court rule 3.29, which provides that when a separate trial of any claim is ordered in a case and a jury trial is had thereon, the separate judgment entered shall be deemed a final judgment for the purpose of appeal. The rule further provides that when a separate trial of any such claim is had before the court without a jury, the court may order a separate judgment entered which shall be deemed a final judgment for the purpose of appeal, or may enter a separate interlocutory judgment and order it held in abeyance until all other claims have been determined. In the *Pizzo* case, at page 380, the court recognizes that "it is of vital importance to litigants and their counsel for the purpose of appeal to be able to know when a final, appealable separate judgment has been entered." In this case the action was in five counts, the first, second, and fifth of which were purely counts in equity to impress a resulting trust upon real estate, to partition it, and to set aside a conveyance thereof in fraud of creditors. Counts three and four were actions at law for damages for breach of promise and for personal injuries. The trial court had entered findings and a decree on counts one, two, and five, all in favor of the plaintiff, and, after motions for a new trial were filed and overruled, the defendants appealed. Counts three and four still remained to be tried. The court considered the provisions of rule 3.29 at length, and pointed out the fact that the case was a multiple cause of action case and that the disposition of counts three and four was not dependent in any respect upon the outcome or final disposition of counts one, two, and five. Although there was no express order for a separate judgment on the three counts and there was nothing in the record to indicate that the trial court had exercised its discretion in favor of a separate judgment or that the judgment entered should be inter-

12. 295 S.W.2d 377 (Mo. 1956) (en banc).

locutory or its enforcement stayed, the opinion concludes that the separate judgment entered on these counts should be construed as an order for a separate judgment within the meaning of the rule and that if the trial court wanted this judgment to be interlocutory or held in abeyance, it should have so provided.

In *State ex rel. Highway Commission v. Lynch*[13] the State Highway Commission as plaintiff in a condemnation suit entered a voluntary order of dismissal of its condemnation petition against the defendant Lynch. The appeal was taken by Lynch from the order of voluntary dismissal, his contention being that he was a necessary party to the condemnation suit. The opinion holds that a defendant may not appeal from a voluntary dismissal because he is not aggrieved by that dismissal within the meaning of the statute relating to the right of appeal,[14] pointing to the fact that defendant's claim relates only to consequential damages and that no claim can exist prior to the actual infliction of the alleged damages. A different rule, however, was applied in *Douglas v. Thompson.*[15] The opinion in this case holds that the order of a circuit court dismissing a plaintiff's petition for failure to comply with a circuit court rule requiring the address of plaintiff constitutes a final judgment from which plaintiff has the right of appeal. The court points out that the dismissal appealed from is a dismissal of the action rather than a dismissal of the petition which might be amendable, and that where the dismissal is of plaintiff's action the order of dismissal is a final appealable judgment.

Records and Briefs

In *Rippe v. Sutter*[16] the plaintiff, a lay woman, appeared both in the trial court and on appeal, *pro se.* Although the court concluded that her brief had been inartfully prepared and was technically deficient in some respects, it was convinced that she had made a sincere effort to comply with the rules, and denied the defendant's motion to dismiss the appeal for insufficient brief. It is an interesting side-light to note that plaintiff won her case on the merits of the appeal.

In *Mannon v. Frick*[17] the court declined to dismiss appellant's appeal for insufficiency of his brief, even though the brief "leaves much to be

13. 297 S.W.2d 400 (Mo. 1956).
14. Mo. Rev. Stat. (1949) § 512.020.
15. 286 S.W.2d 833 (Mo. 1956).
16. 292 S.W.2d 86 (Mo. 1956).
17. 295 S.W.2d 158 (Mo. 1956).

desired" and certain points are insufficient under the rule. In overruling the motion to dismiss, however, respondents' counsel are criticized at page 161 because they have "chosen to stand on that motion and have filed no brief here on the merits. That practice is in nowise to be commended and we trust that no other member of the bar will adopt it. It has certainly not been helpful to the court here."

The appeals were dismissed for failure of the appellants to comply with the supreme court rules governing contents of their briefs in the following two cases: In *Arnold v. Reorganized School District No. 3 of Scotland County*[18] appellant's brief contained less than two pages of printed argument and the rules of the court were wholly ignored in its preparation. In *Repple v. East Texas Motor Freight Lines,*[19] the brief contained only a resumé of the testimony of named witnesses, the points and authorities were abstract and general, and a study of the briefs did not indicate that the interests of justice required any different disposition. However, in *Munday v. Thielecke*[20] in which the appellant's brief was deficient in many respects, the court concluded that the statements gave a fair idea of what the controversy was about, refused to consider certain points not properly preserved for review, but decided on the merits other questions even though defectively raised by the brief. So, also, in *Holmes v. Simon,*[21] the court overruled a motion to dismiss for defective brief but held that three of the four points presented were not sufficiently raised to permit appellate consideration thereof and that the fourth point, a complaint with reference to an instruction, was not before the court because the record showed that no objection had been made to the instruction at the trial.

Missouri appellate prictice has abandoned almost entirely the printing of records, and the records now before the court are the transcripts prepared by the reporters in typewriting. To correct abuses by some members of the reporting profession, the legislature in 1949 enacted a statute with reference to the contents of a "legal page."[22] In *Osborne v. Goodman*[23] the court, noting that the transcript wholly failed to comply with that statute, concluded that "its deficiencies in that regard are so

18. 289 S.W.2d 90 (Mo. 1956).
19. 289 S.W.2d 109 (Mo. 1956).
20. 290 S.W.2d 88 (Mo. 1956).
21. 287 S.W.2d 877 (Mo. 1956).
22. Mo. Rev. Stat. (1949) § 485.100.
23. 289 S.W.2d 68 (Mo. 1956).

pronounced, flagrant and indefensible as to render the amount claimed for preparing the same excessive by at least one third." Accordingly, in reversing the case, the court ordered the taxable costs reduced by one-third.

QUESTIONS REVIEWABLE

The opinion of the court in *Sapp v. Key*[24] dealt with questions reviewable in a negligence action where plaintiff's motion for a new trial was sustained as to the amount of damages only and defendant filed no motion for a new trial. Defendant, on his appeal, in addition to contending that the trial court abused its discretion in awarding a new trial on the issue of damages only, also sought to make the point that there were errors on the issue of liability which justified the granting of a new trial on all issues. The court pointed out that a new trial had been granted on the issue of damages only, and that judicial discretion had therefore been exercised in two respects, first, in determining that the award of damages was such as to amount to a finding against the weight of the evidence on that issue, and second, that a retrial of the damage issue only might be had without unjust prejudice to the defendant. The court added that, although under rule 3.27 it could consider plain error, nevertheless the trial court, and, on appeal, the appellate court, should not consider any error which might have occurred during the trial of the case not specifically brought to the attention of the trial court by motion for a new trial. The defendants argued that this rule would require a defendant to file a motion for a new trial, alleging any errors he might then or thereafter wish to urge, or hazard the possibility that he would be required to retry the case on the issue of damages only. The court, commenting that no opinion it could render could affect, or change the plain provisions of the applicable statutes, concludes that a defendant, under the circumstances, is not in a deplorable plight. The court points out that a defendant in such a case, satisfied with the amount of the damages awarded so long as it remains the total judgment on both damages and liability, may very properly file a motion for a new trial on the issue of liability only, in the event that plaintiff files a motion for a new trial on the issue of damages only. If that were done, and if the trial court awarded plaintiff a new trial on damages only, defendant would be in a position to urge the errors preserved in its motion for all purposes.

24. 287 S.W.2d 775 (Mo. 1956).

If the plaintiff's motion were overruled, the plaintiff's monetary award would remain fixed in the event that a retrial on liability only again resulted adversely to the defendant.

Criminal Law

WILLIAM J. CASON

[Editor's note. It is contemplated that an article by Mr. Cason discussing recent developments in the field of criminal law will appear in the January 1958 issue of the REVIEW.]

Evidence

JOHN DAVID COLLINS*

In the field of evidence, the 1956 decisions are fairly well within established rules, but the following ones are deemed worthy of note.[1]

JUDICIAL NOTICE

In *Shaw v. Griffith*,[2] a humanitarian case, the automobile had power steering and the court took judicial notice of the fact that present-day automobiles respond quickly and accurately to the touch of the driver's hand on the steering wheel. *Brown v. Callicotte*,[3] in which the automobile did not have power steering, was cited in support of this proposition. Once again the court said, in *Peterson v. Tiona*,[4] that it would not take judicial notice of the exact distance within which a specific automobile could be stopped under particular conditions, but, in some instances, judicial notice will be taken of the limits within which stops can be made. Examples of the latter statement are *Hook v. St. Louis Public Service Co.*,[5] in which judicial notice was taken of the fact that a bus traveling 10 miles per hour could have been stopped short of 45 feet, and *Wilson v. Toliver*,[6]

*Attorney, Macon; A.B., University of Missouri, 1949, LL.B., 1951.

1. These decisions are taken from volumes 285 through 296 of the Southwestern Reporter, Second Series.
2. 291 S.W.2d 230 (K. C. Ct. App. 1956).
3. 73 S.W.2d 190 (Mo. 1934).
4. 292 S.W.2d 581 (Mo. 1956).
5. 296 S.W.2d 123 (St. L. Ct. App. 1956).
6. 285 S.W.2d 575 (Mo. 1956).

in which judicial notice was taken of the fact that an automobile cannot be stopped within 50 feet when traveling at 50 miles per hour.

In *Hook v. St. Louis Public Service Co., supra,* a humanitarian case, defendant contended that there was no evidence that the bus was equipped with a horn or with brakes. This contention was overruled by the statement, "Facts consistent with legality are presumed to exist, so we may indulge the defendants with the presumption that the bus had both brakes and horn." This statement is in conflict with *West v. St. Louis-San Francisco Ry. Co.,*[7] in which the supreme court held at page 52 that plaintiff failed to make a humanitarian case because, "There was no evidence as to the type or kind of brakes, *if any,* with which the locomotive or train was equipped, and no evidence that the brakes were in good working condition. . . . There was no evidence that the locomotive or train was equipped with any particular kind of a signaling device, such as a whistle, horn or bell, or that any such device was in good working condition and could have been sounded, nor was there evidence of the time required to sound such signal." (Emphasis added.) Also in conflict with the *Hook* case is *Young v. St. Louis Public Service Co.,*[8] where the supreme court held that a plaintiff failed to make a submissible humanitarian case, stating at page 691, "Neither the kind of motive power, type of braking equipment, nor size of the bus in question was developed." It is submitted that the *Hook* case is not sound because the statement that facts consistent with legality will be presumed to exist, when applied to a defendant in a humanitarian case, results in the anomaly of presuming that the defendant was not guilty of negligence in order that he may be convicted of negligence—it ignores the fundamental rule that the humanitarian doctrine seizes upon the factual situation as it actually exists.

In *Fuzzell v. Williams*[9] the court refused to take judicial notice of the distance from the front end of a Chevrolet to the place where the driver sits, but did take judicial notice of the fact that the front end of the car necessarily preceded the driver out into the zone of danger. The Kansas City Court of Appeals took judicial notice of the fact that the presence, in injurious quantities, of carbon monoxide gas within a bus bespeaks negligence, consequently the doctrine of *res ipsa loquitur* was applicable, *Thomas v. Kansas City Public Service Co.*[10] In *State v. Public*

7. 295 S.W.2d 48 (Mo. 1956).
8. 250 S.W.2d 689 (Mo. 1952).
9. 288 S.W.2d 372 (Spr. Ct. App. 1956).
10. 289 S.W.2d 141 (K. C. Ct. App. 1956).

Service Commission[11] the court judicially noticed orders and reports of the Public Service Commission which had been made in two prior but connected cases, remarking that all three cases were so closely related and interdependent that it was necessary to refer to the two prior cases in order to properly understand the instant case. In *Williams v. Coca-Cola Bottling Co.*[12] the court refused to take judicial notice of the fact that coca-cola was sold upon an exclusive franchise basis and the beauty shop in which the plaintiff purchased the coca-cola in question was located within the territorial limits of the defendant's exclusive territory. In *KAMO Electric Co-op v. Dicke*[13] the court rejected a rather novel contention in refusing to take judicial notice of the fact that the landowner could no longer fly-fish in a particular lake without being subjected to the danger of electrocution by reason of the fishing line contacting the electric wires.

In *Pogue v. Smallen*[14] the court held that the doctrine of judicial notice was not applicable to the hearing upon a motion to dismiss for failure to state a case. The court said that the doctrine of judicial notice is but a rule of evidence which does away with the formal necessity for presenting evidence to prove a particular fact. Since it was not proper to prove any facts in support of the motion, it made no difference as to whether or not a particular fact could be noticed judicially or required proof.

RELEVANCY, MATERIALITY AND COMPETENCY

A. *In General*

In *Taylor v. Kansas City Southern Ry.*,[15] a personal injury suit under the Federal Employers' Liability Act, the petition alleged[16] "that plaintiff's nerves and central nervous system were greatly injured, shocked and affected; . . . that plaintiff has headaches, suffers from nervousness and inability to obtain proper sleep and rest; that plaintiff suffered from shock and received a concussion and contusion of and to his brain and brain cells; that plaintiff has suffered a change in his personality and is

11. 291 S.W.2d 95 (Mo. 1956) (en banc).
12. 285 S.W.2d 53 (St. L. Ct. App. 1955).
13. 296 S.W.2d 905 (K. C. Ct. App. 1956).
14. 285 S.W.2d 915 (Mo. 1956).
15. 293 S.W.2d 894 (Mo. 1956).
16. *Id.* at 896.

nervous and irritable which has affected his ability to deal with the public and with people. . . ." Over the defendant's objection, the plaintiff, and a neighbor, testified that following the first trial of the case, in December 1952, the plaintiff had a nervous collapse, lost all reason, was raging, was put in jail and then committed to a neuro-psychopathic ward of the Hillcrest Memorial Hospital in Tulsa, Oklahoma; that plaintiff was confined in that institution in a room with bars and heavy screens on the windows and the door was kept locked and had only a four-inch window, through which people could peep and see how he was getting along. Plaintiff was confined in this hospital for two months. The objections to this testimony, as well as the motions to strike it, were grounded upon the proposition that under the above-quoted pleading these facts were not in issue. The court held that the objection should have been sustained because under the pleadings the evidence was not relevant to the issues. In so holding, the court remarked that the nervous collapse shown by the evidence might, but does not inevitably, follow the injuries which were pleaded. After discussing the medical evidence which allegedly connected the nervous collapse to the injury, the court said that it made no difference whether or not this evidence did connect the nervous collapse to the injury because of the objection that the testimony was not relevant to the issues made up by the pleadings. The judgment was reversed and the case was remanded for re-trial.

A Thomas cantilever leg brace, which the plaintiff had worn, was shown to the jury in *Glowacki v. Holste.*[17] On appeal defendant contended that this had the effect of unduly arousing the jury's sympathy and that it was error to exhibit it. The court held that the brace was relevant to the issue of damages and was not the type to arouse undue sympathy for the plaintiff.

B. *Cross-Examination*

An expert witness who had testified as to stopping distances, in a humanitarian case, was cross-examined by the use of a "Missouri Driver's Guide" which contained a chart showing the distances within which automobiles could allegedly be stopped while traveling at various speeds. This booklet was not offered in evidence. The court held, in *Faught v. Washam,*[18] that the trial court did not commit error by permitting this

17. 295 S.W.2d 135 (Mo. 1956).
18. 291 S.W.2d 78 (Mo. 1956).

cross-examination even though the publication was not admissible as independent evidence.

Parmley v. Henks[19] was a pedestrian case based upon the humanitarian doctrine. The verdict was for the defendant, and plaintiff appealed. Plaintiff contended that it was error to permit defendant's attorney to elicit from the defendant the fact that the highway patrolman who investigated the accident did not arrest or file charges against defendant. Plaintiff further contended that thereafter the court erred in refusing permission to plaintiff's attorney to show on cross-examination that at that time the defendant was represented by the Prosecuting Attorney of Johnson County. To these actions of the trial court only a general objection was made. The supreme court held that it was within the trial court's discretion to limit the cross-examination of the defendant by not permitting questions concerning the fact that the Prosecuting Attorney represented him at the time in question. In *Parker v. Ford Motor Company*[20] it was held that the trial court erred by limiting the cross-examination of an expert witness to matters which had not been admitted in the answers to interrogatories. The trial court's theory had been that any matter which had been admitted in the answers to the interrogatories was no longer in issue. The supreme court said that interrogatories, and the admissions contained in the answers to them, do not in any way concern the limitation of cross-examination of an expert witness.

Inferences

It was held in *Williams v. Ricklemann*[21] it was error for the trial judge to sustain an objection to the plaintiff's comment, in the closing argument, that although the defendant and his wife were both in the courtroom during the trial, neither one of them had testified. The court said that just because these witnesses were in the courtroom did not make them equally available to both parties and the plaintiff was entitled to draw an inference from the defendant's failure to put them on the stand.

Admissions and Declarations Against Interest

In *Stout v. St. Louis County Transit Company*[22] the St. Louis Court

19. 285 S.W.2d 710 (Mo. 1956).
20. 296 S.W.2d 35 (Mo. 1956).
21. 292 S.W.2d 276 (Mo. 1956).
22. 285 S.W.2d 1 (St. L. Ct. App. 1955).

of Appeals re-stated the familiar rule that a party is not bound by his own estimate of time, speed or distance. In that case it was held that the plaintiff's testimony as to speed was merely an estimate and within the scope of this rule, hence, not binding upon the plaintiff. To the same effect is *Williams v. Ricklemann, supra.* In *Waller v. Oliver*[23] the court recognized that abandoned pleadings are admissible when they contain admissions or statements against the interests of the party in whose pleading they appear. The court found, however, that the abandoned pleading offered did not contain an admission or statement against the interest of the defendant Oliver and could not be introduced for the purpose of impeaching defendant Oliver, even though in his abandoned answer he had alleged that the negligence of his co-defendant was the sole or a concurring cause of the accident, but testified that his co-defendant was not guilty of any negligence at all.

In *May v. May*[24] the defendant's cross-bill for divorce alleged that he was a resident of the state of Missouri and had been for the year preceding the filing of the cross-bill. While he was being cross-examined he was shown an exhibit which was referred to as a petition for divorce which he had filed in Santa Fe, New Mexico, seven or eight months after he filed his cross-bill. The exhibit was not introduced, but on appeal the plaintiff argued that the exhibit contained an allegation that at that time, seven or eight months after filing the cross-bill, defendant was a resident of the state of New Mexico, hence, defendant had judicially admitted that he was not a resident of Missouri at the time of the filing of the cross-bill and this judicial admission prevented the court from having jurisdiction to grant the divorce on the cross-bill. The St. Louis Court of Appeals held that even if it were conceded that the exhibit did contain the allegation of residence in New Mexico, it did not constitute a true judicial admission and at most was "an ordinary or quasi admission" which was simply to be weighed with the other evidence on the subject. The court at page 634 defined a true judicial admission as one "made in court or preparatory to trial, by a party or his attorney, which concedes for the purposes of that particular trial the truth of some alleged fact. . . ." *Campbell v. Evens & Howard Sewer Pipe Co.*[25] was a suit by an architect for the reasonable value of services rendered in drawing building plans. The defense was that plaintiff had been instructed that the cost of the

23. 296 S.W.2d 44 (Mo. 1956).
24. 294 S.W.2d 627 (St. L. Ct. App. 1956).
25. 286 S.W.2d 399 (St. L. Ct. App. 1956).

building was not to exceed a certain sum and that the plans which he prepared were for a building costing in excess of that sum, therefore plaintiff did not perform the terms of the contract and was entitled to nothing. The defendant offered a verdict-directing instruction embodying that defense. The instruction was refused and plaintiff got a verdict for $6,500.00. On appeal defendant claimed that the verdict-directing instruction should have been given and that by refusing it, it had been deprived of its defense. In an attempt to justify the trial court's refusal of this instruction, the plaintiff contended that by judicial admission the defendant had abandoned the defense of complete exoneration. In support of this contention the plaintiff pointed to the testimony of defendant's president, elicited on direct examination, in which he had been asked whether or not defendant took the position that plaintiff was not entitled to any payment for his services, to which he replied, "We don't take that position. We want to pay him the reasonable value of his services." Plaintiff also pointed to a statement made by defendant's attorney, in connection with an offer of proof, to the effect that defendant's theory of the case was that plaintiff would be entitled to be paid for the services rendered up until the time when plaintiff realized that it was going to be impossible to construct the building for the limited cost, but that from that time on, since plaintiff did not notify defendant of that fact, plaintiff was not entitled to be paid. The court held that the testimony from defendant's president and the statement by defendant's counsel did not constitute true judicial admissions. In defining a "true admission" the court said that it was "a formal act done in the course of judicial proceedings" which eliminates the necessity for producing evidence of a particular fact. The order of the circuit court granting a new trial was affirmed. When *May v. May,* decided September 18, 1956, is compared with *Campbell v. Evens & Howard Sewer Pipe Co.,* decided January 17, 1956, both from the St. Louis Court of Appeals, the definition of a "true admission" is somewhat less than clear. The *May* case simply says at page 634 that it is an admission "made in court . . . , by a party or his attorney, which concedes for the purposes of that particular trial the truth of some alleged fact. . . ." When that test is applied to the factual situation in *Campbell v. Evens & Howard Sewer Pipe Co.,* it seems to the author that the testimony of the defendant's president, coupled with the statement of defendant's counsel, would qualify as a true admission—for, they both conceded that plaintiff was entitled to be paid the reasonable value of his services up until the time when he should have realized that the building could

not be constructed for the limited cost. However, in the latter case the definition of a true admission included these words: "a formal act" done in the course of a trial. If the testimony of the defendant's president and the statement of the defendant's attorney do not constitute "a formal act," one wonders just what does.

PRESUMPTIONS

Detrich v. Mercantile Trust Company[26] was a will contest based upon alleged insanity. Verdict was for the contestants, and on appeal the proponents contended there was not a submissible case on insanity. The court held that the case was submissible and based the holding upon the testimony of contestants' doctor. He testified that he treated testatrix in 1948, at which time she had delusions from damage to the brain cells, that her condition was permanent and progressive, and that, although he did not see her after June of 1948, he thought she was of unsound mind at that time and that she would continue in that condition. The court said that this testimony gave rise to a presumption of mental incapacity in February of 1951, when the will was executed. The court said that cases in which the medical testimony related to temporary delusions and physical and mental weaknesses attendant upon old age were not in point. As the court suggested, it is interesting to compare the *Detrich* case with *Dowling v. Luisetti,*[27] in which the testator had Bright's disease and uremia in connection with a general deterioration of the heart and arteries and also a dropsical condition, brought about by a poisoning of his system, all of which ultimately caused a stupor and finally stopped his mental processes. The court held in the *Dowling* case that the opinions of doctors, based upon this diagnosis, that the testator was of unsound mind, did not constitute substantial evidence of mental incapacity, and the contestants failed to make a submissible case.

In other cases involving presumptions, it was held[28] that a depositor, who introduced evidence that he put $3,500.00 in a lock box and later went back and the money was gone, did not make a submissible case against the bank because there was no presumption that the loss was due to the bank's failure to exercise ordinary care; it was held[29] that the presumption, created by section 193.170, Missouri Revised Statutes

26. 292 S.W.2d 300 (Mo. 1956).
27. 173 S.W.2d 381 (Mo. 1943).
28. Tyler v. Lindell Trust Co., 285 S.W.2d 16 (St. L. Ct. App. 1955).
29. Felker v. Metropolitan Life Ins. Co., 288 S.W.2d 26 (Spr. Ct. App. 1956).

(1949) that a death certificate is prima facie evidence of all of the facts which are required to be stated therein, is rebuttable and does not shift the burden of proof to the defendant; and, it was held[30] that there is a presumption, applicable to divorce cases, that every person is sane, and that even though an adjudication of insanity gives rise to a presumption of continued mental incapacity, such presumption does not run backwards, it is prospective in its operation.

Expert and Opinion Evidence

In *Christian v. Jeter*,[31] an automobile case, the court said at page 700, "Ordinarily, one with practical experience is qualified to testify as to the distance within which an automobile may be stopped." However, in that case the court sustained the trial court's ruling whereby the trial court instructed the jury to disregard the testimony of a stopping-distance witness who had testified that he had sold automobiles for thirty years and that he was acquainted generally with the distance within which the plaintiff's automobile could have been stopped. The basis for the holding was the cross-examination of this witness, during which he admitted that he did not know how many feet per second a car traveled at 50 or 60 miles per hour, that he allowed two seconds for reaction time, and that he never had measured the distance within which a car could be stopped at 50 miles per hour—his testimony being just a guess based upon his driving experience.

The supreme court en banc[32] passed upon whether or not it was error to permit the plaintiff's doctor to testify that plaintiff was "perfectly honest" about her symptoms and was "not feigning anything." The holding is weak because the court noted that there was no objection to the question eliciting the latter answer, that the objection to the question eliciting the first answer came after the answer had already been given, that there was no motion to strike the answer, and then said that it was not error to permit this doctor to so testify. To buttress this holding, the court further pointed out that the questions had been asked upon redirect and that during cross-examination defendant's counsel had asked this doctor if it was not a fact that some people were able to feign pain and wincing at times, to which the doctor answered in the affirmative.

30. Schuler v. Schuler, 290 S.W.2d 192 (St. L. Ct. App. 1956).
31. 287 S.W.2d 768 (Mo. 1956).
32. Dickerson v. St. Louis Public Service Co., 286 S.W.2d 820 (Mo. 1956) (en banc).

In *Bedenk v. St. Louis Public Service Company*[33] a doctor testifying on behalf of the plaintiff said that he observed a tremor of the eyelid and of the extended hands. He was then asked if there was anything indicating that this tremor was simulated or involuntary. Defendant objected on the ground that the witness was being asked to pass upon the credibility of the plaintiff, and the objection was overruled. The witness answered that, "No one could imitate that type of tremor." It was held that the objection was correctly ruled and the testimony was admissible.

HEARSAY

Plaintiff's witness testified that she was conscious at all times during the occurrence of the accident, that as defendant's car approached the intersection it was swerving, that she put her arm up to keep from hitting the top of the car, and put her hand on her brother's shoulder to help hold herself. She then described in detail what happened to the other occupants of the car and herself, and stated that her foot was caught between the backs of the two front seats and nearly severed. She also said that the bone of her lower left leg penetrated into the body of her brother and that it was fifteen minutes by her wristwatch before anyone arrived at the scene. The witness who arrived at the scene first was offered to testify that this lady, when he arrived, was screaming with pain, was very bloody and was repeatedly shouting, "He is dead," that she was making frenzied prayers to God, was in physical and mental shock, and that mixed in with the screams and praying she was repeatedly saying, "Why did he keep swerving?" This offer of proof was denied on the ground that it was not part of the res gestae. The supreme court held[34] that the trial court correctly excluded it because it was not within the scope of the res gestae exception to the hearsay rule. Significantly, the court said, "This may occasion what appears to be some conflict in the holdings on the issue." The basis of the decision was the broad discretion to which the trial court is entitled in passing upon the scope of the res gestae exception.

The supreme court en banc held[35] that a certificate, from a doctor selected by the Director of Welfare, stating that the applicant was physically able to perform a gainful activity was hearsay and not admissible

33. 285 S.W.2d 609 (Mo. 1956).
34. Wilson v. Toliver, 285 S.W.2d 575 (Mo. 1956).
35. Ellis v. State Department of Public Health & Welfare, 285 S.W.2d 634 (Mo. 1956) (en banc).

because the only certificate mentioned in the statute is a certificate showing physical *in*capacity. The court said that the same was true of a report of the medical review team which merely repeated the statement of the certificate. The court also held that in proceedings of this type a medical report was not admissible unless brought within the provisions of the Uniform Business Records as Evidence Act.

In *Allen v. St. Louis Public Service Company*[36] it was held that the hospital records of the plaintiff, offered by the plaintiff, were properly identified and admitted into evidence under the Uniform Business Records as Evidence Act. It was also held that a claim file of an insurance company, offered by the defendant, was also properly identified and admitted to evidence under this act. This claim file showed that the plaintiff had made a prior claim for similar injuries, contained a medical report submitted in support of the prior claim, and it also showed how much the plaintiff had been paid for those alleged injuries.

The exception to the hearsay rule, which admits hearsay if it relates to an ancient matter of public or general interest and if the evidence appears to be in the nature of a tradition or community reputation, was discussed at length in *Baugh v. Grigsby*.[37] It was pointed out that the exception is based upon two ideas, necessity and the circumstantial guarantee of trustworthiness, the former being found in the lack of other similar evidence and the latter being found in the fact that a community's conclusion about a matter of general interest is likely to have been, through a sifting process, a trustworthy conclusion. It was also pointed out that what is offered must be, in effect, reputation and not the assertion of an individual—the individual declarant must be merely the mouthpiece of the reputation. The court held that the trial court correctly excluded the offer to prove that the witness had heard his grandfather state that the members of a country school board had asked the witness's grandfather if they could move the schoolhouse onto his land, and the grandfather had told them that they could, but they could only leave it there so long as it was necessary to use that land for school purposes.

In *Faught v. Washam*[38] the defendant produced an expert witness on stopping distances, and under cross-examination he admitted that his testimony-in-chief was based upon statistics published by the National

36. 285 S.W.2d 663 (Mo. 1956).
37. 286 S.W.2d 798 (Mo. 1956).
38. 291 S.W.2d 78 (Mo. 1956).

Safety Council. Plaintiff moved to strike the witness's testimony-in-chief on the ground that it was admittedly based upon hearsay. The motion to strike was overruled and the supreme court held that this was not error, saying that there was other evidence of the witness's qualifications and this matter was within the trial court's discretion. The witness did not base his testimony upon his own experience and judgment—he based it upon the hearsay from the National Safety Council. It seems to the author that it is a novel thing to permit testimony concededly based upon hearsay simply because the witness was qualified to express an independent opinion, which, however, he did not express, and to say that it is within the trial court's discretion to admit testimony which is concededly based upon hearsay.

In *Ensminger v. Stout*,[39] an automobile case, the trial court excluded a highway patrolman's report which was offered on the theory that it was a record made in the usual course of business and required to be kept by a statute or regulation. The court held that the report was correctly excluded, distinguishing a case in which a hospital record had been admitted under the Uniform Business Records as Evidence Act. *Sullivan v. State Department of Public Health & Welfare*[40] was an appeal from a denial of an application of old age assistance. The caseworker had written to three insurance companies to find out if there was any cash surrender value to three policies owned by the applicant. The state offered in evidence three exhibits which it claimed were the answers from the three insurance companies, each of which stated that the policy in question had a cash surrender value of so much money. There was no identification of the signatures upon, nor the authenticity of, these letters. They were objected to as hearsay and upon the ground that the policies themselves showed upon their faces that they did not have any cash surrender value and to admit the letters was to permit a collateral attack upon the policies. The court held that the letters were properly admitted on the ground that they were declarations against the interest of the respective insurance companies "and notwithstanding there was no proof as to the genuineness of the signatures."

Best Evidence Rule

Mack v. Mack[41] was a partition suit against plaintiff's former wife, the defense to which was that there had been a contract made at the

39. 287 S.W.2d 400 (K. C. Ct. App. 1956).
40. 295 S.W.2d 190 (St. L. Ct. App. 1956).
41. 286 S.W.2d 385 (St. L. Ct. App. 1956).

time of the divorce whereby the husband agreed to permit the defendant and the minor children to live in the house until the children became 18 years old or until the wife remarried. Plaintiff produced a written memorandum which had been signed at the time of the divorce case stating that the minor children were entitled to live in the house, but the agreement did not state for how long. Plaintiff contended that this memorandum was the best evidence of the agreement. The court held to the contrary on the ground that it did not purport to include all of the terms agreed upon.

Weight and Conclusiveness

It was contended in *Dennison v. Whaley*[42] that there was no evidence to support a finding of causation between the accident and the injuries. Plaintiff, who recovered a verdict below, contended that a doctor's answer to a hypothetical question supplied this evidence. The question had asked the doctor whether or not, based upon the facts hypothecated, in his opinion the conditions found upon the plaintiff were the result of the circumstances of the wreck. The doctor answered that such a result was "possible" and "probable." He further testified that there could have been other causes. There was no objection to the evidence, the doctor was examined at great length, after this question and answer, concerning the same subject matter and there was no motion to strike the testimony. The defendant cross-examined the witness on the same subject matter. Under these circumstances the court held that the answer to the hypothetical question constituted substantial evidence of causation.

It was held[43] by the St. Louis Court of Appeals, that one who puts the adverse party upon the stand is at liberty to show facts contradicting any and all of the adverse party's testimony. In *Leathers v. Sikeston Coca-Cola Bottling Co.*[44] the question was whether or not there was any evidence having probative value on the question of whether or not the defendant manufactured and sold the particular bottle in question. The defendant's production foreman was asked if the defendant had an exclusive franchise at Dexter, and he answered, "I believe so." It was contended that what the witness "believed" was merely an expression of an opinion and did not have any probative value. The court held to the contrary, stating that it depends upon the testimony surrounding the use

42. 285 S.W.2d 73 (K. C. Ct. App. 1955).
43. Hall v. Brookshire, 285 S.W.2d 60 (St. L. Ct. App. 1956).
44. 286 S.W.2d 393 (Spr. Ct. App. 1956).

of that, or a similar, word. If the surrounding testimony indicates it was merely the expression of an opinion, then it does not have any probative value. On the other hand, if the surrounding testimony shows that the word was used simply to indicate that the witness was not speaking with entire certainty, then it does have probative value because no witness is required to speak with such confidence as to exclude all doubt.

Cathey v. De Weese[45] was a damage suit resulting from the loss of a leg while operating a hay baler. The plaintiff was 17 years old. He sought recovery upon failure to adequately warn of the danger. The plaintiff admitted that he knew that it was dangerous to work upon the machine while the rollers were turning and while the power take-off was in gear. The trial court held that plaintiff was conclusively bound by this admission and set aside the verdict and entered judgment in accordance with the motion for directed verdict. The appellate court reversed this action, holding that the admission of a 17-year-old boy that he was aware of some danger was not conclusive evidence of contributory negligence because the jury might find that he did not appreciate the degree of the danger.

On a suit on the double indemnity provisions of two life insurance policies, the plaintiff claimed death by accidental inhalation of carbon monoxide. The only evidence offered by plaintiff was a death certificate from the coroner of Los Angeles County, California. That certificate stated that the cause of death was carbon monoxide poisoning caused by accident. The plaintiff argued that section 193.170, Missouri Revised Statutes (1949) giving prima facie value to the facts required to be stated in a death certificate, was applicable and was sufficient to make the case submissible. The appellate court held that the statement in the death certificate that the death was accidental was a conclusion and amounted to nothing more than stating the probable cause of death, and the verdict could not be based upon a probability. Verdict for the plaintiff was reversed.[46]

PAROL EVIDENCE

In *Fisher v. Miceli*[47] plaintiff brought a declaratory judgment suit against his former wife, claiming that he was owner of a one-half interest

45. 289 S.W.2d 51 (Mo. 1956).
46. Lynde v. Western & Southern Life Ins. Co., 293 S.W.2d 147 (St. L. Ct. App. 1956).
47. 291 S.W.2d 845 (Mo. 1956).

in certain real estate, legal title to which was in the former wife. Upon appeal it was held that where a written contract was upon a printed form and at the bottom of the form, just below the signature lines, the words "make deed to" appeared, following which there were three lines upon which no one's name had been typed or written, parol evidence was admissible to show to whom the deed was to be made.

In *Murray v. Murray*[48] there had been a separation agreement which provided that one party would not defend a divorce suit brought by the other party. It was held that because such a contract was against public policy and void, the parol evidence rule was not applicable.

The Humanitarian Doctrine

WILLIAM H. BECKER, JR.

[Editor's note. It is contemplated that an article by Mr. Becker discussing recent developments in this area will appear in the January 1958 issue of the REVIEW.]

Insurance

ROBERT E. SEILER*

In 1956, the supreme court passed on seven cases involving primarily substantive questions of insurance law. These decisions, which are reviewed below, involved questions of general interest and do not represent any departure from the well established rules.

In *Hutchinson v. Metropolitan Life Insurance Company,*[1] the issue was whether there was a contract of insurance on the life of plaintiff's husband under the following circumstances: defendant's soliciting agent called on plaintiff and her husband and presented to them a written "plan" or outline of $5,000.00 double indemnity on the husband's life requiring premium payments of $11.40 per month. The husband said he

48. 293 S.W.2d 436 (Mo. 1956).

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1. 293 S.W.2d 307 (Mo. 1956).

would take it and wanted his wife to be the beneficiary. The agent asked for and received $11.40, saying, "You pay me now, and you're insured right now." Forty-one days later, the husband died as a result of an accidental injury, and on the same day, the insurance company declined the application because of an unfavorable medical examination and instructed the agent to refund the premium. The court held there was no contract of insurance, for these reasons: (1) The husband should have realized, even though the written plan submitted by the agent did not so state, that a written application, physical examination, acceptance by the company of him as an insurable risk, and the issuance and delivery of a written policy were conditions to the existence of any contract; (2) the plan on its face showed it was not intended to be an offer; (3) the husband signed an application which made it plain his answers therein would be the basis of the contract "if one be issued"; and (4) the agent had no authority to make a contract of insurance and no liability arose until the policy issued. The court points out there was no claim of fraud or mistake. On the facts, the result seems inevitable and clearly in accord with general insurance law.

In *Mistele v. Ogle*,[2] a garnishment action against a liability insurer, the question was whether the insured had given the insurer proper notice of a change in automobiles, and whether the insurer was estopped to deny lack of coverage. Both questions were held to be jury issues under the facts. However, the case was remanded for a new trial because of error in excluding certain evidence as to ownership, and also because the court held that an instruction purporting to submit the issue of estoppel to deny coverage lacked sufficient factual hypothesis in view of the complicated and contradictory facts of the case.

In *Niehaus v. Central Manufacturers' Mutual Ins. Co.*,[3] plaintiffs sued on a personal property floater policy for personal property stolen from their residence in two burglaries. The defense was that plaintiffs had not filed timely proofs of loss and that plaintiffs were guilty of fraud and false swearing. The jury returned a verdict for the insurance company, which the trial court set aside because of error in an instruction on false swearing. The company appealed from an order granting a new trial.

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2. 293 S.W.2d 330 (Mo. 1956).
3. 293 S.W.2d 355 (Mo. 1956).

The proof of loss was signed "Frank H. Niehaus by Margaret M. Niehaus Atty-in-Fact," although in August 1951, prior to the burglaries, the named insured was changed to Mrs. Niehaus alone, and the insurer claimed that the named insured, therefore, had never filed a proof of loss. The supreme court attached little importance to this, in view of the fact that the policy covered the property of the named insured and "members of the Insured's family of the same household, while in all situations." Mr. Niehaus' situation was that he was in federal prison at the time of the burglaries, for income tax evasion, but the court adds that it was not claimed he was not a member of Mrs. Niehaus' family even while in *prison and that the property stolen was either his or his wife's.*

As to the defense of failure to file timely proofs of loss, the court held that the insurer did not have a defense as a matter of law in this regard, because there was evidence that the local agent waived timely filing of proofs, that being an agent with authority to issue and countersign policies he had authority to make such a waiver, and that the insurer did not present conclusive evidence showing the agency had been terminated prior to the waiver. The fact that two burglaries were included in one proof, or that the proof was signed as set forth above, did not make the proof insufficient, in the absence of any objection from the insurer.

On the matter of the instruction on false swearing, the evidence showed that as originally filed the proof claimed $1,429.30 as having been stolen in the first burglary (October 7, 1951) and $6,820.65 in the second burglary (April 23, 1952). On the day the case was called for trial plaintiffs amended the petition to show it was just the other way around—$6,820.65 stolen in the first burglary and $1,429.30 in the second, and so testified. The court then instructed, in substance, that if plaintiffs filed a claim showing they lost certain property on April 23, 1952, whereas the property had been stolen on another date, and if the items claimed to have been stolen on October 7, 1951 were stolen on another date, and if the jury believed this conduct constituted fraud or false swearing by plaintiffs, then they could not recover. In effect, this instruction left it to the jury to determine for itself what constituted fraud. The supreme court held that the evidence did not show fraud and false swearing as a matter of law, that the same were for the jury and that the instruction was prejudicially erroneous for not requiring a finding that the statements in the proofs were made willfully in bad faith and with intent to deceive the defendant.

In *Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co.*,[4] the court had before it claims asserted by grain elevator operators against various insurance companies for loss of grains and loss due to business interruption under insurance policies insuring against direct loss by "explosion." The elevators, located in the Fairfax area of Kansas City, Kansas, were involved in the Kaw and Missouri River floods of July 13-15, 1951. The waters flooded the basements of the elevators and reached a level of slightly more than two feet in the concrete hoppers of the bins, which were filled with various grains. The issue was whether the metal hopper bottoms were forced off (thereby permitting the grain to pass down into the water in the basement) by an explosive force or gradually by the swelling of the wet grain. The crucial ruling in the case from an insurance law standpoint was based on the fact that the policies did not limit coverage to explosions of a particular kind or due to particular causes. The court ruled that the policies covered any explosion within the commonly accepted meaning of the term, which the court said would include a sudden release of pressure. The jury returned a verdict for the plaintiffs and the court held there was sufficient circumstantial evidence to support the ultimate conclusion that the hopper bottoms were suddenly and violently expelled, and the companies were liable under the explosion policies.

In *Cain v. Robinson Lumber Company*,[5] the question was whether the insurer had effectively cancelled a workmen's compensation policy before a certain accident occurred. The original policy provided that the policy could be cancelled by either party upon written notice to the other, naming a cancellation date not less than ten days thereafter. An endorsement, however, provided that failure of the insured to submit certain payroll reports or pay earned-premiums thereon entitled the insurer to cancel, upon proper written notice. The insurer gave the insured written notice of cancellation for non-payment. This notice was effective by the conditions in the original policy, but was premature by the conditions of the endorsement. The court held that where there is a conflict between language used in the general provisions of a policy and in an endorsement on the same subject, the language in the endorsement will prevail, and hence the attempted cancellation was ineffective.

4. 293 S.W.2d 913 (Mo. 1956).
5. 273 S.W.2d 741 (St. L. Ct. App. 1956); 295 S.W.2d 388 (Mo. 1956) (en banc).

Quisenberry v. Kartsonis[6] was a garnishment proceeding in which the automobile liability insurer defended on the ground of breach of the cooperation clause of the policy. The policy was issued to Mary A. Kartsonis, but also covered any person using the automobile. Mary's brother, Paul, was driving the car, with Mary riding in the front seat, and ran into the rear of plaintiff's car, which was stopped at a traffic light. At the accident scene, plaintiff, Mary, and her brother agreed they would say Mary was driving, because Mary was of the opinion the insurance did not cover if her brother was driving. The insured and her brother gave written statements to the insurer to the effect that Mary was driving, and plaintiff filed suit against Mary, alleging that Mary was the driver. In their depositions taken by plaintiff, Mary and her brother testified that Mary was driving. Later Mary and her brother admitted in writing that their prior statements and testimony were false and that they where given for the purpose of causing the insurance company to pay the damages. Shortly thereafter the insurer's attorneys withdrew from defense of the damage suit, on the ground that these misrepresentations had prejudiced the rights of the insurer. Thereafter plaintiff obtained a default judgment against Mary in the amount of $10,000.00. In the trial of the garnishment action, the jury found for the insurer and this was affirmed on appeal.

The court held that the facts shown constituted breach of the cooperation clause and that beyond question the insurer's defense of the damage suit was prejudiced, because the credibility of the insured and her brother would be impeached by their prior sworn testimony in their depositions. The court refused to go along with dicta in *Cowell v. Employers' Indemnity Corp.*,[7] to the effect that the insurer would be justified in withdrawing from the defense only if the correct information when given would have shown a state of facts under which the insurer would not have been liable. The court declared the question is whether there is prejudice to the insurer in the preparation and defense of the case, and the insurer is not required to show that the jury's verdict would have been different if the true facts had been disclosed.

As to plaintiff's claim that the insurer was not in good faith in withdrawing, and that the insurer waived the breach of the cooperation

6. 297 S.W.2d 450 (Mo. 1956).
7. 326 Mo. 1103, 1115, 34 S.W.2d 705, 709 (1930).

clause, the court said the evidence did not establish any such conclusions as a matter of law and plaintiff had not sought to submit such issues to the jury under instructions.

The court found no error in the insurer's instructions, even though there was no requirement in the instructions that the jury find the insurer suffered loss by reason of the collusion of the parties or the false testimony of the insured.

The court points out that the decision is limited to the particular facts of the case, but it would seem that any breach of the cooperation clause which substantially prejudices the liability insurer in the preparation and defense of the case constitutes a justification for withdrawal.

Morrow v. Loeffler[8] was also a garnishment action against the insurer, based on an alleged agreement to issue an automobile liability policy. The evidence showed that defendant gave money to apply on the premium to one Venker, who had asked defendant to let him "write up a liability policy" on the car. Venker was an agent in the office of an insurance broker, Rosenthal. The broker, through Venker, called the insurer, giving the coverage information, but the insurer declined the offer. Plaintiff claimed there was an oral contract of insurance made by Venker for the insurer but the court applied the general rule that an insurance broker is considered the agent of the insured, not the insurer, and pointed out that there was no evidence Venker had authority to bind the insurer. Venker's alleged statements to defendant that he (Venker) represented the insurer and that defendant was insured in the company were not admissible to prove agency. Plaintiff also claimed that since Venker had retained the money paid by defendant until after the accident, the insurer waived its defenses, and that since Venker collected the premium and told defendant he was insured the insurer was estopped to deny coverage, but the court points out these contentions fail because Venker was not the agent of the insurer.

As in the *Hutchinson* decision,[9] the result seems inevitable under the facts of the case.

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8. 297 S.W.2d 549 (Mo. 1956).
9. Note 1 *supra*.

Labor Law

AUSTIN F. SHUTE*

The case of *Adams Dairy v. Burke*[1] revealed an interesting facet of labor relations. A teamster's local had represented the Adams Dairy Milk Wagon Drivers until 1954, but in that year the drivers formed an independent union. Both the teamster's local and the company consented to a certification election by the N.L.R.B. The independent union was elected over the teamster's local and received its certification. Thereafter, the teamster's local filed unfair labor practices[2] which, after a hearing, were dismissed.

The teamster's local then attempted to urge the public to refrain from buying Adams Dairy Company products when they did business with any store selling such products. The court held that this was a boycott, stating: [3]

> "While there are many definitions of a boycott, in general, it may be said to include any activity on the part of a labor organization, or for that matter any other group of persons, whereby it is sought through concerted action, other than by reason of lawful competition, to obtain withdrawal of public patronage from one in business."

The court pointed out that the union could use various forms of concerted action, such as strikes or picketing, to enforce a lawful objective of organized labor. In addition, the lawful objective must be sought by lawful means. The inherent difficulty in the situation as pointed out by the court, was that if either the company or the teamster's local attempted to exert pressure on the independent union both would be guilty of an unfair labor practice. Thus, stated the court: [4]

> "It is inconceivable that the public policy of this state should be to label as a legitimate labor objective the willful and intentional damaging or destruction of an employer's business because the employer is doing that which the federal law requires him to do and forbids him to change if he is to remain in business."

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1. 293 S.W.2d 281 (Mo. 1956).
2. Labor Management Relations Act, 1947, § 8(a), 61 STAT. 140, as amended, 29 U.S.C.A. § 158 (1956).
3. *Supra* note 1 at 287.
4. *Supra* note 1 at 289.

The court concluded that the action of the teamster's local was a malicious interference with the business of the Adams Dairy Company and was not reasonably related to or for the furtherance of any legitimate object of the local. This, then, brought it within the Missouri law prohibiting combinations in restraint of trade.[5]

The local attempted to argue that the state court would have no jurisdiction since, if there were any unfair labor practices present, the case would be governed by the *Garner* decision.[6] The court observed that neither the company nor the union had alleged any unfair labor practices and pointed out that conspiracies in restraint of trade did not fall within the prohibition of the *Garner* case.

The case of *Kansas City Terminal Railway Company v. Manion*[7] was a case which had been transferred from the supreme court[8] to the court of appeals on jurisdictional grounds. It arose out of a suit to enjoin a threatened strike which had, in turn, arisen from a dispute as to whether or not so called "minor disputes," which the Railway Labor Act[9] gives the Railway Labor Board power to decide, included disputes over time claims.

The railway brotherhood had attempted to evoke the services of the National Mediation Board to mediate the time claims, but the terminal asserted that time claims could not be mediated. Although the Mediation Board recommended that the claims be mediated, the terminal refused to do so. The terminal then went into the state circuit court and received a restraining order against the threatened strike.

This was a very lengthy opinion, in which the history of the Railway Labor Act was traced and the differentiation between so called "major disputes" and "minor disputes" was discussed. There would seem to be no question but that time claims fall within the catagory of so called "minor disputes," and as such come within that portion of the law which prohibits a strike under the Railway Labor Act to enforce settlement of such disputes. The interesting point in the case was that the injunction was sought in the state court rather than the federal court. Since the court found that the threatened strike was vital not only to the bargain-

5. Mo. REV. STAT. (1949) § 416.010.
6. Garner v. Teamsters, 346 U. S. 485 (1953).
7. 297 S.W.2d 31 (K. C. Ct. App. 1956).
8. 290 S.W.2d 63 (Mo. 1956).
9. 44 STAT. 577 (1926), as amended, 45 U.S.C.A. § 151-63 (1954).

ing agreement but the Railway Labor Act as well, it was held that the injured party could elect to seek relief in the state forum.

The case of *American Hotel Company v. Bartenders' International League of America*[10] involved an attempt by the union to organize bartenders working for the Robidoux Hotel in St. Joseph. The picketing was admittedly peaceful, and interstate commerce was not involved. The hotel alleged that the picketing was a violation of the Missouri constitutional provision, as follows:

> "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing."[11]

The trial court had refused to issue its restraining order. The union had, at one time, written a letter to the hotel requesting a closed shop agreement. The court construed the picketing as in furtherance of this request, and held:[12]

> ". . . we think the conclusion inescapable that the ensuing picketing beginning February 9th was for the purpose or had for its objective the coercion of plaintiff into coercing its employees to become members of Local No. 422."

This coercive intent of the picketing, then, brought the actions of the local into conflict with the rights of employees as laid down by the Missouri constitutional section referred to. Thus, held the court, it became a violation of the public policy of the state of Missouri and subject to a restraining order.

The case of *Quinn v. Buchanan*[13] involved the same constitutional section as was involved in the *American Hotel* case just discussed. This time, however, it was asserted by the union. Certain driver-salesmen for the Columbia Packing Company had organized as members of a local teamster's union. The employer used coercive methods in attempting to defeat the union's organization. The union alleged this was a violation of the constitutional section[14] and asked for relief based thereon. The court stated that the constitutional provision:

> ". . . is a provision of the Bill of Rights by which the people assert their rights, acknowledge their duties and proclaim the

10. 297 S.W.2d 411 (Mo. 1957).
11. Mo. CONST. art. I, § 29 (1945).
12. *Supra* note 10 at 415.
13. 298 S.W.2d 413 (Mo. 1957) (en banc).
14. *Supra* note 11.

> principles upon which their government is founded. . . . Provisions of a Bill of Rights are primarily limitations on government, declaring rights that exist without any governmental grant, that may not be taken away by government and that government has the duty to protect."[15]

The court pointed out that the constitutional section is a declaration of the fundamental right of all individuals, and that it is self-executing to the extent that all provisions of the Bill of Rights are self-executing; namely, that any governmental action in violation of the declared right is void. The court held that the plaintiffs, in their class action, were entitled to preventive relief enjoining the company from coercing its employees into withdrawing from the union or from using coercive methods of any sort on the union employees. The union was not entitled, however, to any mandatory relief ordering the company to recognize and bargain with the union.

The case of *Kerkemeyer v. Midkiff*[16] had been originally heard in the Springfield Court of Appeals.[17] In essence, it involved an attempt by the barber's union to withdraw union shop cards from barber shops in which the owner of the shop also worked. The local demanded that the owner-worker either stop plying his trade or join the union. This suit was brought to restrain the local from enforcing their demand, the surrender of the union shop card.

The court found, and certainly it cannot be disputed, that the public policy of Missouri favors the right of a man to work with his own hands. The inherent difficulties of attempting to coerce an owner-worker into joining a union were discussed, for in doing so, the owner-worker would lose all of his rights and duties as the owner of the shop. He would, in effect, be bargaining with himself. The court stated:[18]

> "We can conceive of no surer way of eliminating the small independent business man from the economic scene than to compel him to stop working with his own hands in his own business or to be completely subservient to his adversaries in matters pertaining to his ability to compete in the economic struggle for existence."

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15. *Supra* note 13 at 417.
16. 299 S.W.2d 409 (Mo. 1957) (en banc).
17. 281 S.W.2d 516 (Spr. Ct. App. 1955).
18. *Supra* note 16 at 415.

The court held:[19]

> "We cannot escape the conclusion, and we hold, that it is contrary to the public policy of this state, and therefore an unlawful labor objective, for a labor union to exert economic pressure on an employer to compel him to join a union of his employees when to do so makes him subject to union 'laws' which destroy or substantially impair his right to assert and protect those interests *essential to his status as an employer* in negotiations with the union concerning the terms and conditions of employment of his employees. . . ." (Emphasis supplied.)

Thus the barber shop owners were entitled to the injunctive relief requested insofar as it pertained to the withdrawal of the union shop cards, or the threatening of a strike of the owner's employees for the purpose of compelling the individual owners to join the local or to cease performing work with their own hands.

The case of *Staley v. Paddock*[20] involved a suit by a widow of a teamster's local member for death benefits. The union's constitution and by-laws provided for voluntary death donations. If the local executive board of the union did not approve of the donation, the question of giving the donation was submitted to the membership of the union. Neither the executive board nor the membership of the union approved the donation in this particular case.

The union's contention was that the provisions of the constitution and by-laws constituted simply an authorization to the executive board of the union to make voluntary contributions and did not create any enforceable obligation upon the union.

The court held:[21]

> "The overwhelming weight of authority in this country supports the proposition that a by-law provision such as is here involved, which merely authorizes the payment of charitable donations to members of an association under stipulated circumstances, does not constitute a legal obligation to pay such donations."

Globe-Democrat Publishing Company v. Industrial Commission[22] involved a dispute over unemployment compensation allowances. An em-

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19. *Supra* note 16 at 417.
20. 301 S.W.2d 878 (K. C. Ct. App. 1957).
21. *Id.* at 880.
22. 301 S.W.2d 847 (St. L. Ct. App. 1957).

ployee was discharged for reasons other than his own willful breach of duty or willful misconduct. Under the collective bargaining contract between the publisher and the St. Louis Newspaper Guild, of which the employee was a member, the publisher had to pay the employee one week's pay for each six months' last continuous employment by the publisher up to a maximum of forty-eight weeks in dismissal pay. This lump sum payment of twenty-four weeks' pay was made to the employee, who thereafter filed for unemployment compensation.

Under the applicable unemployment compensation law[23] an employee is ineligible for unemployment compensation when he has received termination allowances. The Commission had sustained the employee on the theory that his dismissal pay would make him ineligible for one week, but that he would be eligible after the first week. The Commission also argued that the payment actually represented additional remuneration for the employee's prior services.

The court considered the question of whether or not the lump sum termination allowance rendered the employee ineligible for only one week or ineligible for twenty-four weeks as argued by the publisher. In reaching its decision, the court considered the legislative intent of the act, and attempted to make a reasonable and logical construction of the statute.

The court held:[24]

> "The statute is not susceptible to the construction that a claimant is ineligible for only the week *in which* the disqualifying payment is made, regardless of the amount thereof. It clearly provides that, 'A claimant shall be ineligible for . . . benefits *for* any week *for* which he is receiving or has received remuneration . . . in the form of . . . Termination allowances.' (Italics supplied.) To adopt the position contended for would not give the statute life and meaning, and effectuate the obvious intention of the legislature. Exactly the opposite result would be accomplished and for all practical purposes the statute would be emasculated."

Thus the court held that the employee was ineligible for unemployment benefits for a period corresponding to the number of weeks' pay that he received on termination.

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23. Mo. Rev. Stat. (1955 Supp.) § 288.040-2(1).
24. *Supra* note 22 at 852.

In *Swope v. Emerson Electric Manufacturing Company*[25] a group of discharged employees brought suit for damages against the company for allegedly discharging the employees because of union activities. Under the terms of the collective bargaining contract in force between the company and the union, work stoppages were prohibited during the life of the contract. The employees here concerned, along with many others, had engaged in a "wildcat" sitdown strike in objection to certain acts of the company in bringing in outside employees to perform certain work. All of the employees involved were discharged, but most of them were rehired by the company thereafter.

The employees' grievance had been arbitrated, with the arbitrator determining that they had been discharged for good cause. An unfair labor practice had been filed by the employees concerned with the Labor Relations Board, but the Board found no evidence of any unfair labor practice and refused to issue its complaint. Thereafter, suit was instituted in the local circuit court, with verdicts being received in favor of all the defendants. The defendants argued that the state court had no jurisdiction on the theory that inasmuch as the employees argued that their discharge was because of union activity, this would amount to an unfair labor practice.

The court pointed out that it has consistently been held that a discharge because of union activities is an unfair labor practice as a "discrimination in regard to hire or tenure of employment."[26] And, under the federal act, the state courts may not exercise jurisdiction as to those matters which constitute unfair labor practices.[27] The court stated that the Labor Management Relations Act has so far displaced the power of the states to deal with labor relations matters affecting interstate commerce, that the states may only act in those cases where the Board has ceded jurisdiction to a state agency pursuant to Title 29 U.S.C.A. section 160 (A).[28]

The court pointed out that the Labor Relations Board could give the employees concerned all of the relief that they were asking, if the Board saw fit to do so.[29] There would seem to be no question but what

25. 303 S.W.2d 35 (Mo. 1957).
26. 61 Stat. 140 (1947), as amended, 29 U.S.C.A. § 158 (a) (3) (1956).
27. Weber v. Anheuser-Busch, 348 U. S. 468 (1955); Garner v. Teamsters, 346 U. S. 485 (1953).
28. Guss v. Utah Labor Relations Board, 353 U. S. 1 (1957).
29. 61 Stat. 147 (1947), as amended, 29 U.S.C.A. § 160 (c) (1956).

the court is correct in its interpretation of the law, in that where the moving party himself alleges unfair labor practices, he must obtain his relief under the federal law unless he may bring himself within some of the exceptions laid down for jurisdiction of the state court.

These, then, are the labor cases with which the Missouri appellate courts have had to deal during the past year. They seem to reveal no exceptional changes from past years in the courts' approach to labor relations, but do show the way in which greater reliance is being placed by the Missouri courts on public policy. This, in many instances, seems to be the only way in which substantial justice can be achieved for the parties—and this, after all, should be the aim in labor relations law, the same as in the other fields of law.

Property

WILLARD L. ECKHARDT*

TAX TITLES—TITLE EXAMINATION STANDARD 26

The title examination standards of The Missouri Bar[1] have been helpful in eliminating unnecessary requirements by title examiners, and in providing title examiners with standards of judgment in areas largely devoid of reported decisions. The only standard to date to be considered by an appellate court in Missouri is standard 26, "Deeds, tax titles." This standard was cited favorably in an appeals case, *Hartley v. Williams*.[2] In this case the problem was whether a title based on a 1939 Jones-Munger tax deed was merchantable in 1954, fourteen and one-half years later, there being no further showing in the abstract by way of affidavit or otherwise. The tax deed recited a small consideration, $30.59,

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1. Title examination standards 1-27 are printed in 9 JOUR. MO. BAR 179-188 (Sept. 1953), and standard 28 is printed in 11 JOUR MO. BAR 163, 164-165 (Sept. 1955). Free reprint copies are available from The Missouri Bar, P. O. Box 209, Jefferson City, Mo.

The standards are conveniently available in 23 V.A.M.S. c. 442 app. The pocket part supplement has the latest revision.

The standards have not been revised to take into account the new probate code, effective January 1, 1956. The Real Property Committee of The Missouri Bar (successor to the Title Examination Standards Committee) expects to complete a revision of the standards early in 1958.

2. 287 S.W.2d 129 (Spr. Ct. App. 1956).

probably inadequate. The respondent's brief, point III, indicated five other specific defects in the tax title, but the court of appeals had no occasion to consider these alleged defects or whether the tax title fell short of a letter perfect tax title.

In holding the tax title unmarketable, the circuit court, Greene County, Warren L. White, J., relied principally on title examination standard 26. In his unpublished memorandum decision Judge White said: "The Missouri Bar, after prolonged study of the subject, has published a pamphlet entitled 'Title Examination Standards' in which by Standards 23 (dealing with the concept of marketability, affidavits of adverse possession, and the significance of twenty-seven years of adverse possession) and 26 (dealing with tax titles) they hold that in cases such as this, the title is not acceptable until 27 years have elapsed since the recording of the tax deed. The authorities cited therein seem to amply justify this conclusion. This pamphlet was prepared by a group of the most skilled title examiners of the State, and its widespread use would indicate a tax title such as this is not acceptable to a considerable portion if not to all of the lawyers whose practice does include examining titles. Every purchaser of land who uses any judgment has the title examined by a lawyer, and if the lawyer will not approve it, is it merchantable? A purchaser is entitled to a title which will protect him from anxiety and should not be compelled to buy a lawsuit. While there is nothing in the evidence to indicate that any attack on defendant's title is threatened, the record does not foreclose the possibility of such attack being successfully maintained. A merchantable title must be one to give assurance that it is attack proof. Such seems to be the considered judgment of the Bar, and if the lawyers will not approve, there will be no buyer."

On appeal the court cited (in addition to Missouri cases and well-known national and local texts[3]) not only title examination standard 26 but also several pertinent law review discussions.[4] Short of twenty-seven

3. GILL, MISSOURI TAX TITLES 89 (1938); FLICK, ABSTRACT AND TITLE PRACTICE § 613 (1951); PATTON, LAND TITLES § 490 (2d ed. 1957).

4. Eckhardt, *Work of Missouri Supreme Court for 1951—Property*, 17 Mo. L. REV. 398, 401-402 (1952) (the comment to standard 26 appearing in the May 1953 revision of the standards is based largely on this material); Scott, *Marketability of Tax Titles in Missouri*, 20 U. KAN. CITY L. REV. 153-163 (1952) (Professor William R. Scott, of the University of Kansas School of Law, considers not only Jones-Munger tax titles, but also the other types of Missouri tax titles).

See also the following which are pertinent but which were not cited by the court: Eastin, *Work of Missouri Supreme Court for 1951—Taxation*, 17 Mo. L. REV. 409, 410-412 (1952); Eastin, *Work of Missouri Supreme Court for 1952—Taxation*, 18 Mo. L.

years of adverse possession, the marketability of a Jones-Munger tax title depends primarily on how much reliance can be placed on section 140.590, Missouri Revised Statutes (1949), the three-year bar on attacks on a collector's tax deed. The several law reviews cited above consider this problem in detail.

The trial judge's memorandum opinion quoted above (reviewed briefly by the court on appeal[5]), states that under standard 26 a tax title is not acceptable until twenty-seven years have elapsed since the recording of the tax deed. It should be noted that the standard does not go this far. The standard is to the effect that short of adverse possession for twenty-seven years, shown by affidavit or otherwise, title examiners are *justified* in requiring perfection of the title. That a title examiner need not always require such perfection is indicated in the last sentence of the comment to standard 26,[6] where it is stated: "It is not intended to suggest, however, that an examining attorney, in the exercise of sound judgment, must in all cases make one or the other of these [perfection] requirements, but in appropriate cases he may pass the title without making these particular requirements."

DELIVERY OF DEEDS—PRESUMPTIONS AS TO DELIVERY—CONDITIONAL DELIVERIES, NOT IN ESCROW

A signed, acknowledged paper in the form of a deed is not a deed (*i.e.*, is not effective) until delivered, and usually proof of delivery is by parol evidence with nothing in the record of title regarding delivery. Consequently the title examiner, within limits, must of necessity indulge in the presumption that an acknowledged deed has been delivered. Missouri title examination standard 13, "Deeds, presumption as to delivery,"

REV. 382, 384-386 (1953); Eckhardt, *Work of Missouri Supreme Court for 1953—Property*, 19 MO. L. REV. 335, 339-341 (1954); Beihl, *Tax Deeds Void on Their Face and Three Year Statute of Limitations*, 20 MO. L. REV. 87-98 (1955) (E. Frederick Beihl, Esq., then a law student and now of the Kansas City Bar, in this very able and important publication, attempted to collect all of the Missouri cases bearing on the problem; he briefs the cases in sufficient detail so that the facts and holdings are apparent and it is not necessary for the reader to pull down and read each case).

Much thanks is due the publishers of Vernon's Annotated Missouri Statutes and Shepard's Missouri Citations for including law review material in their annotations and citations. With the wealth of law review material thus brought to the attention of the Bar, the law reviews are more frequently cited in briefs and opinions.

5. 287 S.W.2d at 133.
6. 9 JOUR MO. BAR 179, 187 (Sept. 1953).

states the presumption, and states under what circumstances and after what period of time a title examiner should make no requirements.[7]

Carr v. Lincoln[8] indicates that the presumption of delivery of a signed, acknowledged deed is difficult to overcome. On July 10, 1953, husband, with wife joining, (hereafter referred to as "H" and "W," respectively) executed a warranty deed granting eleven parcels of land owned by H to a straw man, and the straw man executed a warranty deed granting the same parcels to H and W as tenants by the entirety. On May 4, 1954, H executed a will creating a testamentary trust; only one of the eleven parcels was specifically mentioned in the will. After H's death on May 14, 1954, the deeds (unrecorded) were found in H's safe deposit box in an envelope which had a notation in H's handwriting reciting that both deeds had been delivered, and bearing the same date as the deeds. The issue was whether the deeds had been delivered; if they had been delivered, they created a tenancy by the entirety and thereby eliminated the land from the testamentary trust. There was some evidence that the deeds were intended to operate only as a stopgap provision for W until such time as the testamentary trust could be drafted and executed, at which time the deeds were to be destroyed. After examining and weighing the indications from the evidence, pro and con, the court in an able opinion by Stockard, C., concluded that the presumption of delivery had not been overcome, and that as a consequence the deeds created a tenancy by the entirety. The court relied on an earlier case with similar facts, *Sutorius v. Mayor*.[9]

If the evidence had been clear and convincing that the deeds were to operate only as a stopgap and were to be superseded by the testamentary trust, the court would have been faced with the extraordinarily difficult problem of conditional deliveries of deeds where the escrow technique is not used. In such a case would there be a present delivery of the deeds and the present creation of a tenancy by the entirety, subject however to a parol condition subsequent that the deeds should be void on the execution thereafter of a testamentary trust? Such a condition subsequent probably is void. Or would there be no present delivery of the deeds with no present creation of a tenancy by the entirety, the deeds to become effective only on the parol condition precedent that no testamentary trust

7. See note 1 *supra*.
8. 293 S.W.2d 396 (Mo. 1956).
9. 350 Mo. 1235, 1244, 170 S.W.2d 387, 391 (1943).

be executed thereafter? In such a case probably there is no effective delivery of the deeds at any time.[10]

It is a matter of common experience that many deeds are executed for stopgap purposes. In many cases a simple instrument is executed with the intention of replacing it with a more complex instrument, as was alleged in the principal case. In some cases an attorney in fact may execute a deed pursuant to a power of attorney, with the intention that it be replaced by a deed executed thereafter by the principal. In most cases, if the second instrument is never executed, the first is recorded; and if the second instrument is executed, it is recorded and the first instrument is destroyed; and in most cases the alternative instrument does not appear of record, no one raises any question, and the potential problem of conditional delivery becomes moot. The exceptional case of conditional delivery that does get into litigation presents very difficult problems of fact and of law.

Restrictive Covenants—Preventing Use of Land for Business Purposes

In *Shepherd v. Spurgeon*[11] a grantor conveyed a 300-acre farm reserving, however, one acre for 100 years. The balance of the tract, 299 acres, was restricted as follows: "As part of the consideration hereof it is agreed that no building, booth, or enclosure within the lands herein conveyed shall ever be used for business purposes, and none shall be erected or leased for such purpose." The Missouri Supreme Court held that this covenant prohibiting the use of the land for any business purposes whatsoever was void on the grounds that it tended to create a monopoly, was in general restraint of trade, and was contrary to public policy. The problem raised by this case is the subject of an able comment by Louis F. Cottey in a recent issue of the *Missouri Law Review*,[12] in which Mr. Cottey examines Missouri and other authorities, and distin-

10. On the problem of the conditional delivery of deeds where an escrow is not used, see Ballantine, *Delivery in Escrow and the Parol Evidence Rule*, 29 Yale L.J. 826, 833-840 (1920) (this article deals both with conditional deliveries in escrow and conditional deliveries not in escrow; the cited pages deal with the latter problem); 3 American Law of Property § 12.66 (1952); McCleary, *Some Problems Involved in Conditional Deliveries of Deeds*, 43 U. Mo. Bull. L. 5-9 (1931) (this article deals principally with deliveries in escrow and is the best law review discussion of that problem; the cited pages are helpful on conditional deliveries not in escrow).

11. 291 S.W.2d 162 (Mo. 1956).

12. Cottey, *Public Policy and the Restricted* [sic] *Covenant Preventing the Use of Land for Business Purposes*, 22 Mo. L. Rev. 304-313 (1957).

guishes the residential subdivision cases where restrictive covenants against business are valid and enforceable.

RESTRICTIVE COVENANTS—LIMITATION AFTER BREACH, FIVE OR TEN YEARS

McLaughlin v. Neiger,[13] an appeals case, involved a residential subdivision restrictive covenant prohibiting any business use. It was held that section 516.010, Missouri Revised Statutes (1949), the ten year basic limitation statute on real estate actions, applies, and not the five year section on contracts, section 516.120, Missouri Revised Statutes (1949). The case is fully analyzed by William O. Welman in a recent issue of the *Missouri Law Review*.[14]

CONSTRUCTION AND INTERPRETATION OF LIMITATIONS—"AND HIS HEIRS" AS WORDS OF PURCHASE AND NOT AS WORDS OF LIMITATION—"AND" AS MEANING "OR"

In re Yeater's Estate[15] held that the words "and their heirs" as used in a particular clause in a will were used as words of purchase to give an estate to the several heirs, and were not used as words of limitation indicating how large an estate the ancestor got. The problem is of the type usually considered by the Missouri Supreme Court, but in this case only personal property was involved and the amount in dispute was such that the court of appeals had jurisdiction.

Testator, who died in 1909, bequeathed all of his estate to his widow for life. Subject to the life estate, the property was divided into four equal parts, one part each to his two sons, Charles and Merritt, absolutely, and one part each to his two daughters, Stella and Laura, for life (in spendthrift trust). He then provided in clause 4: "Upon the death of either of my said daughters, her interest shall pass to the heirs of her body on the attainment of their respective majorities and shall not vest until then, and should she have no such heirs, to her sister and brothers *and their heirs*." (Emphasis added.) The opinion sets out the will in its entirety at pages 583 to 584.

The litigation was over Laura's share. The widow died in 1921. Stella died in 1934, survived by two children who received her one-fourth

13. 286 S.W.2d 380 (St. L. Ct. App. 1956).
14. Welman, *Real Property—Covenants Running With the Land—Statute of Limitations on Action for Breach of Restriction*, 22 MO. L. REV. 227-230 (1957).
15. 295 S.W.2d 581 (K. C. Ct. App. 1956).

as heirs of her body under the express terms of the will. For convenience, these children of Stella will be referred to hereinafter as respondents. Thereafter the two sons, Charles and Merritt, assigned their interest in Laura's one-fourth to the two respondents. Charles died in 1943 survived by the three appellants, his issue. Merritt died in 1951, not survived by issue. Laura, whose share is in litigation, died in 1954, not survived by issue. The problem was whether Charles in 1934 had effectively assigned the remainder interest to the two respondents, so that the three appellants, Charles' issue, would take nothing, the respondents taking all.

The trial court was of the opinion that Charles had an alternative contingent remainder subject to the express condition precedent that Laura be not survived by issue, but not subject to an additional condition precedent that Charles survive Laura. The trial court's view was that *Tapley v. Dill*[16] was applicable.

The court of appeals was of the opinion that the will manifested an intention of the testator that Charles must survive Laura to take. Under this view, the principal case is a case concerned with the *interpretation* of a limitation in accordance with the intention of the testator, and it is not a case of the *construction* of a limitation where the intention cannot be ascertained. The typical constructional problems encountered with reference to future interests arise because the grantor or testator never envisaged the situation that actually arises, and consequently never had any intention to express. Professor Leach states with reference to the construction problem: "Thus it is the task of the court less to find an existent meaning than to supplement a defective imagination."[17] It is important to

16. 358 Mo. 824, 217 S.W.2d 369 (1949). For a detailed analysis of this case see Eckhardt, *Work of Missouri Supreme Court for 1949—Property*, 15 Mo. L. Rev. 376, 387-389 (1950).

Tapley v. Dill would seem to make it clear in Missouri that a condition precedent of survivorship will not be implied simply because a contingent remainder or executory interest is subject to an express condition precedent other than survivorship. This is in accord with the position of Restatement, Property § 261 (1940).

A well-known case implying such a condition precedent of survival is *In re* Coots' Estate, 253 Mich. 208, 234 N.W. 141 (1931); *cert. denied without opinion sub nom.* Delbridge v. Oldfield, 284 U. S. 665 (1931); Note, *Wills—Future Estates—Descendibility of Contingent Remainders*, 29 Mich. L. Rev. 954-956 (1931). The rule of this case was changed by statute.

On this problem see generally: 5 American Law of Property § 21.25 (1952); Simes & Smith, Future Interests § 655 (2d ed. 1956); Simes, Future Interests § 391 (1936); Fratcher, Perpetuities and Other Restraints 354-356 (1955).

17. Leach, Cases on Future Interests 241 (2d ed. 1940). See Gray, Nature and Sources of Law, app. VII, rules of construction, §§ 700-705 (1909); *cf.* Pound, *Spurious* Interpretation, 7 Colum. L. Rev. 379-386 (1907) ("interpretation" of laws and constitutions).

keep in mind this distinction between interpretation and construction in evaluating *In re Yeater's Estate.* Viewed as a case of the interpretation of a unique limitation, the case does not state or create any principle of construction which will be applicable to other cases.[18]

Since the court decided the case on the basis of interpretation and not of construction, it may be useful to indicate in somewhat greater detail than did the court how the intention was discovered.

As interpreted by the court, the limitation in the will created the following interests, insofar as Laura's one-fourth share was concerned and disregarding the trust provisions:

(a) Widow: present life estate (enjoyed by her until her death in 1921);

(b) Laura: vested remainder for life (enjoyed by her from 1921 until her death in 1954);

(c) Heirs of body of Laura: contingent remainder in "fee," subject to condition precedent that there be issue surviving Laura (there were none, and this first contingent remainder fell in);

(d) Stella, Charles, and Merritt: first alternative or substitutional contingent remainder in "fee," subject to the express condition precedent that Laura not be survived by issue, and subject to the *intended* condition precedent of surviving Laura (note that the condition precedent of surviving Laura is intended and not merely construed; none survived Laura, and this first alternative contingent remainder fell in; consequently the 1934 assignment of this interest by Charles and Merritt was of no effect);

(e) Heirs of Stella, Charles, and Merritt: second alternative or substitutional contingent remainder in "fee," heirs taking in place and stead of respective ancestors who fail to survive Laura (two respondents each take one-half of one-half of Laura's one-fourth; three appellants each take one-third of one-half of Laura's one-fourth); and

18. The writer expresses no opinion as to whether the court of appeals correctly viewed the case as one of interpretation and not of construction, and as to whether the court made a correct interpretation. The writer participated in the preparation of the brief for the appellants, and it would be inappropriate for the writer to express here any opinion on these matters. The analysis which follows is only for the purpose of clarifying the theory adopted by the court.

(f) Heirs of testator: defeasibly vested reversion in "fee," following the three contingent remainders (defeated by vesting of contingent remainder next above).

The above analysis is based on the interpretation that "and their heirs" are words of purchase and not words of limitation, and that "and" means "or."

Although the words "and their heirs" are apt words of limitation to indicate an absolute interest in land, ordinarily these words are not so used to indicate an absolute interest in personal property. The internal evidence in the will itself indicates that the words "and their heirs" at the end of clause 4 were not used as words of limitation to indicate an an absolute interest, because in other places where the testator gave absolute interests he did so without using "and their heirs" as words of limitation, viz.: clause 3, bequest of remainder of one-fourth absolutely to Merritt, and bequest of remainder in one-fourth absolutely to Charles, without using words of inheritance; clause 4, bequest of remainder in one-half absolutely to Merritt and Charles as trustees, without using words of inheritance, this being the same clause in which the words in question, "and their heirs," are used at the end of the clause; and clause 7, substitutional gifts absolutely to descendants of children in case children predecease testator, without using words of inheritance. Thus the testator clearly indicated that he knew that words of inheritance (words of limitation) were not necessary to create absolute interests in personal property, and he did not so use them. Consequently when he used the words "and their heirs" he was using these words not as words of limitation to limit an absolute interest in the contingent remaindermen, Stella, Charles, and Merritt, but rather he used them as words of purchase to indicate a class of persons who were to take in the place and stead of Stella, Charles, and Merritt.

It having been concluded that the heirs of Stella, Charles, and Merritt take as purchasers, under what circumstances are they to take in the place and stead of Stella, Charles, and Merritt? The clear but not expressly stated condition precedent to their taking is the failure of Stella, Charles, and Merritt to survive Laura. Consequently the contingent remainder in "fee" in Stella, Charles, and Merritt was subject not only to the express condition precedent that Laura not be survived by heirs of her body, but also to the intended condition precedent that they survive Laura. From this it is apparent that when the testator used the

words "*and* their heirs" he meant "*or* their heirs," *i.e.*, "or their heirs if Stella, Charles, and Merritt predecease Laura."

In addition, the court found a clear intent on the part of the testator "to confine the beneficiaries of his estate to his immediate family, their children and descendants." If the contingent remainder of Stella, Charles, and Merritt were not subject to an intended condition precedent of survivorship, then they could have alienated the interest to anyone.

A draftsman should note that the problems discussed above are not all of the potential problems created by clause 4. They simply are the problems that arose in view of the actual sequence of deaths, births, and survival. Suppose Merritt had survived Laura. Would he take all to the exclusion of the issue of Stella and Charles? Suppose Merritt had died as he did in 1951, but survived by a widow who survived Laura, and suppose that under the law of descent a widow is an heir; does "heirs," the last clause 4, problems which should be anticipated and expressly provided Suppose that one of the heirs had made an assignment. Must an heir also survive Laura? These are some of the potential problems present in clause 4, problems which should be anticipated and expressly provided for by the draftsman.

TAXATION

ROBERT S. EASTIN*

There was not a single decision of the Supreme Court of Missouri during 1956 which the West Publishing Company's digest system classified under the caption of "Taxation," nor were there very many cases on related subjects. In fact, the few cases there are do not justify any elaborate system of classification. Those which are deemed worthy of note are as follows:

The cigarette tax imposed for public school purposes by chapter 149, Missouri Revised Statutes (1955 Supp.), when adopted by vote of the people on referendum, was validly enacted although the original bill was not delivered to the Secretary of State and neither the original bill nor any copy thereof was signed by the Speaker of the House.[1] The provisions of section 30 of article III of the 1945 constitution of Missouri, respecting

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1. Brown v. Morris, 290 S.W.2d 160 (Mo. 1956) (en banc).

the signature of bills by the presiding officer of each of the two houses of the legislature are but directory and the vote of the people in favor of the bill cured the defect. Further, the submission of such a bill to a referendum eliminates any requirement of signature by the Governor.[2]

The $75,000,000.00 of state building bonds voted by the people in January 1956 were validly issued and are valid obligations of the state although authorized by a new section, section 37(a), of article III of the constitution[3] and not precisely in accordance with the previously existing exceptions to the limitation on the power to borrow money contained in section 37 of that article.

A city may pledge the proceeds of on-street parking facilities to pay principal and interest on indebtedness incurred to pay for off-street parking facilities.[4] This particular bond issue contained certain covenants with respect to parking meters and other parking facilities which, under all the circumstances, were held reasonable and not an abrogation of the power of future governing bodies of the city with respect to such matters.

It was not the intention of the legislature to authorize special road districts organized under chapter 233, Missouri Revised Statutes (1949) wholly within organized municipalities and if such a district is so organized it is not entitled to receive the usual four-fifths of the special road taxes levied in the district, as authorized by sections 137.555 and 233.125, Missouri Revised Statutes (1949), but, by virtue of section 233.095, it may receive only one-fourth of four-fifths of the special road taxes so levied in the district.[5]

The court has reiterated that a school bond election cannot be contested, absent express statutory provision therefor.[6] The provisions of section 26(g) of article VI of the 1945 constitution of Missouri are not self-executing and in the absence of a statutory provision for a contest, no such proceeding may be maintained. However, if there is a failure to comply with some mandatory provision of the statute so that the election is wholly void, it may be attacked. Here, the provisions respecting

2. *Ibid.*
3. State *ex rel.* Board of Fund Commissioners v. Holman, 296 S.W.2d 482 (Mo. 1956) (en banc).
4. Petition of the City of Liberty, 296 S.W.2d 117 (Mo. 1956) (en banc).
5. Gladstone Special Road District v. County Court of Clay County, 293 S.W. 2d 351 (Mo. 1956).
6. Wann v. Reorganized School District No. 6 of St. Francois County, 293 S.W. 2d 408 (Mo. 1956).

notice were held to be a sufficient compliance with the statute and the election was not wholly void.[7]

While exceptions are on file and undetermined with respect to a plan of reclamation proposed for a levee district organized under chapter 245, Missouri Revised Statutes (1949) there is no right to levy any special taxes or benefits and the whole plan is inchoate until such exceptions are determined and a final decree rendered. Consequently the provisions of section 245.145, Missouri Revised Statutes (1949) with respect to the abatement of levee district proceedings in certain circumstances do not apply until all exceptions are determined and a copy of the decree is filed in the Recorder's office of the county in which the land is situated.[8]

Torts

GLENN A. MCCLEARY*

Excluding the cases based on the humanitarian doctrine which are treated annually elsewhere in the *Review,* the writer found fifty-one cases decided in 1956 which were predicated on some phase of tort law. Approximately half of these decisions had to do with accidents arising in the use of motor vehicles. The cases arising from railway accidents involve injuries to employees and were brought under the Federal Employers' Liability Act.

At other times the writer has called to the attention of the bench and bar the value of including the *Restatement of Torts* in the research on a problem in this very active branch of the law. Particularly is this so in Missouri where the *Restatement of Torts* is cited in the published cases of this state more times than in any other state, with the exception of California, Pennsylvania and New York.[1]

One of the most interesting cases in the period under review was *Hamilton v. Fulkerson,*[2] in which a wife was entitled to maintain an

7. *Ibid.*
8. McCord v. Missouri Crooked River Backwater Levee District, 295 S.W.2d 42 (Mo. 1956).

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1. AMERICAN LAW INSTITUTE, ANNUAL REPORT, 11 (1957). Also in the fields of agency, conflict of laws, judgments and property have the Missouri courts cited the Restatements with great frequency.
2. 285 S.W.2d 642 (Mo. 1955).

action against her husband for an antenuptial personal tort committed in an automobile accident. The parties were married two days after the accident. The opinion considered the reasons usually assigned for denying to a wife a right of action against her husband and concluded that they did not apply to a cause of action arising prior to the marriage. The case is discussed more fully elsewhere in the *Review*.[3]

I. NEGLIGENCE

A. *Duties to Persons in Certain Relations*

1. Possessors of Land

A "bridge" of loose overlapping boards across a foundation excavation in a building project was held, in *Patterson v. Gibson*,[4] not to be inherently dangerous. This holding precluded the plaintiff, a child between four and five years of age, from recovering under the theory of attractive nuisance or enticing trap. The opinion reviews the Missouri cases based on the attractive nuisance theory and shows the limited application of the doctrine. There is dictum to the effect that the result in the instant case would also be reached where loose boards are left across the rafters and joists in any uncompleted building frequented by curious children. The opinion observes that some hazards are presented in most construction work to workmen and to those who intrude on the premises.

In *Nastasio v. Cinnamon*,[5] an action for wrongful death, the trial court had dismissed the amended petition of the plaintiff for failure to state a cause of action under the rescue doctrine. The deceased husband of the plaintiff was a regular member of the city fire department. While off duty, he responded to a fire alarm and entered the burning building owned by the defendants for the purpose of rescuing tenants. It was held that the rescue doctrine contemplates a voluntary act where there was no duty in the sense of a legal obligation or in the sense of a duty by virtue of one's employment. In connection with the deceased fireman's rescue activities, the court stated, "In other words, to 'rescue' persons

3. 22 Mo. L. REV. 216 (1957).
4. 287 S.W.2d 853 (Mo. 1956).
5. 295 S.W.2d 117 (Mo. 1956). Judge Westhues, in a dissenting opinion, reaffirms the position which he took in the companion case of Anderson v. Cinnamon, 282 S.W.2d 445 (Mo. 1955) (en banc), as to the duty owed by possessors to firemen who are injured on the premises from dangers known to the possessor and where the possessor had an opportunity to warn.

imperiled by fire was his business . . ."[6] Therefore, the off-duty fireman who responds to a fire alarm has only the status of a licensee on the premises, the same as that of an on-duty fireman.[7]

2. Carriers

Heppner v. Atchison, Topeka and Santa Fe Ry.[8] is an interesting case because of the unusual consequences flowing from a negligent act. A rear brakeman received injuries to his head and to the small of his back when the caboose of defendant's freight train, in which he was riding, was given an unusual and sudden jerk which caused him to strike his head against the window in the cupola of the caboose. The medical testimony was held sufficient from which a jury could reasonably have found that the blow to the head caused an abscess to the brain, and that the blow to the back activated a pre-existing dormant cancerous condition in the adrenal gland and caused it to spread and become manifest in the brain abscess, and that these cancerous conditions caused the death.[9]

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6. Nastasio v. Cinnamon, *supra* note 5 at 121.

7. The relationship between a window washer and an owner of the building as to dangers from a canopy blocking the light from the window sill, from which window the washer's foot slipped because the sill was dark and difficult to see, is treated in Dixon v. General Grocery Co., 293 S.W.2d 415 (Mo. 1956).

8. 297 S.W.2d 497 (Mo. 1956).

9. Most of the cases involving the liability of railroads were for injuries received by employees and were brought under the Federal Employers' Liability Act. They presented only the more common types of fact situations. In Boyd v. Terminal R.R. Ass'n of St. Louis, 289 S.W.2d 33 Mo. 1956), a switchman had mounted to the top of a freight car to signal another train which appeared likely to collide with the switchman's train. When a collision appeared imminent, the switchman jumped sustaining the injuries complained of. It was held that the movement of the other train was the proximate cause of the injuries received, even though he would not have been injured had he remained on the freight car. His act in attempting to stop the movement of an approaching train was not an effort to save property but was done by one in charge of a train in the performance of his duties.

Cleghorn v. Terminal R.R. Ass'n of St. Louis, 289 S.W.2d 13 (Mo. 1956), was a switchman's action for injuries sustained when, at night, he tripped on a black switchstand in the railroad yard. The action was brought on the theory that the employer failed to provide a safe place to work by not illuminating or marking the switchstand in some manner. Held, a jury question.

The duty of a railroad fireman to keep a lookout laterally from the train was held, in Scott v. Terminal R.R. Ass'n of St. Louis, 291 S.W.2d 859 (Mo. 1956), not to extend to porches which are located on a street running along the railroad right of way, and on which children are sitting or playing. There was no evidence that the five year old child, who lost a leg when allegedly run over by the defendant's train, was on the tracks ahead of the locomotive where he could have been seen by the engine crew.

The employer was found to be negligent in failing to provide a reasonably safe place for a car repair employee to work, for injuries sustained when he stepped on a metal bolt or pin and fell on the concrete runway in the repair yard while engaged in repairing a freight or tank car. Howard v. Missouri Pacific R.R., 295 S.W.2d 68 (Mo. 1956).

In an action against a bus company for injuries suffered by a passenger, where the bus which had stopped approximately ten feet from the curb to discharge passengers on a busy street was struck in the rear by a truck, thereby causing the passenger to fall from the step of the bus to the street, a submissible case of negligence was made in *Dickerson v. St. Louis Public Service Co.*[10] The St. Louis Court of Appeals had held that the truck constituted an "intervening efficient and proximate cause." In distinguishing a concurring or contributing cause from a sole or intervening cause, the supreme court affirmed the judgment for the plaintiff in the trial court in holding that the driver of the bus, in stopping with its left side near the middle of the street and thus completely obstructing the main traffic line, should reasonably have considered the probability of injury, not only from careful drivers of other vehicles, but also from negligent drivers.

Assuming, for the purpose of testing the sufficiency of a petition, that the streetcar company did provide and maintain the safety zone in the public street, where the plaintiff was standing for the purpose of boarding a streetcar when she was struck by an automobile, and assuming further that plaintiff was a business invitee of the streetcar company, it was held in *Hiltner v. Kansas City Public Service Co.*,[11] that she could not recover from the streetcar company in the absence of an allegation in the petition that the danger from autombiles driving through the zone was a concealed or hidden danger, of which the plaintiff was unaware, and that the streetcar company failed to warn plaintiff that the safety zone was not in a reasonably safe condition.

3. Automobiles

In an action by an automobile passenger for injuries received in a two-car collision, an instruction authorizing a verdict for the plaintiff if the defendant drove his vehicle "at a high and excessive rate of speed, under the circumstances, to-wit: In excess of 45 miles per hour" was held prejudicially erroneous, in *Glowacki v. Holste*,[12] as invading the province of the jury by indicating that a particular rate of speed was excessive as a matter of law. Nor did this fall within the harmless error rule of conjunctive submission where separate negligent acts are sub-

10. 286 S.W.2d 820 (Mo. 1956) (en banc).
11. 293 S.W.2d 422 (Mo. 1956).
12. 295 S.W.2d 135 (Mo. 1956).

mitted,[13] as that rule does not apply in a situation where one of the grounds of negligence is submitted under an erroneous statement as to the applicable substantive law [14]

4. Municipal Corporations

In *Hiltner v. Kansas City*,[15] the plaintiff brought an action against the city and the streetcar company for injuries received when she was struck by an automobile while she was standing within a streetcar safety zone for the purpose of boarding a streetcar operated by the Public Service Company. The petition charged the city with the negligent maintenance of the streetcar safety zone. The action of the trial court in dismissing the petition was affirmed on the ground that the establishment of a safety zone, setting aside a portion of the street for the exclusive use of pedestrians, was a regulation of traffic, both vehicular and pedestrian, in performance of its governmental function. The court recognized that "Every safety zone is an obstruction of the street to a certain degree. That is its purpose. But as long as the obstruction has as its purpose, and is a reasonable device for the regulation of traffic, the city is not liable for its creation and maintenance, even though in doing so it may be negligent."[16] This case was distinguished from those establishing a city's liability in tort for its failure to maintain streets in a reasonably safe condition where the obstruction or dangerous defect was not an instrumentality used solely for the direction of traffic, or the defect did not pertain to the use of the instrumentality in directing traffic.[17]

5. Humanitarian Negligence

The cases based upon the humanitarian doctrine are treated separately in each volume of the *Review* by Mr. Becker.[18] Due to the signifi-

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13. See Palmer v. Lasswell, 287 S.W.2d 822 (Mo. 1956), where an instruction submitting several charges of contributory negligence in the conjunctive was held not reversible error although one of the assignments of negligence was not supported by evidence.

14. Glowacki v. Holste, *supra* note 12. The other automobile cases involved only routine problems.

15. 293 S.W.2d 422 (Mo. 1956).

16. *Id.* at 425.

17. As to the liability of the streetcar company in this case, see text at note 11 *supra*.

18. A separate article on the humanitarian doctrine did not, however, appear in the 1957 volume (vol. 22) of the *Review*. It is contemplated that an article on this topic written by Mr. Becker will appear in the January 1958 issue. (Editor's footnote.)

cance of the doctrine to Missouri lawyers, it has been thought that these decisions should receive special emphasis.

B. *Defenses in Negligence Cases*

It is usually said that the standard applied in determining contributory negligence in the case of a child differs from the standard applied in the case of an adult. The age, intelligence and experience of the child are taken into consideration by the jury in determining whether the child measured up to the standard required under the particular circumstances.[19] However, in *Wilson v. Shumate*,[20] the court held that section 304.010, Missouri Revised Statutes (1949), providing that "every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care. . . ." makes no exception to the all-inclusive words "every person." Consequently, an instruction was reversibly erroneous which permitted the jury to consider the plaintiff's "age, her intelligence and discretion" in determining whether the plaintiff exercised that degree of care that a very careful and prudent person would ordinarily have exercised under the same or similar circumstances.[21]

II. False Arrest and Imprisonment

In *Frank v. Wabash R.R.*,[22] a private watchman of the defendant had been licensed by the Board of Police Commissioners of St. Louis and had arrested the plaintiff and four other boys without a warrant for the commission, in the watchman's presence, of a misdemeanor of throwing sticks and rocks at passing passenger trains. In an action for false arrest and imprisonment it was held that by virtue of the license the watchman was authorized to make an arrest in this location under the same circumstances as would a member of the police force of the city of St. Louis.

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19. In Cathery v. DeWeese, 289 S.W.2d 51 (Mo. 1956), a 17-year-old farm hand lost a leg while operating a hay baler. There the court held (page 51) that "An allegedly resourceful seventeen year old farmhand with a ninth grade education was not to be adjudged by standards of care applicable to an adult, after a mere three weeks' use of hay baler."

20. 296 S.W.2d 72 (Mo. 1956).

21. Other cases of contributory negligence which may be noted: In an action by an automobile guest against the host for injuries sustained when the host went to sleep and ran into a parked vehicle, wherein the host contended that the guest was contributorily negligent in going to sleep against the host's shoulder, so that he was unable to avoid running into the parked vehicle after he awoke, the evidence was sufficient to authorize an instruction on contributory negligence. La Fata v. Busalaki, 291 S.W.2d 151 (Mo. 1956).

TRUSTS AND SUCCESSION

WILLIAM F. FRATCHER*

Probably the most important decision of the year was that in *Thomson v. Union National Bank in Kansas City*,[1] relating to termination of trusts and deviation from the terms of trusts. Testator died in 1917, survived by his wife and three sons, aged nine, seven and six. His will, executed in 1913, bequeathed his estate, consisting mainly of personal property, to a trustee, with authority to retain existing investments, but with a direction that any reinvestment should be in bonds approved for investment by New York or postal savings banks. The will directed the trustee to pay the income to the widow during her lifetime and, upon her death, to divide the corpus into as many shares as they had children. Any child who had reached the age of forty at his mother's death, was to receive his share of the corpus then; any child who had not, was to receive his share of the corpus on reaching forty. If a child predeceased the mother before reaching forty, his share was to be distributed to his issue after the mother's death and after the time when that child would have reached forty if living. Due to the restriction on investments, the income declined seriously. The widow and the three sons, all of whom

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Although a motorist at night runs into the side of a train at a grade crossing it is not contributory negligence as a matter of law where the motorist's evidence was that the crossing signal lights were not working. Although the failure of the flasher lights to operate would not relieve the motorist of all duty to look ahead of him as he approached and went up the crossing, yet the fact that the flasher lights were not working amounted to an assurance that he could go upon the crossing in safety, and he would be required to look and listen only with the vigilance of a motorist approaching the crossing in the exercise of due care under the same or similar circumstances. Davis v. Illinois Terminal R.R., 291 S.W.2d 891 (Mo. 1956).

In an action for injuries as a result of electric shock, occurring when a pump being removed by the plaintiff and her husband from a well in the well house near their farm home came in contact with defendant electric cooperative corporation's uninsulated high tension wires leading from its high tension line to a transformer pole near the well house, contributory negligence as a matter of law was established in failing to take precautions to prevent contact of the pump with the wire. The court distinguished this situation (page 16) from cases "where the injured person came in bodily contact with electric wires in populous areas and at public places or at places and under circumstances where defendant knew, or in the exercise of proper care should have known, that persons rightfully transacting business thereat were likely to come in bodily contact with the wires." Hamilton v. Laclede Electric Cooperative, 294 S.W.2d 11 (Mo. 1956).

22. 295 S.W.2d 16 (Mo. 1956).

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1. 291 S.W.2d 178 (Mo. 1956), motion for rehearing or to transfer to court en banc denied June 11, 1956; criticized, Sparks, *Future Interests*, 32 N.Y.U.L. REV. 419, 430 (1957). Commissioner Bohling dissented as to deviation.

were over forty, sued to compel termination of the trust or, in the alternative, for permission to deviate from the restrictions on investment. A decree denying both forms of relief was affirmed. The court held that, although the plaintiffs were the sole beneficiaries of the trust, they were not entitled to terminate it prematurely because that would defeat a material purpose of the trust. It refused to permit deviation on the ground that there had not been sufficient economic or other change since 1913 to warrant violation of the restrictions on investments, even though the types of investments authorized had declined during that period in income production from 5½ or 6 per cent to 3 per cent or less.

In England, if all the beneficiaries of a trust are of full age and sound mind, they are entitled to terminate the trust by compelling the trustee to convey to them even though such termination will defeat a material purpose of the trust.[2] This rule is an aspect of the broader basic doctrine of the common law that restraints on the alienation, management and use of property by its beneficial owner are never valid when imposed solely for the benefit of the owner himself.[3] In short, English law will not tolerate the subjection of a sane adult to involuntary guardianship.[4]

During the latter part of the nineteenth century the Supreme Judicial Court of Massachusetts overturned both the basic doctrine and the rule as to termination based on it, by holding, first, that provisions of a trust instrument could effectively prohibit a life beneficiary from alienating his interest[5] and, later, that even though the terms of the

2. Saunders v. Vautier, Cr. & Ph. 240, 41 Eng. Rep. 482 (1841). Under mediaeval law a cestui que use could compel the feoffees to uses to convey to him, so terminating the use. BACON, READING UPON THE STATUTE OF USES 10 (1600). See Anonymous, Y.B. Trin. 37 Hen. VI, pl. 23 (1459). The English courts recognized one exception to this rule: the interest of the beneficiary of a trust for the separate use of a married woman could be made inalienable and she could be effectively prohibited from terminating the trust. Jackson v. Hobhouse, 2 Mer. 483, 35 Eng. Rep. 1025 (1817). The restraints on alienation and termination were effective, however, only while the beneficiary was married, ceasing upon her husband's death. Barton v. Briscoe, Jac. 603, 37 Eng. Rep. 978 (1822). The exception was abolished and all such restraints made invalid by the statutes 25 & 26 Geo. V, c. 30 § 2 (1935) and 12, 13 & 14 Geo. VI, c. 78 § (1) (1949).

3. Anonymous, Jenk. 20, pl. 37, 145 Eng. Rep. 15 (1347); Anonymous, Y.B. Pasch. 24 Edw. III, pl. 29 (1350); Yelverton, J. in Anonymous, Y.B. Hil. 21 Hen. VI, pl. 21 (1443); Hussey, C. J. in Anonymous, Y.B. Hil. 8 Hen. VII, pl. 3 (1493); Brandon v. Robinson, 18 Ves. Jr. 429, 34 Eng. Rep. 379 (1811).

4. For a forceful argument in favor of the English view, see GRAY, RESTRAINTS ON ALIENATION, Preface (2d ed. 1895).

5. Broadway National Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504 (1882). Such provisions are uniformly held to deprive the beneficiary of the power to compel premature termination of the trust. 3 SCOTT, TRUSTS § 337.2 (2d ed. 1956).

trust did not restrain alienation by the beneficiary, they could effectively prohibit his compelling premature termination of the trust.[6] Most American jurisdictions have followed the lead of the Massachusetts court. By the great weight of authority in this country, the beneficiaries of a trust, although of full age and sound mind, may not compel its termination if that would defeat a material purpose of the trust.[7] In 1888 the Missouri Supreme Court adopted the Massachusetts view that prohibitory restraints on alienation of the interest of a life beneficiary of a trust are valid.[8] As late as 1904, however, the court adhered to the English view that if the beneficiaries of a trust are of full age and sound mind they are entitled to compel its termination even though that would defeat a material purpose of the trust.[9] A 1931 decision appeared to adopt the Massachusetts rule as to termination, commonly known as the *Claflin* rule, but did not make it wholly clear that it had done so.[10] The decision under discussion makes it abundantly clear that, in Missouri, the beneficiaries of a trust are not entitled to compel its termination if that would defeat a material purpose of the trust. Those who feel that the English common law doctrine is an important aspect of Anglo-Saxon emphasis on the dignity and liberty of the individual will not welcome this definitive pronouncement.

The purported purpose of the *Claflin* rule is to carry out the intention of the settlor but, because it is only a rule depriving the beneficiaries of the power to *compel* the trustee to terminate the trust, it does not effectively accomplish this purpose except in the rare case where the trustee chooses, for sentimental reasons, to abide by the settlor's manifestation of intention. In the absence of spendthrift restraints on alienation, if the trustee *willingly* conveys the trust property to the benefi-

6. Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454, 3 L.R.A. 370, 14 Am. St. Rep. 393 (1889).

7. 3 SCOTT, TRUSTS §§ 337, 337.1, 337.2, 337.3 (2d ed. 1956).

8. Lampert v. Haydel, 96 Mo. 439, 9 S.W. 780, 2 L.R.A. 113 (1888). This is commonly known as the spendthrift trust doctrine. In Bixby v. St. Louis Union Trust Co., 323 Mo. 1014, 22 S.W.2d 813 (1929), the court went to the shocking extreme of holding that a sane adult could be deprived by the will of another not only of his power to alienate his own property but of his power to bind himself by contract. This means, in effect, that a person may be declared *non compos mentis* without a hearing.

9. Peugnet v. Berthold, 183 Mo. 61, 81 S.W. 874 (1904); *accord,* Dado v. Maguire, 71 Mo. App. 641 (St. L. Ct. App. 1897); Rector v. Dalby, 98 Mo. App. 189, 71 S.W. 1078 (K. C. Ct. App. 1903).

10. Evans v. Rankin, 329 Mo. 411, 44 S.W.2d 644 (1931); *accord,* Hamilton v. Robinson, 236 Mo. App. 289, 151 S.W.2d 504 (St. L. Ct. App. 1941) (expressly overruling Dado v. Maguire, note 9 *supra,* and adopting the Claflin rule).

ciaries, the trust is terminated even though its material purposes are thereby defeated.[11] The real effect of the *Claflin* rule is to enable the trustee to set its own price for consent to termination. It may not be merely a coincidence that the rise and spread of the *Claflin* rule has been contemporaneous with the rise and spread of trust companies, engaged in the business of administering trusts for profit, which do not like to be deprived of their anticipated fees. Despite the fact that the principal real effect of the *Claflin* rule is to protect professional trustees rather than settlors and beneficiaries, it is generally held that the interest of the trustee in its compensation is not such a material purpose of the trust as will deprive the beneficiaries of their power to compel termination.[12] Moreover, it is well established that if the only purpose of a trust for successive beneficiaries is to preserve the principal of the trust estate during the life of the income beneficiary so that it may ultimately be enjoyed by the remainderman, termination will not defeat a material purpose of the trust within the meaning of the *Claflin* rule.[13] In the case under discussion, the desire of the testator to postpone distribution to his sons until they reached forty was, no doubt, a material purpose of the trust. That purpose had been accomplished, for the sons were all over forty when the suit was commenced. The will, so far as quoted by the court, did not manifest any other purpose in creating the trust than to enable the beneficiaries successively to enjoy the property. That purpose does not prevent compulsory termination under the *Claflin* rule. Hence the decision in *Thomson* appears to extend the *Claflin* rule beyond its generally accepted limits.

In the instant case the court held that the provisions of the trust did not violate the common law Rule Against Perpetuities as a rule against remoteness of vesting. The court failed to consider the now rather well-established collateral rule that provisions of a trust instrument restraining termination under the *Claflin* rule for a period which may exceed lives in being and twenty-one years are void.[14] The *Thomson*

11. Partridge v. Clary, 228 Mass. 290, 117 N.E. 332 (1917); 3 SCOTT, TRUSTS § 342 (2d ed. 1956).

12. 3 SCOTT, TRUSTS § 337 (2d ed. 1956).

13. 3 SCOTT, TRUSTS § 337.1 (2d ed. 1956).

14. *In re* Ridley, 11 Ch. D. 645 (1879); Whitby v. Mitchell, 42 Ch. D. 494 (1889), *aff'd* 44 Ch. D. 85 (C.A. 1890) (these English cases relate to the trusts for married women mentioned in note 2 *supra*); Southard v. Southard, 210 Mass. 347, 96 N.E. 941 (1911); Throm Estate (No. 2), 378 Pa. 163, 106 A.2d 815 (1954); RESTATEMENT, TRUSTS, SECOND § 62, comment *k* (3) (Tent. Draft No. 3, 1956); 3 SIMES & SMITH, LAW OF FUTURE INTERESTS § 1393 (2d ed. 1956); 1 SCOTT, TRUSTS § 62.10 (2d ed. 1956);

will purported to restrain termination until the testator's sons would have reached forty if living, even if they died more than twenty-one years before that time. This restraint clearly might have continued for longer than lives in being and twenty-one years.

A court of equity may authorize the trustee of a private trust to deviate from some of its terms when, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat the purposes of the trust.[15] The Missouri Supreme Court has previously made liberal exercise of this power.[16] Directions in a trust instrument as to trust investments which have become obsolete because of a change in economic conditions are typical of the restrictions from which deviation is commonly permitted. The Thomson will became effective in 1917. It prescribed a limited category of bonds as permissible trust investments. These were the acceptable trust investments of that period. It is common knowledge that inflation, declining interest rates, the federal income tax and changes in the economic structure of the country have made vast changes in the investment market. The Missouri Supreme Court has recognized the fact that these changes have altered the permissible types of trust investments when the provisions of the trust instrument impose no restrictions.[17] Other courts, confronted with provisions similar to those of the Thomson will, have permitted deviation from them under like facts.[18] It may be that if the remaindermen had opposed deviation, it could properly have been denied. But here the remaindermen, mature adults, one of whom was a trust officer of a national bank, were seeking permission to deviate. The refusal of the court in this case to permit the beneficiaries to protect their income and property against declining interest rates and inflation seems unreasonably illiberal. Moreover, as in the case of the application of the *Claflin* rule, it could not really compel the carrying out of the settlor's manifested intention. As both the life beneficiary and the remaindermen sought deviation, the trustee could

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Brownell, *Duration of Indestructible and Spendthrift Trusts,* 23 CORNELL L.Q. 629 (1938); Morray, *The Rule Against Prolonged Indestructibility of Private Trusts,* 44 ILL. L. REV. 467 (1949).

15. 2 SCOTT, TRUSTS § 167 (2d ed. 1956).

16. *E.g.,* Seigle v. First National Company, 338 Mo. 417, 90 S.W.2d 776, 105 A.L.R. 181 (1936).

17. Rand v. McKittrick, 346 Mo. 466, 142 S.W.2d 29 (1940); *accord,* St. Louis Union Trust Co. v. Toberman, 235 Mo. App. 559, 140 S.W.2d 68 (St. L. Ct. App. 1940). See Torrance, *50 Years of Trust Investment,* 93 TRUSTS & ESTATES 250 (1954).

18. Citizens' National Bank v. Morgan, 94 N.H. 284, 51 A.2d 841, 170 A.L.R. 1215 (1947); St. Louis Union Trust Co. v. Ghio, 222 S.W.2d 556 (St. L. Ct. App. 1949), noted, 16 Mo. L. REV. 333 (1951).

deviate from the terms of the trust, with their consent, with impunity.[19] The only real effect of the court's refusal to authorize deviation was to put the trustee in a position to bargain for additional fees as the price of its willingness to reinvest in securities appropriate under current market conditions.

The decision in *Thomson* would seem to be unsound and undesirable with respect to both termination and deviation. It is to be hoped that the court will overrule it as to both points at the earliest opportunity.

Next in importance to the decision in *Thomson* was that in *Ridenour v. Duncan*.[20] Testatrix died March 18, 1949 survived by her husband, her son Earl, and the plaintiffs, who were children of her deceased son Earnest. Her will devised her property to her sons by a prior marriage, Earl and Earnest. The court found that, at the time of her death, Fults held title to an apartment house on resulting trust for testatrix. The day after her death Fults conveyed the property to Earl and his wife pursuant to prior oral instructions of the testatrix. Earl and his wife employed a real estate agent to sell the property. On March 28, 1949 it was sold and conveyed to the defendant, Mrs. Herod, who paid half the price in cash and half by a promissory note secured by deed of trust. Mrs. Herod did not know of testatrix's interest in the property but did know that testatrix's husband occupied one of the apartments. Testatrix's husband sued to establish a dower interest in the property. In consideration of $200.00 paid by Earl, the husband quitclaimed his interest to Mrs. Herod on September 20, 1949. Thereafter plaintiffs sued to establish a one-half interest in the property as devisees of testatrix. A decree for plaintiffs was affirmed on the ground that, when Mrs. Herod obtained the conveyance from testatrix's husband, she held half the interest so conveyed for the benefit of plaintiffs.

It is well established, at least when they are co-heirs or co-devisees, that when one of several tenants in common purchases an encumbrance on the whole title or a title which is adverse to all the co-tenants, he must share the benefit of his purchase with the others, they contributing their shares of the cost.[21] Missouri, while applying this doctrine fully as to

19. Scullin v. Clark, 242 S.W.2d 542, 29 A.L.R.2d 1024 (Mo. 1951); 2 SCOTT, TRUSTS § 216 (2d ed. 1956).

20. 291 S.W.2d 900 (Mo. 1956), motions for rehearing or to transfer to court en banc denied July 9, 1956.

21. Hinters v. Hinters, 114 Mo. 26, 21 S.W. 456 (1893); Annot., 54 A.L.R. 874 (1928).

tax and other wholly adverse titles, follows a minority rule which qualifies the doctrine by permitting a co-tenant, under some circumstances, to buy at mortgage foreclosure sale without sharing with his co-tenants.[22] It has been held, in Missouri and elsewhere, that the purchase by a tenant in common of the share of one of his co-tenants is not the purchase of an outstanding claim of title against the joint interests, within the meaning of the doctrine, and therefore such a purchaser may retain the whole benefit of his purchase.[23] Similarly, it has been held that a co-tenant in remainder may purchase a life estate in the whole without being accountable to his co-remaindermen.[24] Thus the question involved in *Ridenour v. Duncan* was whether the interest conveyed to Mrs. Herod by the husband's quitclaim deed of September 20, 1949 was a title or encumbrance adverse to the whole title of the co-tenants or merely the interest of one of several co-tenants.

The Missouri statutes then in force gave the surviving husband, in lieu of curtesy, the same share in the real estate of his deceased wife that a widow has in the real estate of her deceased husband.[25] The statutes entitled a widow to "be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seized of an estate of inheritance, . . . to hold and enjoy during her natural life."[26] Like common law dower, this interest could not be cut off by the will of the deceased spouse.[27] As in the case of common law dower, the statutes did not contemplate that the surviving spouse should continue as a tenant in common with the heirs or devisees of the deceased spouse; his third was to be assigned to him in severalty.[28] Hence the question in *Ridenour* was whether the husband's unassigned statutory dower was a title adverse to that of the devisees or merely an estate held in co-tenancy

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22. Bragg v. Ross, 349 Mo. 511, 162 S.W.2d 263 (1942); Annot., *supra* note 21 at 892-894.

23. Snell v. Harrison, 104 Mo. 158, 16 S.W. 152 (1891); Annot., *supra* note 21 at 905-907.

24. Annot., *supra* note 21 at 909-910.

25. Mo. Rev. Stat. (1949) § 469.020.

26. Mo. Rev. Stat. (1949) § 469.010. It is significant for the case under discussion that this statutory dower, unlike common law dower, extends to land held on trust for the deceased spouse.

27. Mo. Rev. Stat. (1949) § 468.140.

28. Galbraith v. Fleming, 60 Mich. 408, 27 N.W. 583 (1886). See Brannock v. Magoon, 216 Mo. 722, 728, 116 S.W. 500, 502 (1909). It was deemed a chose in action. 1 Coke, Institutes 32 b (1628). It could be released, but a release would inure to the benefit of all the heirs or devisees.

with them for the purposes of the purchase of adverse title doctrine. This specific question could not have arisen at common law because, at common law, unassigned dower was inalienable.[29] A Missouri statute expressly permitted transfer of unassigned dower.[30] It could be argued that this statute converted unassigned dower from a mere chose in action, an encumbrance on the land, to an estate held in co-tenancy with the heirs or devisees. There is dictum in an earlier opinion of the court to the effect that the statute did not have this effect; that a transferee of unassigned dower had only a chose in action, not an estate.[31] The decision in *Ridenour* would seem to confirm that dictum.

Intestate Descent and Distribution

Vreeland v. Vreeland[32] involved an important question of the inheritance rights of adopted children and their descendants. After decedent and his brother, Edgar, were born, their parents were divorced. Their father remarried and had a son, John. Their mother remarried and, with her second husband, adopted a daughter, Mary, in 1924. Mary predeceased decedent, survived by a son, Harold. Decedent died intestate in 1952. The circuit court decided that Edgar was entitled to two-thirds of the estate and John to one-third. Reversed. Held: Edgar was entitled to one-half and John and Harold to one-quarter each. Adoptive children may inherit from collaterals of the adoptive family under the adoption law of 1917, which governed. That act provided, "Said child . . . shall be capable of inheriting from, and as the child of said parents as fully as though born to them in lawful wedlock."[33] As reenacted in 1947,[34] the section contains the same language. Although not significant in this case, the view of the court that the rights of inheritance of adopted children are governed by the law in force at the date of adoption rather than that in force at the time of the decedent intestate's death, may be of considerable importance in other cases.

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29. See note 28 *supra.*

30. Mo. Rev. Stat. (1949) § 469.060, Phillips v. Presson, 172 Mo. 24, 72 S.W. 501 (1903). The statutory section referred to in this note and those cited in notes 25-27, *supra*, were repealed by the Missouri probate code, effective January 1, 1956, saving accrued rights. Mo. Laws 1955, p. 390 § 1.

31. Brannock v. Magoon, 216 Mo. 722, 730, 116 S.W. 500, 503 (1909).

32. 296 S.W.2d 55 (Mo. 1956).

33. Mo. Laws 1917, p. 194, § 1677.

34. 2 Mo. Laws 1947, p. 217, § 9614; Mo. Rev. Stat. (1949) § 453.090.

WILL CONTESTS

Blatt v. Haile[35] approved rigorous enforcement of a harsh rule of procedure in will contests. Section 468.580 of the Missouri Revised Statutes (1949) (since superseded by section 473.083, Missouri Revised Statutes (1955 Supp.)) provided that a contestant of a will "shall proceed diligently to secure and complete service of process as provided by law on all parties defendant in any such action; and if service of process shall not be so secured and completed upon all parties defendant, not later than the end of the second term of the circuit court following the term of said court at which said petition was filed, the petition, on motion of any party defendant in said action . . . shall, in the absence of a showing by the plaintiff of good cause for failure to secure and complete such service, be dismissed. . . ." Plaintiff, a resident of Maryland, commenced a will contest on February 10, 1954, claiming, as heir, $40,000.00 of a $261,000.00 estate. The circuit court commenced terms in February, May and November. All defendants were served promptly except a legatee of $500.00 whose address was unknown. Plaintiff executed an affidavit for service by publication on this legatee on March 4, 1954 but, because of the illness of one partner, the death of another, the dissolution of his firm, and extensive travel for another client, her Missouri attorney failed to file the affidavit until February 21, 1955, which was after the end of the second term of court. Dismissal of the petition, with prejudice, was affirmed, the court saying that the circuit court did not abuse its discretion and adding the disturbing, and seemingly inconsistent, statement, "after the lapse of the prescribed period the court has no jurisdiction over the subject matter of the contest." This is visiting the lawyer's sin of omission on his innocent and helpless client with a vengeance.

McCormack v. Berking[36] involved the sufficiency of proof of undue influence. Testatrix executed a will in 1931, during her husband's lifetime, devising two-thirds of her estate to her husband's brother and one-third to her sister. After her husband's death in 1946, defendant, a neighbor, persuaded her to sell him the husband's automobile for a grossly inadequate price. While in the hospital in the fall of 1949 testatrix asked a friendly neighbor not to tell defendant of her illness or give him the

35. 291 S.W.2d 85 (Mo. 1956), motion for rehearing or to transfer to court en banc denied June 11, 1956.

36. 290 S.W.2d 145 (Mo. 1956), motion for rehearing or to transfer to court en banc denied June 11, 1956.

keys to her house because, "if he comes, he would make her do whatever he wanted her to do." Upon testatrix's temporary return to her house, defendant and wife moved in and defendant procured a lawyer who drafted a will giving testatrix's entire estate to defendant. This was executed by testatrix while only defendant, the lawyer and their wives were in the house with her. She was then senile, mortally ill, in pain, and probably under the influence of drugs. Later, in the hospital, she made statements indicating that she thought the 1931 will was still in effect. She died March 1, 1950 and defendant, who had had possession of it, presented the 1949 will for probate the same day. A judgment for contestants of the 1949 will was affirmed on the ground there was enough evidence to warrant the jury finding that contestants had met the burden of proving undue influence.

Detrich v. Mercantile Trust Company[37] was a will contest on the ground of mental incapacity. The will was executed in February 1951. There was evidence that in 1948 decedent was hospitalized for psychosis, cerebral arteriosclerosis and Parkinson's disease and that she then showed permanent brain damage which could not be repaired. The trial court instructed that proponents had a burden of rebutting the presumption of continued incapacity. Judgment for contestants reversed. Held: The presumption of continued incapacity is merely a permissible inference which the jury could, but did not have to, draw.

In *Hursh v. Crook*[38] evidence consisting mainly of a handwriting expert's opinion that the signatures were traced, was held sufficient to support a jury verdict that a will was forged.

Construction of Wills

Zillig v. Patzer[39] involved the application of the pretermitted child statute[40] which gave a child "not named or provided for" in his parent's will a share in the estate as on intestacy. The will of the parties' father, who had seven children, devised his farm and household goods to plaintiff,

37. 292 S.W.2d 300 (Mo. 1956). See Schuler, 290 S.W.2d 192, 196 & n.1 (St. L. Ct. App. 1956) to the effect that whereas in divorce suits the party asserting insanity has the burden of proof, in will contests the proponent has the burden of proving testamentary capacity.

38. 292 S.W.2d 305 (Mo. 1956).

39. 287 S.W.2d 771 (Mo. 1956).

40. Mo. Rev. Stat. (1949) § 468.290. This section was superseded January 1, 1956 by § 260 of the probate code, Mo. Rev. Stat. (1949) § 474.240, which is differently worded.

a daughter, directed that the stock in his rented store be sold at auction and the proceeds divided "between all of you," authorized, if plaintiff married, sale of the farm and division of the proceeds "between all of you," and appointed two sons executors. Decree for defendants, the other children, reversed. Held: A child not named may yet be provided for within the meaning of the statute. The "between all of you" directions provided for all the children, including those not named.

Hereford v. Unknown Heirs, Etc., of Tholozan[41] is an interesting application of the constructional preference for early vesting and early indefeasibility.[42] Testatrix, a childless widow, died in 1877 leaving a will, executed in 1862, by which, after making provision for her brother and sister and the children of a deceased sister, she devised the residue to trustees, without duties, to the use of Adelle Philips, child of a deceased brother, for life, "then for the sole, separate and exclusive use, benefit and behoof of Eulalie Philips only daughter of said Adelle Philips & all other children of said Adelle Philips, if any should be born hereafter, share & share alike, & if the said Eulalie Philips & the other children of said Adelle Philips, if any there should be, shall die, without having married, or without issue living, then the said property" should pass in fee simple to the brother and sisters and their legal representatives. Adelle, who had no additional children, died in 1920. Eulalie, who never married, died in 1950. A decree that Eulalie took a fee simple which became absolute on the death of Adelle was affirmed on the ground that

41. 292 S.W.2d 289 (Mo. 1956) (en banc).

42. An attitude virtually contrary to this well-established and thoroughly sound constructional preference was exhibited by the Kansas City Court of Appeals in *In re* Yeater's Trust Estate, 295 S.W.2d 581 (1956). Testator died in 1909 devising his estate to his wife for life, remainder in four equal parts, one to each of his two sons, the other two to the sons on spendthrift trust for his daughters, Laura and Stella. The will provided, "Upon the death of either of my said daughters, her interest shall pass to the heirs of her body on the attainment of their respective majorities and shall not vest until then, and should she have no such heirs, to her sister and brothers and their heirs." The wife died in 1921. Stella died in 1934, leaving children. Later in 1934 the two sons assigned their interest to Stella's children. Son Charles died in 1943, leaving children. Son Merritt died in 1951 without issue. Daughter Laura died in 1954 without issue. Stella's children claimed the whole remainder under the trust. Decree for them reversed. Held: The interests of the sons in Laura's trust were contingent on surviving her. They having failed to do so, Charles's heirs took by purchase and their rights could not be cut off by their father's assignment.

In this decision the Kansas City Court of Appeals came close to adopting the fallacious doctrine, formerly followed by some courts but now thoroughly exploded, that if a future interest is limited on some other contingency, it is subject to an additional implied contingency of survivorship until it becomes possessory. As to this unfortunate aberration, see FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 354-356 (1955).

the gift over on Eulalie's death without having married was intended to take effect only if she predeceased Adelle, the life tenant.

Zahn v. Martin's Estate[43] dealt with the effect on the remaindermen of a life tenant's power to sell the fee. Testatrix died in 1936, leaving a will by which she devised all her real estate to her husband, "to have and to hold for and during his natural life, or sell and divide the proceeds, to parties as herein stated." A later paragraph provided that her farm and home place were to go at the death of the husband "unless sold and then the proceeds to" plaintiffs. The husband sold the farm and home place in 1943 and mingled the proceeds with his personal assets. He died in 1954. Plaintiffs sued his executrix for the proceeds of these sales. The circuit court entered judgment for the executrix, apparently on the theory that plaintiffs' action was barred by the five-year statute of limitations. The supreme court held that the provisions of the will, when read together, gave the husband a life estate in the proceeds. Consequently, plaintiffs' right to them did not accrue until his death and their claim was not barred by the statute of limitations. The court also held that plaintiffs' interest was not limited to the farm and home place but extended to other lands of the testatrix.

Administration of Estates

In re Petersen's Estate[44] was a proceeding by an executrix against a son of the decedent for discovery of assets, brought under sections 462.400-.440, Missouri Revised Statutes (1949) (since superseded by sections 473.340-.353, Missouri Revised Statutes (1955 Supp.)). The son contended that a note and deed of trust, of which the son was obligor, were given to him by the decedent inter vivos. A judgment for the executrix was affirmed on the ground that the son had a burden, in such a proceeding, of proving the gift by clear, cogent and convincing evidence, which burden he had not met.[45]

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43. 295 S.W.2d 103 (Mo. 1956).
44. 295 S.W.2d 144 (Mo. 1956).
45. See also Edlen v. Tweed, 295 S.W.2d 397 (St. L. Ct. App. 1956), a similar proceeding. Defendant, widow of decedent, admitted taking some of the assets but denied present possession. The circuit court ordered her to turn over the assets or, if she did not have them, pay their value. Defendant contended that a § 462.400 proceeding is not proper if defendant has disposed of the assets before the proceeding is commenced; that trover is the remedy then. Defendant also claimed joint ownership. Reversed. Held: The statutory proceeding may be brought even if the defendant has previously converted the assets. The administratrix having made out a prima facie case of title in the deceased, defendant had the burden of proof of joint ownership, and failed to meet it. However, the judgment in the alternative was erroneous.

Siegel v. Ellis[46] laid down a liberal rule of pleading for claimants against estates. Within one year after the grant of letters to the executrix, claimant served her with a verified notice of his claim founded upon, "Account stated with decedent representing agreed share of proceeds from sale of household appliances $9,876.00." After the year had expired claimant filed an amended claim in the same amount describing in some detail the joint adventure with the decedent to which the account stated related. Judgment for claimant affirmed. Held: "A demand filed in the probate court is not to be judged by the strict rules of pleading. It is sufficient if it gives reasonable notice to the legal representative of the estate of the nature and extent of the claim and is sufficiently specific that a judgment thereon will be res judicata of the obligation upon which it is based. And it is only when the original claim is wholly insufficient that it may not be amended after the limitation period fixed by statute for the filing of claims."

Minor v. Lillard[47] involved a claim against the estate of a decedent for the value of services rendered to decedent over a period of six and one-half years prior to her death, without express agreement as to period or terms of service. During one year of that period no services were rendered. Held: As the services were not continuous for the full period, the five-year statute of limitations applied to part of the claim.[48]

There must be a finding of which assets are still held with an order to return as to those, and a money judgment for the value of those converted as of the date of conversion.

Two other 1956 Missouri appeals decisions, on related questions, are of interest. In Trenton Motor Company v. Watkins, 291 S.W.2d 659 (K. C. Ct. App. 1956) decedent executed a deed of trust which provided that, on sale, the trustee should pay any surplus to her or her legal representative. After her death her son and sole heir gave a second deed of trust to plaintiff. Thereafter the first deed of trust was foreclosed. Decedent's estate had unpaid debts. Held: Decedent's administrator was entitled to the surplus in preference to plaintiff.

In Wimberly v. McElroy, 295 S.W.2d 597 (K. C. Ct. App. 1956) testator died domiciled in California bequeathing his estate, including a promissory note of a Missouri corporation, to his wife and a Kansas City trust company on trust for his parents and others. His father, a resident of Texas, wrote the Public Administrator in Kansas City asking him to secure ancillary administration and letters were issued to the Public Administrator. The widow and executrix petitioned for revocation of these letters. An order revoking them was affirmed by the circuit court. Affirmed. Held: Mo. REV. STAT. (1949) § 466.010 (now § 473.667) permits Missouri ancillary administration of intangible personalty upon the application of a creditor, or a showing by a legatee or executor that a legacy is left to a Missouri resident or corporation. The father's letter was not such a showing.

46. 288 S.W.2d 932 (Mo. 1956), motion for rehearing or to transfer to court en banc denied April 9, 1956.

POUR-OVER TRUSTS

In recent years estate planners have come to favor the pour-over trust as a device for saving at least some of their clients' assets from the greedy maw of the tax gatherer. The client creates an inter vivos trust for his family and puts in it such assets as he can do without during his lifetime. This transaction is taxed at the lower rate of the gift tax rather than the higher rate of the estate tax. By his will the client bequeaths what is left of his assets to the trustee of the inter vivos trust, to be held and administered under the terms of that trust. For the device to function efficiently and economically it is essential that, after the settlor's death, the trust be deemed a single trust, preferably inter vivos, rather than two separate trusts, one inter vivos and the other testamentary. Some courts have gone to considerable lengths to permit the use of this device in the manner intended.[49]

The decision in *State v. Strother*[50] was unfavorable to the efficacy of the pour-over trust device. On May 12, 1950 decedent transferred property to trustees on revocable inter vivos trust. On June 24, 1950 she executed a will devising the residue of her estate to the trustees of the inter vivos trust, to become a part of the trust estate thereof. The probate court admitted the will and the inter vivos trust instrument to probate. Plaintiffs then commenced an action in the circuit court to contest both the will and the inter vivos trust on grounds of fraud and undue influence. The circuit court denied a motion to dismiss those counts relating to the inter vivos trust as such. Relators commenced a proceeding in prohibition in the supreme court to bar the circuit court from exercising jurisdiction as to these counts. The supreme court granted a writ of prohibition as prayed on the ground that, under section 468.580 of the Missouri Revised Statutes (1949) (reenacted, probate code, section 473.083,

47. 289 S.W.2d 1 (Mo. 1956), motion for rehearing or to transfer to court en banc denied April 9, 1956.

48. Other 1956 decisions on claims against decedents estates were: Baker v. Brown's Estate, 294 S.W.2d 22 (Mo. 1956) (allowance of claim for services affirmed); Foster's Estate v. Theis, 290 S.W.2d 185 (St. L. Ct. App. 1956) (probate court has no power to award compensation to attorneys who, while representing will contestants, benefited estate by discovering assets), criticized, Atkinson, *Succession*, 32 N.Y.U.L. REV. 452, 476 (1957); Thrasher v. Allen Estate, 291 S.W.2d 630 (St. L. Ct. App. 1956) (claim for services not fraudulent); Deichmann v. Aronoff, 296 S.W.2d 171 (St. L. Ct. App. 1956) (allowance of claim against estate of illiterate decedent based on a check and notes given by a firm in which decedent was a secret partner affirmed).

49. *In re* York Estate, 95 N.H. 435, 65 A.2d 282, 8 A.L.R.2d 611 (1949); 1 SCOTT, TRUSTS § 54.3, pp. 382-4 (2d ed. 1956).

50. 289 S.W.2d 73 (Mo. 1956), (en banc).

Missouri Revised Statutes (1955 Supp.)) a will contest is in the nature of an appeal from the probate court and cannot be joined with other causes of action.

It ought to be possible to determine the validity of a pour-over trust, as to both its inter vivos and testamentary aspects, in a single suit in equity. If the Missouri statutes do not now permit this, they should be amended to do so.

TRUST ADMINISTRATION

The well-founded dislike of courts for provisions of trust instruments tending to relieve trustees from liability for failure to use good faith and good judgment[51] is illustrated by *Vest v. Bialson.*[52] Shortly before her death decedent executed a will, drafted by defendant, by which she devised property, consisting of real estate worth about $13,500.00, corporate stock worth $15,000.00 and some $2,300.00 in cash, to defendant upon trust to pay the income to plaintiffs, her two daughters, until they reached the age of 35, and then to distribute the corpus to them. Plaintiffs' will contest, based partly on defendant's alleged undue influence, was unsuccessful and there was severe friction between plaintiffs and defendant over the administration of the trust. The will allowed defendant a 15 per cent fee on gross income and 5 per cent on principal distributions. It gave him broad powers of sale and reinvestment in real or personal property "without his being restricted to a class of investments which a Trustee is or may hereafter be permitted by law to make" and power to "re-invest the whole and every part of said trust estate according to his sole judgment and discretion, without any limitation upon his power and authority so to do." Defendant sold the corporate stock and paid $9,250.00 for a small apartment building which the vendor had acquired three months before for $5,750.00. This property yielded a gross income considerably in excess of its net income. It was sold at a $200.00 loss after plaintiffs brought this suit. Defendant used the rest of the liquid assets and one of the original pieces of trust real estate to purchase another apartment house from the same vendor. The real price, which was $26,500.00, was $4,500.00 more than the vendor had acquired the property

51. See SIMES & FRATCHER, CASES AND MATERIALS ON THE LAW OF FIDUCIARY ADMINISTRATION, c. 12 (1956).

52. 293 S.W.2d 369 (Mo. 1956), rehearing denied September 10, 1956, noted, Niles, *Trusts and Administration*, 32 N.Y.U.L. REV. 433, 443 (1957).

for earlier in the year. $17,000.00 of the price was paid by borrowing money, secured by deed of trust, on this and other trust real estate. The gross income on this property was high enough to give defendant $2,490.00 in fees but the net income to plaintiffs over five years was only $93.00. This property was sold at a $3,000.00 loss after plaintiffs brought this suit to remove and surcharge the trustee.

The trial court dismissed the suit and awarded defendant extraordinary fees of $1,650.00, expenses of $167.80, and attorney's fees of $5,000.00 for defending it. The supreme court reversed the decree, surcharged the trustee for the losses on the two real state investments and the failure to make an adequate net income on the second of these, denied him fees and expenses for defending the suit, and directed his removal as trustee. It permitted him to retain the fees allowed by the will in the absence of a showing of fraud or bad faith. The court held that, despite the broad powers conferred on the trustee by the will, he abused his discretion by failing to diversify investments, by purchasing a speculative and hazardous investment (the apartment house purchased on credit), and by purchasing investments which would give him large fees, based on gross income, while subjecting the beneficiaries to the risk (which was realized) of very little net income. It also held that a trustee may not offset gains made on one investment against losses caused by another and improper investment. The court concluded that the trustee's removal was necessary because the hostility between him and the beneficiaries, caused partly by his fault, was such as to prevent him from carrying out the trust purposes.[53] The opinion, written by Judge Hyde, is an excellent discussion of the duties and discretionary powers of trustees.

The related judicial tendency to construe somewhat narrowly provisions of trust instruments conferring broad discretionary powers on trustees and to control the exercise of the discretionary powers so conferred was manifested in *Winkel v. Streicher*.[54] This was a suit to con-

53. In *In re* Jackson's Will, 291 S.W.2d 214, 294 S.W.2d 953 (Spr. Ct. App. 1956), the will devised property to Luna and Landis as trustees for Luna and Mrs. Lummis. Landis either resigned or refused to act and the circuit court, on motion of Mrs. Lummis, without notice to Luna, appointed Mr. Lummis trustee vice Landis. Luna appealed. Reversed. Held: Mo. REV. STAT. (1949) §§ 456.190-.200 providing for *ex parte* appointment of successor trustees, do not apply to testamentary trusts. The co-trustee and beneficiary was entitled to notice of the proceeding to appoint a successor testamentary trustee. Appointment of one beneficiary's husband as co-trustee, against the wishes of the other beneficiary and co-trustee, was undesirable.

54. 295 S.W.2d 56 (Mo. 1956) (en banc), *modifying, on transfer*, Winkel v. Streicher, 287 S.W.2d 389 (St. L. Ct. App. 1956).

strue a will providing, "The trustee shall pay the net income and any part of the corpus of the estate as he in his sole discretion deems necessary, to my niece, Lillie Streicher, or her guardian or to any person or corporation caring for her, for the support and maintenance of my said niece." Three years after this will took effect, Lillie's mother died, devising her estate to plaintiff, Lillie's sister, upon the understanding that she would pay for the support of Lillie. Defendant, trustee under the aunt's will, discontinued all payments and plaintiff sued to compel their resumption. A decree for the defendant on the ground he had discretion as to both income and principal was reversed by the St. Louis Court of Appeals. The court of appeals held that the trustee did have discretion as to both income and principal, but as the will did not give him "absolute" or "uncontrolled" discretion, his decision must be reasonable. Whether it was or not depended upon the amount devised to the plaintiff, which was not proved and should have been.

The case was transferred to the supreme court. In a carefully reasoned opinion by Judge Hyde it held that, in view of the placement of the words "any part of the," the trustee's discretion was limited to the corpus, so that Lillie had an absolute right to the whole net income. As to the corpus, it held that the trustee's discretion was limited to determining how much Lillie needed for support and that he had no right, in making this determination, to consider her sources of income other than the trust. It ruled that the court of appeals improperly considered, on the question of construction, oral statements of the testatrix to the draftsman of her will. The opinion points out that there are conflicting views on the question of whether a power to invade corpus to provide for the support of the beneficiary entitles her to full support from the trust even though she has other income and adopts the majority view, which is that of the *Restatement of Trusts,* section 128, comment e, that presumptively it does.

A peculiar and troublesome Missouri rule limiting the power of courts of equity to exercise supervision over the administration of trusts was applied in *First National Bank of Kansas City v. Stevenson.*[55] Testator bequeathed securities worth $127,000.00 to a trustee "for the sustaining of" the local church to which he belonged, with direction to pay the church $300.00 a month "out of income first, but any deficiency to be paid out of principal" for the support of listed activities of the church.

55. 293 S.W.2d 362 (Mo. 1956), motion for rehearing or to transfer to court en banc denied September 10, 1956.

The income from the trust, as testator must have known, was more than twice $300.00 a month. Testator's next of kin asserted that they were entitled to the income in excess of $300.00 a month on the theory that it was undisposed of by the will. The circuit court entered a decree that the church was entitled to the whole income from the trust. Under the decree the court retained jurisdiction of the trust for the purpose of ordering further reports by the trustee to the court. The supreme court approved the construction of the will which entitled the church to the excess income but reversed the decree because of, *inter alia*, the provision for retention of jurisdiction, reasserting the unfortunate and inconvenient rule of *State ex rel. McManus v. Muench*,[56] that a court of equity which has acquired jurisdiction over a trust for one purpose cannot retain it for the purpose of handling future controversies arising in connection with its administration. That rule, as the court implied, was abrogated by statute, section 456.210 of the Missouri Revised Statutes (1949), as to cases where the circuit court initially takes jurisdiction to appoint a successor trustee for a testamentary trust. The effect upon that statute of section 3 of the probate code, section 472.020 of the Missouri Revised Statutes (1949), conferring jurisdiction over the administration of testamentary trusts on the probate court, has yet to be determined.

Resulting Trusts

By an ancient doctrine of equity, which has been continued in modern law, if one person pays the purchase price for a conveyance of property to another, the latter presumptively holds upon resulting trust for the former.[57] If the transferee is a natural object of the bounty of the payor, such as his wife or child, the presumption is prima facie rebutted and a gift is inferred, in the absence of evidence of other intention.[58] As resulting trusts are trusts arising by implication of law and so expressly exempt from the requirement of manifestation and proof by a signed writing imposed on express trusts of land by the Statute of Frauds,[59] oral evidence is admissible to support or rebut the presumption

56. 217 Mo. 124, 117 S.W. 25 (1909). See Overstreet, *Appointment of Successor Trustees, Trust Administration and Settlements in Missouri*, 13 Mo. L. Rev. 255, 263 (1948), cited by the court.

57. 4 Scott, Trusts §§ 440-40.4 (2d ed. 1956). Purchase money resulting trusts have been abolished by statute in New York and some other states. It would seem that resulting trusts are not executed by the Statute of Uses and, hence, that the interest of the beneficiary is always equitable. 1 Scott, Trusts § 73 (2d ed. 1956).

58. 4 Scott, Trusts §§ 442-43 (2d ed. 1956).

59. Sanders, Uses and Trusts 124 (1792); Mo. Rev. Stat. (1949) §§ 456.010, 456.030.

even though land is involved.[60] This doctrine is the basis of a surprisingly large volume of litigation in Missouri. The 1956 decisions alone would supply material for a chapter on purchase-money resulting trusts.

In *Davis v. Roberts*[61] the plaintiff negotiated a transaction by which a house was conveyed to his parents. Plaintiff paid $1,000.00 of the $5,000.00 price and the balance was paid by notes, secured by deeds of trust executed by the parents. Plaintiff and the parents lived in the house until the death of the parents, intestate. Plaintiff paid off the $1,000.00 second deed of trust and purchased the $3,000.00 first deed of trust. Plaintiff sued the other heirs of his parents to establish that they held the whole title on resulting trust for him. A decree for plaintiff was reversed on the ground that the purchase-money resulting trust rule benefits one who pays the consideration for a conveyance to another only to the extent that the consideration is paid incident to the transaction in which the conveyance is made. Hence plaintiff was the beneficiary of a resulting trust only to the extent of a one-fifth interest in the house, based on his initial payment of $1,000.00. Payments subsequent to the conveyance gave him nothing by way of resulting trust. The court attempted to distinguish *Padgett v. Osborne*,[62] which reached a substantially contrary result on very similar facts, on the ground that it involved an oral express trust taken out of the Statute of Frauds by performance. In the *Padgett* case a house was conveyed to parents, who executed notes secured by deed of trust for most of the price. Their daughter made the down payment and later paid off the deed of trust. The surviving parent, while insolvent, conveyed to the daughter and she was allowed to retain the house against the parent's creditors. In the 1956 decision the court reasserted the rule that, when a child pays the consideration for a conveyance to his parent there is, presumptively, a resulting trust for the child, not a gift to the parent.

In *Meyer v. Meyer*[63] the plaintiffs lacked ready cash but owned St. Louis rental property, part of which defendants, their son and daughter-in-law, occupied rent-free. Plaintiffs asked their son to find them a house

60. 4 SCOTT, TRUSTS §§ 441, 443 (2d ed. 1956).
61. 295 S.W.2d 152 (Mo. 1956) (en banc).
62. 221 S.W.2d 210 (Mo. 1949). It may be questioned whether the cases can be distinguished successfully. Davis v. Roberts follows the generally accepted view. 4 SCOTT, TRUSTS § 457 (2d ed. 1956); *accord*, Wenzelburger v. Wenzelburger, 296 S.W.2d 163 (St. L. Ct. App. 1956).
63. 285 S.W.2d 694 (Mo. 1956).

in St. Charles which they could rent or buy. He purchased one for $4,000.00 using $1,000.00 of his wife's money as a down-payment and borrowing the balance. Plaintiffs allowed him to take title in the name of himself and his wife as security for the $1,000.00. Plaintiffs occupied the house for six years, paid off the loan, and paid all taxes and insurance falling due during this period. They tendered payment of the $1,000.00. Defendants then evicted them and plaintiffs sued to establish a resulting trust. The plaintiff father having died after the suit was started, the trial court entered a decree for the surviving plaintiff, subject to reimbursement of defendants for amounts expended by them on the house. The decree was affirmed, the court holding that in the case of a purchase-money resulting trust, as distinguished from a constructive trust, it is unnecessary for the beneficiary to establish that title was taken in the name of the alleged trustee without the knowledge or consent of the beneficiary. This decision is sound, on a resulting trust theory, only if the payment and assumption of debt by the defendants was a loan to the plaintiffs. The evidence indicated that it was.

In *Fisher v. Miceli*[64] a husband and wife owned two parcels of land by the entirety. The husband conveyed his interest in one to the wife. Later the husband and wife contracted to purchase a home and conveyed the two parcels to the vendor as a down payment. The vendor, with the consent of the husband, performed the contract by executing a deed to the wife alone. After their divorce, the husband sued to establish a one-half interest in the home. A decree for the wife was affirmed on the ground the husband had failed to rebut the presumption that, when a husband pays the consideration for a conveyance to his wife, a gift rather than a resulting trust is intended.[65]

Although it could well have been, *Glauert v. Huning*[66] was not decided on a resulting trust theory. The result would have been the same on that theory. A husband used his own money, derived from the sale

64. 291 S.W.2d 845 (Mo. 1956), motion for rehearing or to transfer to court en banc denied July 9, 1956.

65. In Glynn v. Glynn, 291 S.W.2d 190 (Spr. Ct. App. 1956), a wife used $3,500.00 of her husband's money, with his consent, to purchase a note, secured by deed of trust, which was endorsed to "Dr. H. L. Glynn *or* Lucille Glynn." After divorce the husband collected on the note. The wife sued for half the proceeds. Judgment for plaintiff affirmed. Held: A chose in action payable to husband *or* wife is presumptively held by the entirety. The husband failed to rebut the presumption that, when he paid the consideration for an assignment to his wife, a gift was intended.

66. 290 S.W.2d 126 (Mo. 1956), rehearing denied May 14, 1956. *Cf.* Carr v. Lincoln, 293 S.W.2d 396 (Mo. 1956).

of a business prior to his marriage, to purchase land worth $75,000.00 in the names of himself and his wife. He predeceased the wife, devising all his lands to her for life, remainder to plaintiffs, his relatives. There was evidence of oral statements by both husband and wife indicating that they intended the husband to retain the entire beneficial ownership of the land in question. The wife treated the land after the husband's death as if she were only a life tenant. Her will devised her property to defendants, her relatives. In a suit to try title, a decree determining that plaintiffs, the husband's devisees in remainder, owned the land, was affirmed, the court saying that the plaintiffs had met the burden of producing convincing evidence to rebut the presumption arising from the form of the conveyances that the wife took beneficially as a tenant by the entirety in fee simple. The court proceeded on the theory of an oral contract taken out of the Statute of Frauds by part performance. The opinion did not mention the rule, well-established in Missouri, that where a husband pays the consideration for a conveyance to himself and his wife, oral evidence is admissible to show that she was intended to hold her interest on resulting trust for him.[67]

In contrast with *Glauert v. Huning, Pizzo v. Pizzo*[68] was decided on a resulting trust theory when it probably should not have been. Plaintiff and defendant were married in 1938 and divorced in 1947. They soon recommenced living together and defendant held plaintiff out as his wife. In 1950 plaintiff paid $1,000.00 of the $3,800.00 down payment on a house on the understanding that it was to be owned by the parties by the entirety. Defendant paid the rest of the down payment and gave a $9,000.00 note, secured by deed of trust, for the balance of the purchase price. The house was conveyed to defendant. In 1954, after they had again separated, plaintiff sued on a resulting trust theory to establish a half interest in the house. A decree for her was affirmed. It is difficult to see why one who has paid $1,000.00 of a total consideration of $12,800.00 for a conveyance to another should be entitled to half the property by way of resulting trust. It would seem that the court could have found a more satisfactory theory for settlement of this controversy than that of resulting trust.

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67. See, *e.g.*, Lehr v. Moll, 247 S.W.2d 686 (Mo. 1952); Thieman v. Thieman, 218 S.W.2d 580 (Mo. 1949).

68. 295 S.W.2d 377 (Mo. 1956) (en banc).

CONSTRUCTIVE TRUSTS

The constructive trust is a device used by courts of equity to deprive persons of unjust enrichment when this cannot be accomplished by enforcement of a contract, an express trust or a resulting trust.[69] Constructive trusts, like resulting trusts, are expressly exempt from the requirement of manifestation or proof by a signed writing imposed on express trusts by the Statute of Frauds.[70] They are, also like resulting trusts, regularly imposed in certain stereotyped situations. The list of situations in which resulting trusts will be imposed ceased to expand in the sixteenth century. The list of situations in which constructive trusts will be imposed has, on the contrary, tended to lengthen. The 1956 Missouri decisions do not involve any novel situation but they do involve an old one which has caused much trouble.

In *Frisch v. Schergens*[71] the same result could have been reached on a resulting trust theory. Defendant, her former husband and a roomer in her house, negotiated for the purchase of a duplex by plaintiff. On defendant's suggestion that it would facilitate eviction of the occupying tenants under O.P.A. regulations, the duplex was conveyed to plaintiff and defendant. Plaintiff sued to establish title to the whole of the duplex in herself on a constructive trust theory. A decree for plaintiff, subject to a lien for $1,100.00 advanced by defendant toward the $3,200.00 down payment, was affirmed on the ground that defendant's relationship to plaintiff was confidential.

In *Rosenfeld v. Glick Real Estate Company*[72] plaintiffs employed defendant real estate company to find a purchaser for a parcel of land. A contract to purchase was signed by one Abramoff but plaintiffs insisted on a modification not acceptable to Abramoff. Defendant real estate company and the individual defendant, who were joint adventurers, then had plaintiffs convey to one Leach, an employee of the company, and paid plaintiffs the purchase price with defendant's own checks. Plaintiffs sued to rescind on the ground that an agent for sale may not sell to himself. Decree for defendants on the ground plaintiffs knew Leach was a straw party and that defendants were the real purchasers affirmed. If the defendants had taken title secretly, without the knowledge of the

69. 4 SCOTT, TRUSTS §§ 462-62.2 (2d ed. 1956).
70. MO. REV. STAT. (1949) § 456.030.
71. 295 S.W.2d 84 (Mo. 1956).
72. 291 S.W.2d 863 (Mo. 1956), rehearing denied July 9, 1956.

plaintiffs, a constructive trust should, no doubt, have been imposed. An agent for sale who secretly sells to himself violates his fiduciary duty to his principal and so is unjustly enriched.

Poole v. Campbell[73] involved a question with respect to which the Missouri decisions exhibit confusion and conflict. In 1933 a widow owned three business buildings, valued at from $8,000.00 to $15,000.00, subject to a $3,000.00 mortgage which was being foreclosed and which she could not arrange to pay. She then conveyed the premises by warranty deed to her brother-in-law, reciting a consideration of $9,000.00, which amount was paid by the grantee, partly by discharge of the mortgage and other debts of the grantor and partly in cash. After the widow's death her only child sued the grantee's devisee for specific performance of an alleged oral agreement of the grantee that, when he was through with the property, he would return it to the grantor, if living and, if not, to the plaintiff. A decree for the defendant was affirmed on the grounds of lack of clear proof of the alleged agreement and of facts taking it out of the Statute of Frauds.

Under English law, where a conveyance of land is made upon an oral trust in favor of the transferor or upon an oral contract to reconvey to the transferor, and the transferee, relying upon the Statute of Frauds, refuses to perform the trust or contract, a constructive trust will be imposed in favor of the transferor.[74] By the weight of authority in this country, a constructive trust will not be imposed in this situation unless (1) the transfer was procured by fraud, duress, undue influence or mistake, or (2) the transferee at the time of the transfer was in a confidential relation to the transferor, or (3) the transfer was made as security for an indebtedness of the transferor.[75] Most of the Missouri cases, including the more recent ones, appear to accept the majority American rule.[76]

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73. 289 S.W.2d 25 (Mo. 1956), rehearing denied April 9, 1956.

74. Bannister v. Bannister, [1948] 2 All E.R. 133; 1 SCOTT, TRUSTS § 44 (2d ed. 1956).

75. 1 SCOTT, TRUSTS § 44 (2d ed. 1956). The *Restatement of Trusts* took no position as to whether a constructive trust should be imposed when none of these three situations was present. § 44, caveat (1935). However, Tentative Draft No. 2 of the *Restatement of Trusts, Second,* states that there is a growing body of American authority in favor of the English rule. § 44, comment *a* (1955).

76. *E.g.* Mugan v. Wheeler, 241 Mo. 376, 145 S.W. 462 (1912); Beach v. Beach, 207 S.W.2d 481 (Mo. 1947). Commissioner Dalton's opinion in the latter case said at page 486, "Fraud, either actual or constructive, was an essential element of the alleged constructive trust . . . The simple violation, however, of a parol contract does not give rise to a constructive trust for, if such was the law, the statute of frauds would be virtually repealed." Norton v. Norton, 43 S.W.2d 1024 (Mo. 1931), inclines

But at least two of them virtually adopt the English rule by the indirect means of holding that the subsequent refusal of the transferor to perform his oral promise is "constructive fraud" which relates back to the time of the original transfer and makes it voidable.[77] *Poole v. Campbell* was decided, essentially, on the ground of lack of proof of the alleged oral agreement. Definitive clarification of the Missouri rule on this controversial question must await another decision on the point.

The New General Code for Civil Procedure and Supreme Court Rules 1, 2 and 3 Interpreted[1]

CARL C. WHEATON*

I. APPLICATION OF CODE

Our code for civil procedure does not apply when there are special procedural statutes covering a situation.[2]

For instance the Old Age Assistance Act is a special procedural statute governing the rights of appeal and is not a part of the new code for civil procedure, hence appellate provisions of the new code do not apply to appeals from a circuit court to a court of appeal in social security cases, as the statute prescribing the manner of such an appeal was not repealed by the provisions of the code for civil procedure. Hence a motion to dismiss an appeal in an old age assistance case, on the ground that the appellant had failed to comply with the supreme

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toward this view but cites O'Day v. Annex Realty Co., *infra* note 77, without criticism or attempt to distinguish it.

77. Peacock v. Nelson, 50 Mo. 256 (1872); O'Day v. Annex Realty Co., 191 S.W. 41 (Mo. 1917). The opinion in the latter case said at page 48, "Where a grantee takes possession of real estate under a deed, absolute in its terms, under a parol agreement, whereby he undertakes to hold the property for some legitimate purpose, or to sell and account for the proceeds, or to reconvey it to the grantor, his refusal to perform his promise amounts to a constructive fraud, and he will be held to be a trustee for the grantor or his heirs." This passage was criticized in Parker v. Blakeley, 338 Mo. 1189, 1204, 93 S.W.2d 981, 989 (Mo. 1936).

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1. The new general code for civil procedure (hereafter referred to as "code for civil procedure," "new code" or "code") was enacted in 1943. Mo. Laws 1943, pp. 353-97, §§ 1-145. In the main it has been codified in chapters 506, 507, 509, 510 and 512, Missouri Revised Statutes (1949). The code has been amended in some respects since its enactment. Supreme court rules 1, 2 and 3 appear at pages 4098 to 4113 of volume 2, Missouri Revised Statutes (1949). The following interpretations of the code and of these rules are based on Missouri cases appearing in volumes 290 through 301 of the Southwestern Reporter, Second Series.

2. Choate v. State Department of Public Health & Welfare, 296 S.W.2d 189 (Spr. Ct. App. 1956).

court rule in that it failed to furnish the respondent with a transcript of the testimony, was denied.[3]

II. Effect of Code on Actions at Law and in Equity

Though section 506.040, Missouri Revised Statutes (1949) provides that there shall be one form of action to be known as "civil action" all distinctions between actions at law and in equity are not thereby eliminated.[4]

III. Parties

A. *Real Parties in Interest*

There have been several decisions during the past year which have considered the question whether or not parties were real parties in interest.

Thus, it has been held that a legatee who was not an heir could not contest a will and could not complain of the fact that she had not been made a party to an action in which there had been a judgment sustaining the will.[5]

Where an insured contracted on February 5, 1954 to exchange the insured property on or before March 1, 1954, and continued to hold the legal title thereto for the purpose of securing the agreed purchase price thereof, and the property was destroyed by fire on February 28, 1954 and the contract was extinguished by mutual rescission, the insured continued to possess an insurable interest and the fire insurers were obligated to him for the loss.[6]

Each owner of an undivided interest in an estate owned by tenants in common has the absolute right to file a partition suit to have the land divided in kind or, if that be impracticable, to have it sold and the proceeds divided among the owners.[7]

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3. *Ibid.*
4. Kesinger v. Burtrum, 295 S.W.2d 605 (Spr. Ct. App. 1956).
5. Blatt v. Haile, 291 S.W.2d 85 (Mo. 1956).
6. American Central Ins. Co. v. Kirby, 294 S.W.2d 556 (K. C. Ct. App. 1956).
7. State *ex rel.* State Park Board & Dalton v. Tate, 295 S.W.2d 167 (Mo. 1956) (en banc).

Also where a written agreement, under which the liability insurer advanced to an insured the amounts paid by him in satisfaction of a judgment against him and another for injuries sustained by a third person in an automobile-truck collision, expressly relieved the insured from any obligation to repay such loan except to the extent that he was indemnified by another insurer allegedly liable for a proportionate share of the indemnity for such a loss, the insured retained legal title to the claim against such other insurer for indemnity and was a real party in interest entitled to maintain an action on such claim.[8]

On the other hand, only such persons may sue under the wrongful death statute as the statute permits.[9] Further, the Lawyers' Association of St. Louis was held not to be a proper party plaintiff in a declaratory judgment proceeding to determine the applicability of a city earnings tax ordinance to the income of lawyers practicing in the city of St. Louis. No matter how solicitous it might be of the rights of its members it could not, by reason of its desire to help them, sue in its own name to enforce their rights. It was, therefore, not a real party in interest and was not entitled to avail itself of the Declaratory Judgment Act to secure a construction of the applicable legislative enactments.[10]

B. *Necessary Parties*

A legatee is a necessary party to an action to set aside a will.[11]

Under a will giving a nephew "and family and children" one-half of the proceeds obtained from the sales of certain property, the nephew and his wife and children would take a one-half interest in the proceeds, and the wife and children would be necessary parties to an action by the nephew in an action to recover the amount realized from such sales.[12]

Where the deceased was survived by two minor children and the surviving husband did not commence a suit for her wrongful death within the prescribed time, such children had a joint claim for com-

8. Halferty v. National Mutual Casualty Co., 296 S.W.2d 130 (K. C. Ct. App. 1956).
9. Nelms v. Bright, 299 S.W.2d 483 (Mo. 1957) (en banc).
10. Lawyers' Ass'n of St. Louis v. City of St. Louis, 294 S.W.2d 676 (St. L. Ct. App. 1956).
11. Blatt v. Haile, *supra* note 5.
12. Zahn v. Martin's Estate, 295 S.W.2d 103 (Mo. 1956).

pensatory damages under the wrongful death statute and both had to be made parties to the suit therefor.[13]

But, in a condemnation case, brought in connection with highway construction, owners of land who complained that the construction would deprive them of direct access to a highway and would cause water to overflow their land were not necessary parties, as their damages were consequential in nature.[14]

C. *Joint Tort-feasors*

A single injury occasioned by several tort-feasors permits an action against each severally or any or all may be joined as defendants.[15]

D. *Class Actions*

A proceeding to escheat unclaimed premiums which had been impounded in the registry of a federal district court, in a suit against the insurer doing business in Missouri, was a bona fide class action, where there were numerous individual defendant policyholders whose whereabouts were unknown, and no other method of procedure was either appropriate or practicable.[16]

Provisions in the code and in the supreme court rules requiring that the defendant or defendants named to represent a class be chosen adequately and fairly to represent the whole class are mandatory and not merely technical or directory.[17]

The determination of the minimum number of defendants required, in a particular case, to insure an adequate representation of a class, rests ultimately in the sound discretion of the court, and each case must be determined upon its own particular facts.[18]

E. *Interpleader*

It has been held recently that "double liability" within the meaning of the statute providing that persons having claims against a plaintiff may be joined as defendants and be required to interplead when

13. Nelms v. Bright, *supra* note 9.
14. State *ex rel.* State Highway Commission v. Lynch, 297 S.W.2d 400 (Mo. 1956).
15. Agnew v. Union Construction Co., 291 S.W.2d 106 (Mo. 1956).
16. State v. Goodbar, 297 S.W.2d 525 (Mo. 1957).
17. City of St. Ann v. Buschard, 299 S.W.2d 546 (St. L. Ct. App. 1957).
18. *Ibid.*

their claims are such that the plaintiff is or may be exposed to "double or multiple liability," means exposed to double recovery for a single liability. As a result of the application of this test, it has been decided that in an interpleader action by a transfer company against a landlord and tenants, a petition alleging that the transfer company's employee damaged a leased building and that the company was exposed to multiple liability for damage because the landlord had filed a suit in magistrate court for her damage and the tenants were threatening the transfer company with litigation for the tenants' damage, failed to state sufficient facts to entitle the transfer company to relief under the interpleader statute, since there was no allegation of "double liability" for a single liability.[19]

The correctness of the meaning of "double liability" set forth above is very doubtful. What of the case of various claims against bondsmen, where the liability on the bond is, by its terms, limited?

F. *Intervention*

In intervention statutes generally, "interest" means a direct and immediate claim to, and having its origin in, the demand made or proceeds sought by one of the parties to the original action, but such "interest" does not include a mere consequential, remote, or conjectural possibility of being in some manner affected by the result of the original action.[20]

To come within section 507.090-1(2), Missouri Revised Statutes (1949) which gives one an absolute right to intervene, "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," the interest must be such an immediate and direct claim upon the very subject matter of the action that the intervener will either gain or lose by the direct operation of the judgment that may be rendered therein.[21]

The purpose of an action to condemn easements in described lands for the establishment and operation of an underground gas storage reservoir was to take rights in the described lands and to determine

19. Shaw v. Greathouse, 296 S.W.2d 151 (K. C. Ct. App. 1956).
20. Laclede Gas Co. v Abrahamson, 296 S.W.2d 100 (Mo. 1956).
21. *Ibid.*

the compensation due the owners thereof for the rights taken. Hence, persons having an interest in such lands, but not made defendants to the action, would have an absolute right to intervene therein, but the owners of adjoining lands subject only to consequential damages would not have the interest in the action necessary to give them an absolute right to intervene. Thus, owners in adjoining lands within a 6,000-acre tract, having underground formations suitable for storage of gas, did not have the interest necessary to give them the absolute right to intervene in an action to condemn easements in other lands, constituting the dome area of such a tract, for the establishment and operation of an underground gas storage reservoir, as any possible damage to such adjoining lands would be only consequential, since the owners of the adjoining lands would not be bound by the judgment in such an action on any claim which they might have under the constitution for compensation for such damages.[22]

Under the discretionary trial court authority to permit the owners of adjoining lands to intervene in such an action, for the purpose of presenting issues of public use, of the validity of an order of the Public Service Commission authorizing condemnation, and of the constitutionality of the Underground Gas Storage Act, intervention could be denied for failure to make timely application to intervene, where such applications were not made until the day set for the trial and two weeks after the commencement of the trial respectively.[23]

IV. Service by Publication

Statutes providing for the service of process by publication are strictly construed, and when reliance is placed upon a judgment obtained upon constructive notice it must appear that such notice was given in strict compliance with the statutory provision.[24]

An affidavit for constructive service by publication was insufficient to warrant the trial court's order of such service in a divorce suit, where the sworn affidavit alleged that the defendant was a nonresident of the state and could not be personally served in the state in the manner prescribed by law for personal service and had absconded and

22. *Ibid.*
23. *Ibid.*
24. Driscoll v. Konze, 296 S.W.2d 31 (Mo. 1956).

absented himself from his usual place of abode in the state and had concealed himself so that ordinary process of law could not be served on him, and that his address was unknown to the plaintiff, since the allegations in the affidavit were inconsistent and the plaintiff swore that they both were true.[25]

V. Pleadings

A. *Purpose of*

The office of the pleadings is to define the issues and to isolate the issues to those controverted in order to advise the trial court and the opposite party of the issues to be tried.[26]

Thus, it has been said that the office of the petition is to inform the defendant of that against which he must defend.[27] Again, it has been stated that the pleadings continue to be of the greatest utility in defining the issues of a case tried under our present code. The petition is to be of the same usefulness as before, or of more usefulness than before, in plainly stating the facts upon which the plaintiff relies to show that he is entitled to recover. Pleadings are not to be used to conceal issues or to ambush the adverse party.[28]

B. *Construction of*

Generally speaking, the same rules which govern the interpretation and construction of other writings are applicable to pleadings. So, the language of a pleading is to be given its plain and ordinary meaning and such interpretation as *fairly* appears to have been intended by the pleader. In determining what cause of action is sought to be alleged, the petition must be read from its four corners and in its entirety; and, when it is reasonably possible to do so, effect should be given to every part of the petition. The court may consider not only the facts pleaded but also the relief sought. In the final analysis, the question becomes what is the gravamen of the complaint and the gist of the action, in the resolution of which the court cannot resort to

25. Sigwerth v. Sigwerth, 299 S.W.2d 581 (Spr. Ct. App. 1957).
26. Deig v. General Ins. Co., 301 S.W.2d 409 (Spr. Ct. App. 1957); Gover v. Cleveland, 299 S.W.2d 239 (Spr. Ct. App. 1957); Cook v. Bolin, 296 S.W.2d 181 (Spr. Ct. App. 1956).
27. Ritchie v. Burton, 292 S.W.2d 599 (Spr. Ct. App. 1956).
28. King v. Guy, 297 S.W.2d 617 (Spr. Ct. App. 1957).

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mere guesswork or speculation to determine whether a particular cause of action is pleaded and it must be concerned by what the petition alleges or fails to allege, rather than by what counsel may say.[29]

If a petition states a claim upon which relief may be granted, the averments of the petition are to be given a liberal construction, and should be accorded their reasonable and fair intendment, and fair implication should be indulged from the facts stated.[30]

Where the inquiry is what cause of action has been pleaded in a petition not attacked before judgment, and not whether any cause of action has been stated in a petition found fatally defective on a motion to dismiss prior to trial, the doctrine of liberal construction of the petition is applied only to aid and support a judgment and not to overthrow it.[31] Where a divorced wife in preparing a petition for support followed a form designed for the situation where the support is sought from a husband and father for his wife and family, but it was apparent that the plaintiff intended to seek support only for her minor child, the court treated as surplusage those allegations in the petition which indicated that the plaintiff was seeking support for herself.[32]

On the other hand a pleading which is ambiguous or in which doubt or confusion appears should be construed most strongly against the pleader and in favor of a judgment against him.[33] Also where a defendant makes his objection against a petition at the first opportunity, the pleadings are to be construed most strongly against the plaintiff, and their construction must be such as to do substantial justice.[34]

C. *Petitions*

1. Joinder of Claims

A plaintiff may join as many claims as he has against a defendant.[35]

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29. *Ibid.*
30. Hiltner v. Kansas City, 293 S.W.2d 422 (Mo. 1956).
31. Gover v. Cleveland, *supra* note 26.
32. Ivey v. Ayers, 301 S.W.2d 790 (Mo. 1957).
33. Cook v. Bolin, *supra* note 26; Joshmer v. Fred Weber Contractors, 294 S.W.2d 576 (St. L. Ct. App. 1956).
34. Ritchie v. Burton, *supra* note 27.
35. Brown v. Sloan's Moving & Storage Co., 296 S.W.2d 20 (Mo. 1956).

It has been held recently that a party may join in one count a cause of action for negligence and for a breach of warranty, and, if the evidence is sufficient, he may submit either.[36] Taken at its face value, this is too broad a statement, as such a pleading involves duplicity and is not approved. However, from the facts in the case, it appears that no objection was taken to the pleading until after judgment. In such a situation an error in the form of the pleading would be waived by the defendant.

Although, in general, one may join causes of action in different counts which contain in one of them statements of facts which are inconsistent with such statements in another one of them, one may not plead inconsistent statements of facts in the same count, for, in the latter case, the defendant would not know what one was intending to state.

Hence, it has been determined that, since an action for the recovery of consideration paid under a rescinded contract of sale and an action for damages for a breach of warranty are wholly inconsistent and utterly repugnant, a seller may not affirm and disaffirm the contract of sale at the same time and in the same count of his petition in the absence of a plea in the alternative.[37]

2. Duty of Plaintiff

The plaintiff has the primary duty to express his meaning clearly in a petition, and neither the trial judge nor the reviewing court should be charged with assuming that the pleader intended to conceal one cause of action within another, or be forced to resort to guess work or speculation to determine whether a particular cause of action is pleaded.[38]

3. Sufficiency of Petition

It is a fundamental and firmly entrenched principle that, in determining whether or not a petition states a claim or cause of action, the averments therein are to be given a liberal construction according the allegations their reasonable and fair intendment, and fair implica-

36. McCallum v. Executive Aircraft Co., 291 S.W.2d 650 (K. C. Ct. App. 1956).
37. King v. Guy, 297 S.W.2d 617 (Spr. Ct. App. 1957).
38. Gover v. Cleveland, 299 S.W.2d 239 (Spr. Ct. App. 1957).

tion should be indulged from the facts stated. So considered, a petition should be held sufficient if its averments invoke substantive principles of law which entitle the plaintiff to relief.[39]

Therefore, a petition should not be held insufficient merely because of a lack of definiteness or certainty in allegations or because of informality in the statement of an essential fact.[40]

D. *Answers*

1. Affirmative Defenses

During the past year, it has been held that the defenses of accord and satisfaction,[41] assumption of risk,[42] statute of frauds,[43] res judicata,[44] and self-defense[45] are affirmative defenses.

On the other hand, it has been determined that the defense of sole cause may be raised by a general denial.[46] This is logical as the defendant is merely claiming that he was not negligent.

Further, it has been determined that if, in a negligence case, the law of another state, in which the facts involved occurred, required as one of the elements of the plaintiff's cause of action care on the plaintiff's part, such care must be pleaded by the plaintiff although the plaintiff sues in Missouri, as the question of the plaintiff's care is a matter of substantive law and the procedural rule that contributory negligence is an affirmative defense does not apply.[47]

2. Counterclaims

A defendant may join in a counterclaim as many claims as he has against an opposing party.[48]

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39. Joshmer v. Fred Weber Contractors, 294 S.W.2d 576 (St. L. Ct. App. 1956).
40. Hiltner v. Kansas City, 293 S.W.2d 422 (Mo. 1956).
41. Agnew v. Union Construction Co., 291 S.W.2d 106 (Mo. 1956).
42. La Fata v. Busalaki, 291 S.W.2d 151 (Mo. 1956).
43. Barr v. Snyder, 294 S.W.2d 4 (Mo. 1956).
44. Rippe v. Sutter, 292 S.W.2d 86 (Mo. 1956).
45. Davis v. Terminal R.R. Ass'n of St. Louis, 299 S.W.2d 460 (Mo. 1957).
46. Hall v. Clark, 298 S.W.2d 344 (Mo. 1957).
47. O'Leary v. Illinois Terminal R.R., 299 S.W.2d 873 (Mo. 1957) (en banc); Gerhard v. Terminal R.R. Ass'n of St. Louis, 299 S.W.2d 866 (Mo. 1957) (en banc).
48. Brown v. Sloan's Moving and Storage Co., 296 S.W.2d 20 (Mo. 1956).

E. *Replies*

1. Necessity for

The present statutes contain no provision requiring the filing of a reply for the purpose only of denying the averments of an answer, unless the answer contains a counterclaim, or unless the court has ordered a reply to be filed.[49]

2. Departure

In an action on a guaranty, the plaintiff's reply, alleging that the defendant was estopped to rely upon the defense that the instruments had been endorsed "without recourse," merely pleaded a defense to the defendant's answer and was not a departure from the claim stated in the petition.[50]

F. *Admissions in Pleadings*

If an answer contains a counterclaim or if the court has made an order requiring a reply, and no denial is filed, the averments of the answer stand admitted. If a reply is filed, even though it is not required, all affirmative defenses not denied by the reply are deemed admitted.[51] But, if the answer does not contain a counterclaim, and no reply has been ordered by the court, and none has been filed, the averments of the answer shall be taken as denied or avoided.[52]

G. *Exhibits*

Where a suit under the Uniform Reciprocal Enforcement of Support Act of Virginia, which was transferred to a Missouri court, was brought in the name of a divorced wife, and not by a guardian, curator, or next friend in the name of the "obligee" who was a minor child, and where there was no allegation in the petition that the plaintiff had legal custody of the obligee, but there was attached to the petition answers of the plaintiff to some questions asked by the judge of the Virginia court in which she stated that the divorce court granted her

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49. Smyth v. City of St. Joseph, 297 S.W.2d 578 (K. C. Ct. App. 1956).
50. Kansas City Trust Co. v. Mayflower Sales Co., 291 S.W.2d 51 (Mo. 1956).
51. Smyth v. City of St. Joseph, *supra* note 49.
52. Smyth v. City of St. Joseph, *supra* note 49; Barr v. Snyder, *supra* note 43.

custody of the child, the Missouri court would treat the questions and answers as an exhibit to the petition.[53]

Exhibits attached to the plaintiff's petition are a part of the petition for all purposes and may be considered in passing upon the sufficiency thereof.[54]

H. *Amendments*

1. As to Parties

Generally, one having a joint interest may be added as a party plaintiff after the statute of limitations has run and such joinder will relate back to the original institution of the action.[55]

Hence, where a minor daughter proceeded to trial as the sole plaintiff in an action for compensatory damages for the wrongful death of her mother in reliance on the trial court's ruling that the defendant's objection that the decedent's minor son was a necessary party plaintiff was not timely filed, the plaintiff was entitled to an opportunity to amend the petition to join the decedent's son as a party plaintiff either before or after the trial court directed a verdict and entered judgment thereon for the defendant on the ground of a defect of parties plaintiff.[56]

2. As to Pleadings

Whether the defendant in a jury-waived case should be permitted to file a count of an amended counterclaim for the first time on the morning on which the trial was to commence was discretionary with the trial judge, where the plaintiff did not claim surprise or request a continuance in order to prepare a defense to such count, but only objected generally to such filing.[57]

3. Unpleaded Issues Tried by Consent of Parties

When issues not embraced in or raised by pleadings are tried by

53. Ivey v. Ayers, 301 S.W.2d 790 (Mo. 1957).
54. Beets v. Tyler, 290 S.W.2d 76 (Mo. 1956).
55. Nelms v. Bright, 299 S.W.2d 483 (Mo. 1957) (en banc).
56. *Ibid.*
57. Browder v. Milla, 296 S.W.2d 502 (St. L. Ct. App. 1956).

the express or implied consent of the parties, they shall be treated as if they had been properly raised by the pleadings. The pleadings are treated as though they had been amended to include those issues.[58]

For example, where the defendant in an action for the breach of a warranty that the propeller on the plaintiff's airplane was properly repaired did not, at the pleading stage, attack the petition for failure to allege a breach of warranty, and the parties and the trial court proceeded on the theory that a cause of action for breach of warranty was pleaded, the defendant could not, after judgment, complain that the issue of a breach of warranty was submitted but not pleaded.[59]

VI. Motions

A. *Grounds for*

The defense of res judicata is a permissive ground for a motion under the language "and other matters" contained in section 509.290, Missouri Revised Statutes (1949). It may be raised by a motion to dismiss a petition.[60]

B. *Admissions by*

In an action by a former employee against a former employer for actual and punitive damages because of an alleged wrongful discharge of the former employee, an allegation of the petition that the discharge was wrongful and unlawful constituted nothing more than a conclusion, which was not admitted by the former employer's motion to dismiss for failure to state a claim on which relief could be granted, since facts alleged, not conclusions stated, are admitted by such a motion.[61]

C. *Waiver by*

Where one properly raises an objection by motion, he does not waive it by later pleading over, as by pleading a counterclaim.[62]

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58. Woolfolk v. Jack Kennedy Chevrolet Co., 296 S.W.2d 511 (St. L. Ct. App. 1956).
59. McCallum v. Executive Aircraft Co., 291 S.W.2d 650 (K. C. Ct. App. 1956).
60. Agnew v. Union Construction Co., 291 S.W.2d 106 (Mo. 1956).
61. Williams v. Kansas City Public Service Co., 294 S.W.2d 36 (Mo. 1956).
62. Durwood v. Dubinsky, 291 S.W.2d 909 (Mo. 1956).

D. *Motion for More Definite Statement*

In exercising his discretion as to whether or not a motion to require a more definite statement should be granted, the trial court is not authorized to compel a plaintiff, before the introduction of evidence, to plead specific negligence when he is entitled to proceed, at least as far as is shown by the petition, by alleging general negligence, for one has the right to take advantage of a *res ipsa loquitur* cause of action.[63]

Thus, in an action to recover damages for injuries to an employee of the defendant railroad company caused by the derailment of a motor car, where the trial court's order to make the petition definite and certain did not merely require the plaintiff to state wherein the defendant's knowledge of the cause of derailment was superior to that of the plaintiff, if he elected to proceed under the *res ipsa loquitur* doctrine, or wherein the defendant was negligent, if the plaintiff elected to proceed on specific negligence, but required the plaintiff to make the petition definite and certain as to four matters set forth in the defendant's motion to require the plaintiff to aver each and all of such matters specifically, and the petition was sufficient to state a cause of action under the *res ipsa loquitur* doctrine, the court erred in requiring the plaintiff to allege specific negligence or to have his petition dismissed.[64]

The filing of a motion for a more definite statement is, in effect, a concession that the petition states a claim upon which relief can be granted, but it is not a concession that the petition discloses a case to which the *res ipsa loquitur* doctrine is applicable.[65]

Thus, if the trial court concludes that a *res ipsa loquitur* case has not been alleged, it may grant a motion for a more definite statement including the allegation of acts of specific negligence.[66]

E. *Motion for Judgment on the Pleadings*

Where each party to an action filed a motion for judgment on the pleadings, for the purpose of the motions, each thereby admitted the facts which were well pleaded in the pleadings of the other.[67]

63. Allen v. St. Louis-San Francisco R.R., 297 S.W.2d 483 (Mo. 1957).
64. *Ibid.*
65. *Ibid.*
66. *Ibid.*
67. Kerkemeyer v. Midkiff, 299 S.W.2d 409 (Mo. 1957) (en banc).

VII. Physical Examination of Party

A. *Who May Be Examined*

Under the statute authorizing a court to require the physical examination of a party by a physician chosen by the party requesting the examination and who shall be deemed to be the witness of the party procuring the examination, the word "party" refers to one who is a party to the action in a legal sense. This statute does not permit an examination of the wife of a party suing to recover for consequential damage to him caused by personal injuries to the wife.[68]

However, our supreme court seems also to have held that courts have an inherent discretionary right to require a physical or mental examination of a party to a personal injury suit, or of others, and that the physician or physicians so appointed act as officers of the court and not as agents of either party. Under this inherent power, the court has been permitted, in a husband's suit for consequential damages for personal injuries to the wife, to order the physical examination of the wife even though her action has already been disposed of by settlement or judgment.[69]

B. *Consequences of Refusal to Comply With Order*

Upon the failure of a plaintiff to comply with the order of a court relating to a physical or mental examination, the court may stay the proceedings, remove the case from the trial docket, or, in an extreme case, strike the pleadings of the plaintiff or dismiss the cause, or conceivably exclude evidence of the injuries at the trial.[70]

VIII. Interrogatories

Though answers to interrogatories may constitute admissions for certain purposes, they may not be used as the basis for limiting the cross-examination of an expert witness.[71]

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68. State *ex rel.* St. Louis Public Service Co. v. McMullan, 297 S.W.2d 431 (Mo. 1957) (en banc).
69. *Ibid.*
70. *Ibid.*
71. Parker v. Ford Motor Co., 296 S.W.2d 35 (Mo. 1956).

IX. Dismissals

A. *Failure to Prosecute*

Courts have an inherent right to dismiss causes for failure to prosecute.[72]

Where the plaintiff had notice of the date on which a case was set for trial, but did not appear, the trial court could have dismissed the case immediately, and did not abuse its discretion in holding the case for several days, without notice, before dismissal.[73]

Where the plaintiff's counsel made an appearance, and an order was made reinstating a case on the trial docket for a certain date, the plaintiff had immediate notice, through counsel, of the day of the trial.[74]

B. *Court's Ground for Dismissal*

If the trial court's judgment of dismissal is correct, the stated reason therefor is immaterial.[75]

C. *Effect of Dismissal*

While section 510.170, Missouri Revised Statutes (1949) prevents a plaintiff's dismissal, either voluntarily or by taking an involuntary nonsuit, from having any effect to dismiss a defendant's counterclaim, this does not apply to a defendant's own dismissal or action having that effect. For instance where the defendant in an action to determine title to realty filed an answer (stating the same grounds as its motion to dismiss) and also a counterclaim for the determination of title, and at the trial the defendant objected to the hearing of evidence and insisted on the matter being determined on the pleadings on its motion to dismiss, this amounted to an abandonment, waiver, and withdrawal of the defendant's answer and counterclaim.[76]

X. Directed Verdicts

A cause may not be withdrawn from a jury unless the facts in

72. Doughty v. Terminal R.R. Ass'n of St. Louis, 291 S.W.2d 119 (Mo. 1956).
73. *Ibid.*
74. *Ibid.*
75. Rippe v. Sutter, 292 S.W.2d 86 (Mo. 1956).
76. Evans v. Brussel, 300 S.W.2d 442 (Mo. 1957).

evidence and the legitimate reasonable inferences which may be drawn therefrom are so strongly against the plaintiff that there is no room for reasonable minds to differ.[77]

A request by the plaintiff for an instruction directing a verdict for the plaintiff at the conclusion of all of the evidence, was correctly refused as requiring a verdict for the plaintiff even if the jury believed that he suffered no injury as the result of a collision. The evidence permitted reasonable minds to differ as to whether or not the plaintiff was injured during the collision.[78]

If the plaintiff makes a case under any theory submitted during a trial, a request by the defendant for a directed verdict in the latter's favor should be denied.[79]

XI. Request for Judgment in Accordance With Motion for Directed Verdict

If the plaintiff makes a case under any theory submitted, the defendant's motion after verdict for judgment is properly denied.[80]

XII. Cases Tried Without a Jury

A. *Purpose of Statute*

One of the purposes of the enactment of the statute detailing the procedure in cases tried upon facts without juries was to eliminate differences in procedure between law and equity cases tried by a court without a jury.[81]

B. *Exclusion of Evidence*

In a divorce case, the reviewing court must exclude incompetent evidence from its consideration and base its conclusions upon the evidence properly admitted.[82]

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77. Antweiler v. Prudential Ins. Co., 290 S.W.2d 652 (K. C. Ct. App. 1956).
78. Biscoe v. Kowalski, 290 S.W.2d 133 (Mo. 1956).
79. Nelson v. Wabash R.R., 300 S.W.2d 407 (Mo. 1957).
80. *Ibid.*
81. Durwood v. Dubinsky, 291 S.W.2d 909 (Mo. 1956).
82. M——— v. G———, 301 S.W.2d 865 (St. L. Ct. App. 1957).

C. *Duty, in General, of Appellate Court*

Where a case is tried without a jury, the appellate court should independently consider the evidence and reach its own conclusions, but where the evidence is conflicting and close, and particularly where the decision depends upon conflicting oral testimony and upon the credibility of witnesses, it should generally defer to the findings of the trial court unless it is satisfied that the findings should have been otherwise.[83]

During the year our courts have held that this doctrine applies generally both to equity[84] and to law[85] cases. Further it has been decided that it is applicable to proceedings to cancel a note,[86] to cancel[87] or to set aside[88] a deed, to obtain a decree that the plaintiff is the sole owner of land,[89] to obtain a judgment authorizing a city to annex a certain area,[90] to reform a deed,[91] to enforce a mechanic's lien,[92] to obtain a divorce,[93] to obtain separate maintenance,[94] to modify a divorce decree with respect to the custody of a child,[95] to be relieved from the terms of a property settlement in connection with a divorce proceeding,[96] to adopt a child,[97] to obtain the specific perform-

83. *In re* Petersen's Estate, 295 S.W.2d 144 (Mo. 1956). See also Fischman v. Kiphart, 297 S.W.2d 784 (St. L. Ct. App. 1957); Farmers & Merchants Bank v. Burns & Hood Motor Co., 295 S.W.2d 199 (St. L. Ct. App. 1956); Stewart v. Droste, 294 S.W.2d 600 (St. L. Ct. App. 1956); Miceli v. Williams, 293 S.W.2d 136 (St. L. Ct. App. 1956); Steckler v. Steckler, 293 S.W.2d 129 (Spr. Ct. App. 1956).

84. McCarty v. McCarty, 300 S.W.2d 394 (Mo. 1957); Gaugh v. Webster, 297 S.W.2d 444 (Mo. 1957); Robb v. N. W. Electric Power Cooperative, 297 S.W.2d 385 (Mo. 1957); Pizzo v. Pizzo, 295 S.W.2d 377 (Mo. 1956) (en banc); Davis v. Roberts, 295 S.W.2d 152 (Mo. 1956) (en banc); Frisch v. Schergens, 295 S.W.2d 84 (Mo. 1956); Rosenfeld v. Glick Real Estate Co., 291 S.W.2d 863 (Mo. 1956); Fisher v. Miceli, 291 S.W.2d 845 (Mo. 1956); Kalivas v. Hauck, 290 S.W.2d 94 (Mo. 1956); Ford v. Boyd, 298 S.W.2d 501 (St. L. Ct. App. 1957).

85. Steinzeig v. Mechanics & Traders Ins. Co., 297 S.W.2d 778 (K. C. Ct. App. 1957); Browder v. Milla, 296 S.W.2d 502 (St. L. Ct. App. 1956).

86. Herrold v. Hart, 290 S.W.2d 49 (Mo. 1956).

87. Wenzelburger v. Wenzelburger, 296 S.W.2d 163 (St. L. Ct. App. 1956).

88. Hudspeth v. Zorn, 292 S.W.2d 271 (Mo. 1956).

89. Franck Bros., Inc. v. Rose, 301 S.W.2d 806 (Mo. 1957).

90. Faris v. City of Caruthersville, 301 S.W.2d 63 (Spr. Ct. App. 1957); City of St. Ann v. Buschard, 299 S.W.2d 546 (St. L. Ct. App. 1957).

91. City of Warsaw v. Swearngin, 295 S.W.2d 174 (Mo. 1956).

92. Wilson v. Berning, 293 S.W.2d 151 (St. L. Ct. App. 1956).

93. M———— v. G————, *supra* note 82; May v. May, 294 S.W.2d 627 (St. L. Ct. App. 1956); Dietrich v. Dietrich, 294 S.W.2d 569 (St. L. Ct. App. 1956); White v. White, 290 S.W.2d 178 (St. L. Ct. App. 1956).

94. Pappas v. Pappas, 294 S.W.2d 605 (St. L. Ct. App. 1956).

95. Graves v. Wooden, 291 S.W.2d 665 (Spr. Ct. App. 1956); Hachtel v. Hachtel, 291 S.W.2d 201 (Spr. Ct. App. 1956).

96. Murray v. Murray, 293 S.W.2d 436 (Mo. 1956).

97. *In re* Hyman's Adoption, 297 S.W.2d 1 (Spr. Ct. App. 1956).

ance of a contract,[98] to enjoin a union from picketing a theatre,[99] and to charge a testamentary trustee for losses incurred by him and to obtain his removal as trustee.[100]

In a case tried without a jury an appellate court may not set aside the judgment therein, unless it is "clearly erroneous."[101]

XIII. Control of Court Over Judgment

Usually, it is only for thirty days after the entry of its judgment that a court retains jurisdiction to set the judgment aside on its own motion. This rule has been applied during the year to divorce proceedings.[102]

XIV. New Trials

A. *Purpose of Motion for*

The purpose of a motion for a new trial is to call the trial court's attention to the alleged erroneous rulings upon which the movant relies, and thus to give the court an opportunity to correct its own errors, if any.[103]

B. *Time Within Which Motion Must Be Made*

A motion for a new trial must be filed not later than ten days after the entry of the judgment involved.[104]

Where a motion to set aside an order is filed more than ten days after the entry of the order, the motion, because it is untimely, will be regarded as no more than a suggestion to the court that it set aside the judgment of its own motion during the thirty-day period within which it retains jurisdiction for that purpose.[105]

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98. Barr v. Snyder, 294 S.W.2d 4 (Mo. 1956).
99. Heath v. Motion Picture Mach. Operators Union No. 170, 290 S.W.2d 152 (Mo. 1956).
100. Vest v. Bialson, 293 S.W.2d 369 (Mo. 1956).
101. Turner v. Mitchell, 297 S.W.2d 458 (Mo. 1957); Browder v. Milla, 296 S.W.2d 502 (St. L. Ct. App. 1956); Pappas v. Pappas, *supra* note 94; Stewart v. Droste, 294 S.W.2d 600 (St. L. Ct. App. 1956); Atkinson v. Smothers, 291 S.W.2d 645 (St. L. Ct. App. 1956).
102. Bradley v. Bradley, 295 S.W.2d 592 (St. L. Ct. App. 1956); Carrow v. Carrow, 294 S.W.2d 595 (St. L. Ct. App. 1956).
103. Baker v. Brown's Estate, 294 S.W.2d 22 (Mo. 1956).
104. Bradley v. Bradley, *supra* note 102.
105. *Ibid.*

C. *Hearing Evidence in Connection With Motion for*

A trial court may hear evidence in connection with a motion for a new trial.[106]

D. *Limitation on Time Within Which Court May Act on Motion for*

1. Purpose of

The purpose of fixing a limited period for acting upon motions for a new trial is to speed up litigation by eliminating unreasonable delay in the trial court after judgment.[107]

2. The Limitation

Section 510.370, Missouri Revised Statutes (1949) expressly provides that the court, within thirty days after judgment, may of its own initiative order a new trial, and if it does so, the trial court may, within ninety days thereafter, set a hearing on the motion to give an opportunity to oppose the court's action.[108]

3. Effect of Limitation

This statute provides that if a motion for a new trial is not passed on within ninety days after the motion is filed, it is deemed denied for all purposes. The word "all" is sometimes said to be the most comprehensive in the English language; it denotes the "whole number of," "each" and "every." The use of these all-inclusive terms indicates an intent to accomplish by operation of law each and every purpose achieved by a formal order of the trial court, timely made, overruling a motion for a new trial.[109]

4. When Motion for New Trial Is, or Is Not, Granted

Whenever it is shown that a verdict has likely been induced or that the amount thereof has been affected by erroneous instructions, or by the improper admission or exclusion of evidence, a new trial, and not a remittitur, will be granted.[110]

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106. Murphy v. Graves, 294 S.W.2d 29 (Mo. 1956).
107. Baker v. Brown's Estate, *supra* note 103.
108. *Ibid.*
109. *Ibid.*; Nelms v. Bright, 299 S.W.2d 483 (Mo. 1957) (en banc).
110. Taylor v. Kansas City Southern Ry., 293 S.W.2d 894 (Mo. 1956).

Though jurors on the voir dire must answer questions fully, frankly, and honestly, an unintentional failure to disclose information not directly connected with the case in which they are called does not necessarily show prejudice so as to call for a new trial.[111]

Further, the mere failure of a juror, even after specific inquiry, to make full disclosure on the voir dire examination as to pending actions of a juror or members of his family for damages, does not necessarily compel the granting of a new trial. This is a matter within the court's discretion.[112] The trial judge should grant a new trial on the ground of perjury only when he is satisfied that perjury has been committed by the witness and that an improper verdict or finding was occasioned thereby.[113]

To obtain a new trial on the ground of newly discovered evidence, the aggrieved party must show that (1) the evidence has come to his knowledge since the trial; (2) it was not owing to want of diligence that it did not come to his knowledge sooner; (3) it is so material it would probably produce a different result if a new trial were granted; (4) it is not cumulative only; and (5) the object of the evidence is not merely to impeach the character or credit of a witness. Moreover, the affidavit of the witness himself should be produced, or its absence accounted for.

Hence, in an action challenging the validity of a zoning ordinance as applied to the plaintiff's property, it was not error for the trial court to overrule the plaintiff's new trial motion which suggested no new witnesses or new evidence, as such, but suggested only that some of the defendant's witnesses had been mistaken in their testimony and would now testify in favor of the plaintiff and that other witnesses of the defendant had been proven wrong by passage of time.[114]

5. Specifying Grounds for Granting New Trial

It is error for a trial court not to specify of record the ground or grounds upon which it grants a new trial.[115]

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111. McCallum v. Executive Aircraft Co., 291 S.W.2d 650 (K. C. Ct. App. 1956).
112. Logsdon v. Duncan, 293 S.W.2d 944 (Mo. 1956).
113. Calvin v. Lane, 297 S.W.2d 572 (K. C. Ct. App. 1957).
114. Deacon v. City of Ladue, 294 S.W.2d 616 (St. L. Ct. App. 1956).
115. Elgin v. Elgin, 301 S.W.2d 869 (St. L. Ct. App. 1957).

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On an appeal from an order granting a new trial, which order did not specify the grounds for granting the new trial, the one in whose favor it is granted has the burden of supporting the order.[116]

XV. Objections to Trial Errors

A. *Necessity for*

On civil appeals, with certain exceptions, no claim of error can be considered unless it was presented to or expressly decided by the trial court.[117]

This principle has been applied recently to errors concerning the method of stating the elements of a claim,[118] to the introduction of evidence,[119] and as to the place of hearing a motion for a new trial.[120]

B. *Degree of Specificity Required*

If a question is presented during the progress of a trial and definite objections or requests are made, with a specific statement of the grounds or reasons therefor, a motion for a new trial need only call attention to the claim of error generally, for the purpose of preserving the question for review on appeal; but if the error claimed occurred after the case was submitted, in order to preserve the point for appeal, the error must be specifically set out.[121]

Objections that testimony is incompetent, immaterial, irrelevant, self-serving, prejudicial and the like, without a further specification of the reason, are generally insufficient to preserve anything for review.[122]

Where the plaintiff at a trial objected to the admission of certain evidence on the ground that the question called for a conclusion, the

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116. *Ibid.*
117. Scowden v. Scowden, 298 S.W.2d 484 (Spr. Ct. App. 1957).
118. Davis v. Roberts, 295 S.W.2d 152 (Mo. 1956) (en banc); Burns v. Vesto Co., 295 S.W.2d 576 (K. C. Ct. App. 1956).
119. Teters v. Kansas City Public Service Co., 300 S.W.2d 511 (Mo. 1957); *In re* Petersen's Estate, 295 S.W.2d 144 (Mo. 1956); State *ex rel.* State Highway Commission v. Rauscher Chevrolet Co., 291 S.W.2d 89 (Mo. 1956); Hoyt v. Finke, 300 S.W.2d 539 (K. C. Ct. App. 1957); Garrison v. Campbell "66" Express, 297 S.W.2d 22 (Spr. Ct. App. 1956).
120. Hendershot v. Minich, 297 S.W.2d 403 (Mo. 1957).
121. Scowden v. Scowden, *supra* note 117.
122. Teters v. Kansas City Public Service Co., *supra* note 119.

reviewing court could not consider whether the testimony was hearsay.[123]

Where, in his motion for a new trial, the defendant claimed error because, among other things, the plaintiff did not "plead or prove a just and true account filed with the Circuit Clerk as required by Section 429.080 Revised Statutes of Missouri 1949," it was held that this objection was sufficient to preserve the defendant's point.[124]

Where the defendants objected that a reference was not authorized by statute and they did nothing which could constitute a written consent to a reference, they properly preserved, for consideration on appeal, their objections to a reference.[125]

C. *Formal Exceptions*

Under section 510.210, Missouri Revised Statutes (1949) formal exceptions to rulings of a trial court are no longer necessary in order to preserve for review alleged error in such rulings.[126]

D. *Repetition of Objections*

Where a party has reasonably objected to evidence on a given subject by one witness and the objection is overruled, such party is not required or expected to become indecorous by repeating his objection when like testimony by another witness is offered.[127]

E. *Waiver of Objection*

A party does not waive his objection to an alleged error of a court in letting in incompetent evidence by cross-examining or by offering countervailing evidence in an effort to render the incompetent evidence innocuous.[128]

F. *Necessity of Presenting Claims of Error in Motions for New Trials*

Supreme court rule 3.23 provides that usually in order to preserve

123. Hall v. Clark, 298 S.W.2d 344 (Mo. 1957).
124. Wilson v. Berning, 293 S.W.2d 151 (St. L. Ct. App. 1956).
125. Durwood v. Dubinsky, 291 S.W.2d 909 (Mo. 1956).
126. Williams v. Ricklemann, 292 S.W.2d 276 (Mo. 1956).
127. Taylor v. Kansas City Southern Ry., 293 S.W.2d 894 (Mo. 1956).
128. *Ibid.*

allegations of error for appellate review, such errors must first be presented to the trial court in a motion for a new trial.[129]

This doctrine has been applied recently to rulings of courts concerning the competency of witnesses,[130] the admission of a deposition in evidence,[131] the propriety of an argument,[132] the amount of an award,[133] and the ruling on a motion in the nature of a writ of error coram nobis. The reason given for the last holding is that the ruling on the writ involves evidence outside of the record.[134]

However, there are various exceptions to the rule which are set out therein and there have been some late interpretations of that part of the rule stating the exceptions.

For instance, it has been said that where the trial court has no jurisdiction of the subject matter, where the petition fails to state a claim, and where the evidence is insufficient to support the judgment, it is not necessary to present those grounds of error in a motion for a new trial in order to preserve them as bases for an appeal.[135] The same ruling has been made concerning an order overruling a motion to set aside a judgment for irregularity patent on the face of the record.[136]

G. *After-Trial Motions*

Since an after-trial motion is treated the same as a motion for a new trial in supreme court rule 3.24, one may preserve a ground for an appeal in a motion for a judgment in accordance with his motion for a directed verdict.[137]

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129. State *ex rel.* State Highway Commission v. Galloway, 292 S.W.2d 904 (Spr. Ct. App. 1956).

130. Deichmann v. Aronoff, 296 S.W.2d 171 (St. L. Ct. App. 1956).

131. *Ibid.*

132. Marler v. Pinkston, 293 S.W.2d 385 (Mo. 1956).

133. Scowden v. Scowden, 298 S.W.2d 434 (Spr. Ct. App. 1957).

134. *In re* Jackson's Will, 291 S.W.2d 214 (Spr. Ct. App. 1956).

135. State *ex rel.* State Highway Commission v. Galloway, *supra* note 129. See Bradley v. Bradley, 295 S.W.2d 592 (St. L. Ct. App. 1956), in accord as to lack of jurisdiction over the subject matter. Further, see Tillery v. Crook, 297 S.W.2d 9 (Spr. Ct. App. 1957), in accord as to the insufficiency of the evidence to support a judgment.

136. *In re* Jackson's Will, *supra* note 134. See Evans v. Brussel, 300 S.W.2d 442 (Mo. 1957), in accord as to the sufficiency of the petition to state a claim.

137. State *ex rel.* State Highway Commission v. Galloway, *supra* note 129.

XVI. Appeals

A. *Right Statutory*

The right of appeal is statutory, and is available only upon strict compliance with the statutory requirements.[138]

B. *Aggrieved Party*

To appeal from a judgment, one must not only be a party to the action in which it is rendered, but he must have an interest in the subject matter in controversy, that is, he must be a party aggrieved.[139]

Thus, a corporation, contending throughout the hearing in a garnishment proceeding by its judgment creditor and in its brief on appeal from a judgment for the plaintiff against the garnishee trust company that money allegedly held on deposit thereby for the appellant corporation was owned by others, was not a "party aggrieved" by such judgment and was not entitled to appeal therefrom.[140]

Further, a defendant is not "aggrieved" by a voluntary dismissal and may not appeal therefrom.[141] Also the plaintiffs who had no interest in the land to which they sought to quiet title, were not aggrieved by, and could not complain of, the judgment deciding that title was in the defendant.[142]

C. *Piecemeal Appeal*

The usual rule is that appellate courts cannot review cases on appeal that are brought to them piecemeal or in detached portions.[143]

However, supreme court rule 3.29, with regard to *non-jury trials*, clearly gives the court *discretion to order a separate judgment* on the separate non-jury trial of a claim and provides that such a separate

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138. Anderson v. Metcalf, 300 S.W.2d 377 (Mo. 1957); Pizzo v. Pizzo, 295 S.W.2d 377 (Mo. 1956) (en banc); Adams v. Adams, 294 S.W.2d 18 (Mo. 1956); State *ex rel.* State Highway Commission v. Hammel, 290 S.W.2d 113 (Mo. 1956); Choate v. State Department of Public Health & Welfare, 296 S.W.2d 189 (Spr. Ct. App. 1956); State *ex rel.* White v. Terte, 293 S.W.2d 6 (K. C. Ct. App. 1956); Collier v. Smith, 292 S.W.2d 627 (Spr. Ct. App. 1956).

139. Briss v. Consolidated Cabs, 295 S.W.2d 391 (K. C. Ct. App. 1956).

140. *Ibid.*

141. State *ex rel.* State Highway Commission v. Lynch, 297 S.W.2d 400 (Mo. 1956).

142. Feeler v. Reorganized School District No. 4, 290 S.W.2d 102 (Mo. 1956).

143. Anderson v. Metcalf, *supra* note 138; State *ex rel.* State Highway Commission v. Hammel, *supra* note 138.

judgment shall be deemed a final judgment for the purposes of appeal. Hence, where a non-jury action was brought on five separate counts and the trial court entered a judgment disposing of all of the issues presented by three of such counts without indicating whether such judgment was intended either as final or interlocutory, and the disposition of the remaining two counts were not dependent in any respect on the outcome or final disposition of the three counts, the separate judgment was construed to be an order for a separate judgment and was deemed a final judgment for the purpose of appeal.[144]

D. *Appeal From Final Judgments*

Except where a separate trial limiting the issues has been ordered, a judgment to be final and appealable, must dispose of all of the issues and of all of the parties.[145] The purpose of the general rule is to prevent piecemeal presentation of cases on appeal, or presentation in detached portions.[146]

In the interest of justice and to avoid prejudice, provisions are made for the trial court, in its discretion, to order a separate trial of any claim, counterclaim, or third-party claim in a jury trial in which a separate judgment may be rendered and which will be deemed final for purposes of appeal. In cases tried before the court without a jury, the court may order a separate judgment therein which shall be deemed final for purposes of appeal, or may order a separate interlocutory judgment and order it held in abeyance to await judgment on all of the claims, counterclaims, or third-party claims. The appellate court looks to the record to see if the trial court ordered a separate judgment "or entered a separate interlocutory judgment" which it "held in abeyance" until all other claims had been determined.[147]

Where a suit was brought by a petition in three counts, one of which was in equity and the others of which were actions at law for damages, and the court entered a separate judgment on the equity

144. Pizzo v. Pizzo, 295 S.W.2d 377 (Mo. 1956) (en banc).
145. Anderson v. Metcalf, *supra* note 138; Adams v. Adams, *supra* note 138; State *ex rel.* State Highway Commission v. Hammel, *supra* note 138; Young v. Raupp, 301 S.W.2d 873 (K. C. Ct. App. 1957); Engel Sheet Metal Equipment v. Shewman, 301 S.W.2d 856 (St. L. Ct. App. 1957); Collier v. Smith, *supra* note 138.
146. Pizzo v. Pizzo, *supra* note 144.
147. Engel Sheet Metal Equipment v. Shewman, *supra* note 145. See also Pizzo v. Pizzo, *supra* note 144; State *ex rel.* State Highway Commission v. Hammel, *supra* note 138.

count, entry of a separate judgment would be construed as an order for a separate judgment within the meaning of supreme court rule 3.29 providing that the court might order a separate judgment which would be deemed a final judgment for purposes of appeal.[148]

Where a divorced wife, as the defendant in a partition action instituted by her former husband, filed a cross-action in the nature of a counterclaim for the value of improvements made to the property since her divorce, and the cross-action was the only remaining live issue in the case, a judgment against the wife on the cross-action was a final judgment for purposes of appeal.[149]

The sustaining of the motion to quash an execution is a final judgment for purposes of appeal, as such a judgment bars a recovery.[150]

It has also been decided in a divorce action that a judgment denying a wife's motion for attorney's fees to defend an attack on an execution was a final appealable judgment.[151] This is questionable. The case cited in support of this holding was that such a judgment was appealable, not as a final judgment, but as a special order after a final judgment.

An order appointing commissioners in a condemnation proceeding is interlocutory in its character and an appeal will not lie therefrom. Even though a defendant may contest the right of the plaintiff to condemn, the judgment in such a case is not final until after the commissioners file their report and the exceptions thereto, if any, are tried and the amount of the damages are finally fixed. The reasons for such a conclusion are obvious. The order appointing the commissioners is no final determination of the rights of the parties. It is only one step in the proceedings. Since the order is interlocutory, any error that may have been made in relation thereto may be corrected at any time by the trial court.[152]

Where an execution was issued to enforce the payment of certain amounts for child support and court costs under a divorce decree, and the defendant's employer, as garnishee, acknowledged an indebtedness

148. Robb v. N. W. Electric Power Cooperative, 297 S.W. 2d 385 (Mo. 1957).
149. Hahn v. Hahn, 297 S.W.2d 559 (Mo. 1957) (en banc).
150. Howard v. Howard, 300 S.W.2d 853 (St. L. Ct. App. 1957).
151. *Ibid.*
152. State *ex rel.* State Highway Commission v. Hammel, 290 S.W.2d 113 (Mo. 1956).

to the defendant, an order which directed the sheriff and the garnishee to allow the defendant an exemption which he claimed and to release all but ten per cent of his wages was a "preliminary order," not a "final judgment," and, therefore, was not appealable.[153]

No appeal lies from an order setting aside a judgment of dismissal for failure to prosecute, as this leaves further proceedings to be held in the case before an ultimate judgment is given.[154]

Also, where persons allegedly entitled to purchase realty under a contract brought an action against the vendors and persons to whom they sold the realty, allegedly in contravention of the plaintiffs' rights, in two counts, the first alleging the breach of contract and the second alleging conspiracy between the defendants to breach the contract, the trial court's action in rendering a general judgment against the vendor-defendants without specifying upon which count and without making any final disposition of the cause against the purchaser-defendants, did not result in a final judgment for purposes of appeal.[155]

And where the judgment in an action arising out of an exchange of property determined that the plaintiffs were entitled to damages resulting from the defendants' acts in respect to the defendants' property, but made no disposition of the defendants' counterclaim for rent on other lands, the judgment was not final and was not appealable.[156]

A judgment does not become final, if a timely motion for a new trial is filed, until disposition of the motion.[157] Further, an order which overruled a motion to set aside a judgment was, in itself, a judgment which was intended to receive the grace of postponement of finality by a motion for a new trial, and therefore the finality of the judgment was postponed, and an appeal which was taken seven days after the overruling of the motion for a new trial was timely.[158]

But, where a judgment allowing alimony pendente lite was entered on October 1, 1954, and no motion for a new trial was filed within the prescribed ten-day period, the judgment became final, for the purpose of ascertaining the time within which an appeal may be taken, at the

153. Goforth v. Goforth, 301 S.W.2d 877 (St. L. Ct. App. 1957).
154. Newman v. Kern, 297 S.W.2d 594 (St. L. Ct. App. 1957).
155. Young v. Raupp, 301 S.W.2d 873 (K. C. Ct. App. 1957).
156. Collier v. Smith, 292 S.W.2d 627 (Spr. Ct. App. 1956).
157. Bradley v. Bradley, 295 S.W.2d 592 (St. L. Ct. App. 1956).
158. *In re* Jackson's Will, 291 S.W.2d 214 (Spr. Ct. App. 1956).

expiration of thirty days after the entry of such judgment on October 1, 1954.[159]

Since a proceeding on a motion to vacate a judgment is a "case" and the motion for a new trial is an authorized motion in any kind of a case, the finality of the judgment in such a proceeding is postponed until the motion for a new trial is disposed of.[160]

E. *Appeal From Interlocutory Judgments in Partition Actions*

It is provided in section 512.020, Missouri Revised Statutes (1949) that an appeal may be taken "from any interlocutory judgments in actions of partition which determine the rights of the parties." An interlocutory decree which adjudged that the plaintiffs were the equitable owners of a tract of land subject to a contract lien of the defendants, and ordered an accounting, but which did not decree that the parties defendant were the owners of any undivided interest in that tract, and which did not order a partition, was not an appealable order under the provision for appeal referred to above.[161]

F. *How Taken*

1. Notice of Appeal-Time for Filing

Appeal as of right cannot be taken unless a notice of appeal shall be filed not later than ten days after the judgment or order appealed from becomes final.[162]

2. Transcript

a. Time for Filing

Section 506.060-2, Missouri Revised Statutes (1949) permits the court to grant an extension of time for filing a transcript, even after the statutory period for filing has expired. Hence, the filing of a transcript on September 14, 1955 was timely, when the record disclosed the facts that the notice of appeal was filed on March 24, 1955; that on September 13, 1955, the appellant filed in the appellate court

159. Bradley v. Bradley, *supra* note 157.
160. *In re* Jackson's Will, *supra* note 158.
161. Adams v. Adams, 294 S.W.2d 18 (Mo. 1956).
162. Bradley v. Bradley, *supra* note 157.

an application for an extension of time in which to file a transcript, and that his request was granted.[163]

b. Necessity for

A transcript is required on an appeal, hence statements made in a brief of one of the parties cannot be accepted as a substitute for a transcript.[164]

c. Preparation of, in General

A record on appeal should be prepared and completed in the trial court, and in such time and manner that, if the parties fail to agree on the correctness of any part of the transcript, it may be settled and approved by the trial court.[165]

d. Correction of

If the record on appeal does not reflect the true facts it should be corrected in the trial court.[166]

The appellate court is at liberty to supply an omission or to correct a misstatement in the record by directing the trial judge to make and certify a finding on the issue, but it is not required to do so, since the presentation to the appellate court of a full and correct transcript remains the affirmative duty of the parties.[167]

e. Appellate Court Does Not Change Transcript

Except for its right to send a transcript back to the trial court for amendment, the appellate court must take the transcript on appeal as it comes to it.[168]

3. Briefs

a. Purpose of Supreme Court Rule 1.08

Supreme court rule 1.08 is not intended merely to state a "show of surface routine." It is of utility in enabling a painstaking analysis

163. Munday v. Thielecke, 290 S.W.2d 88 (Mo. 1956).
164. *In re* Jackson's Will, *supra* note 158.
165. Hendershot v. Minich, 297 S.W.2d 403 (Mo. 1957).
166. *Ibid.*
167. *Ibid.*
168. Farmer v. Taylor, 301 S.W.2d 429 (Spr. Ct. App. 1957).

of all meritorious contentions, and the observation of it is most conductive to an expeditious, efficient, and just review and determination of the causes on their merits. The rule is, of course, for the benefit of the appellate court and of counsel. Compliance with the requirements of the rule enables the court to consider and determine the precise questions which the appellant considers to be decisive in sustaining his position that a trial court's rulings were prejudicially erroneous.[169]

b. Jurisdictional Statement

A section entitled "jurisdiction" in the statement portion of an appellant's brief which charged that the acts and conduct of the State Highway Department were unwarranted, arrogant, and oppressive and a deliberate challenge to the right of a municipal government to exercise its police power and that "a construction and clarification of the powers conferred upon the respondent under Section 29, Section 30 and Section 31 of Article IV of the Constitution of 1945" was required, was held to be more in the nature of an argument than of a statement and bore no resemblance to the kind of jurisdictional statement called for by rule 1.08(a) (1).[170]

c. Points and Authorities

It is the duty of an appellant to point out distinctly the alleged errors of a trial court and to show that he was prejudiced by the rulings alleged to be erroneous, and to make specific reference to pages in the transcript on appeal which disclose the bases for the contentions of error in a trial court's rulings.[171]

Mere abstract statements of law in an appellate brief do not present anything for review.[172] Thus, a statement to the effect that certain statutes required an insurer to furnish blank proofs of loss after notice of loss, presented nothing for review.[173]

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169. Jacobs v. Stone, 299 S.W.2d 438 (Mo. 1957).

170. State *ex rel.* State Highway Commission v. Hudspeth, 297 S.W.2d 510 (Mo. 1957).

171. Jacobs v. Stone, *supra* note 169; Moore v. St. Louis Southwestern Ry., 301 S.W.2d 395 (Spr. Ct. App. 1957); Beeler v. Board of Adjustment of Joplin, 298 S.W.2d 481 (Spr. Ct. App. 1957).

172. Scowden v. Scowden, 298 S.W.2d 44 (Spr. Ct. App. 1957); Lewis v. Watkins, 297 S.W.2d 595 (St. L. Ct. App. 1957); Cook v. Bolin, 296 S.W.2d 181 (Spr. Ct. App. 1956); State at inf. Attorney General *ex rel.* Erwin v. Taylor, 293 S.W.2d 12 (Spr. Ct. App. 1956); Fisher v. Lavelock, 290 S.W.2d 655 (K. C. Ct. App. 1956).

173. Paine v. Albany Ins. Co., 299 S.W.2d 897 (K. C. Ct. App. 1956).

The same was held of a point complaining that "The Court erred in giving plaintiff's Instruction 4 for the reason that the instruction is broader in scope than the pleadings and a departure therefrom."[174]

Even where an error is assigned in the overruling of a motion for a directed verdict, nothing is presented for review where no reason is specified in support of the point set out in an appeal brief.[175] An allegation of error in a brief to the effect that the verdict was against the evidence, against the weight of the evidence, and against the law under the evidence was held to be entirely too general to present any issue for decision on appeal.[176]

Finally, in connection with objections to expert testimony, it was decided that the points that a "Person must have special skill or knowledge respecting the matter involved so superior to that of men in general as to make formation of a judgment a fact of probative value in order to qualify as an expert witness," and that a "Hypothetical question to expert must include facts detailed in evidence and not rely on expert having heard testimony," obviously did not comply with supreme court rule 1.08(a) (3) and (d).[177]

G. *Changing Theories on Appeal*

A party is bound on appeal by the theory upon which he tried his case.[178]

In connection with this rule, the theory upon which an action was brought, is determined, in part, by reading the petition in its entirety, and by giving to the language of the petition its plain and ordinary meaning and an interpretation which fairly appears to have been intended by the pleader.[179]

Where the plaintiff's submission of a negligence case under the humanitarian doctrine was a matter of legal strategy rather than a misadventure, the action of the trial court in setting aside the judg-

174. Smyth v. City of St. Joseph, 297 S.W.2d 578 (K. C. Ct. App. 1956).
175. Lewis v. Watkins, *supra* note 172.
176. Lewis v. Watkins, *supra* note 172; *In re* Hyman's Adoption, 297 S.W.2d 1 (Spr. Ct. App. 1956); State at inf. Attorney General *ex rel.* Erwin v. Taylor, *supra* note 172.
177. Thrasher v. Allen Estate, 291 S.W.2d 630 (St. L. Ct. App. 1956).
178. State *ex rel.* State Highway Commission v. Dockery, 300 S.W.2d 444 (. 1957); Blair v. Hamilton, 297 S.W.2d 14 (Spr. Ct. App. 1956); Cook v. Bolin, S.W.2d 181 (Spr. Ct. App. 1956).
179. Gover v. Cleveland, 299 S.W.2d 239 (Spr. Ct. App. 1957).

ment for the plaintiff and entering a judgment for the defendant could not be disturbed on the plaintiff's appeal so as to permit a remand for a new trial on the question of primary negligence.[180]

Also, where the trial theory of the plaintiff was that a road had become a public road by prescription, on appeal he could not rely on its becoming such a road by an implied or common-law dedication.[181]

H. *Matters Considered on Appeal*

1. Questions Presented by Pleadings

Where a workmen's compensation proceeding involved the question of which of two firms was the employer of the claimant and therefore liable for compensation, and the record did not show that this question of liability under the terms of the contract of employment was by proper pleadings presented to the Commission or to the circuit court, the appellate court refused to pass on any branch of the question.[182]

Further, where an account stated was not pleaded as an affirmative defense in an action to recover a balance allegedly due for repairs and improvements to a house, and no instruction was requested submitting such issue, the defense could not be asserted for the first time in the appellate court.[183]

2. Grounds of Motion for New Trial

Grounds on which a plaintiff makes a motion for a new trial and which are not included as bases for granting the motion will not be considered on an appeal by the defendant from the granting of the motion, as they are deemed to have been overruled by the court so that the appellant cannot properly complain of the court's action as to them.[184]

3. Failure to Appeal From Action of Trial Court

The usual rule is that a failure to appeal from an action of a trial

180. Farmer v. Taylor, 301 S.W.2d 429 (Spr. Ct. App. 1957).
181. Gover v. Cleveland, *supra* note 179.
182. Wigger v. Consumers Cooperative Ass'n, 301 S.W.2d 56 (K. C. Ct. App. 1957).
183. Meyer v. Gamblin, 298 S.W.2d 526 (St. L. Ct. App. 1957).
184. Mosley v. St. Louis Public Service Co., 301 S.W.2d 797 (Mo. 1957).

court removes that action as a foundation for an appeal. Thus, where there was a failure to appeal from an order granting the defendant's motion for a new trial, the plaintiff was deemed to have assented to that ruling.[185]

Further, on a divorced wife's appeal from a judgment modifying a divorce decree awarding her custody of the parties' adopted minor son by awarding his custody to his natural mother, the appellate court would not consider the appellant's citation of error in allowing her an insufficient amount for expenses, including attorney fees, because of the court's belief that the troubles necessitating the modification of the decree were caused solely by the wife, where no appeal was taken from the court's order overruling the wife's re-filed motion for an allowance of expenses on appeal and attorney fees.[186]

4. Points and Authorities

Review by an appellate court is limited to those matters which are properly presented in the appellant's brief under his "Points and Authorities."[187]

For example, where, though the plaintiff's brief argued that the defendant's instruction was erroneous, no such point appeared in her points and authorities relied on, as required by supreme court rule 1.08(3), the alleged error was not properly presented for review by the court of appeals.[188]

Also, where a petition for declaratory relief alleged the violation of constitutional rights but no constitutional questions were presented under the appellant's points, any objections relating thereto were treated as waived by the appellant.[189]

5. Point First Raised in Reply Brief

A point raised for the first time in a reply brief is not entitled to consideration.[190]

185. State *ex rel.* McKenzie v. La Driere, 294 S.W.2d 610 (St. L. Ct. App. 1956).
186. Hachtel v. Hachtel, 291 S.W.2d 201 (Spr. Ct. App. 1956).
187. Monroe v. Monroe, 300 S.W.2d 536 (K. C. Ct. App. 1957); Beeler v. Board of Adjustment of Joplin, 298 S.W.2d 481 (Spr. Ct. App. 1957); State v. Couch, 294 S.W.2d 636 (St. L. Ct. App. 1956).
188. Guiterrez v. St. Joseph Light & Power Co., 294 S.W.2d 360 (K. C. Ct. App. 1956).
189. Jacobs v. Leggett, 295 S.W.2d 825 (Mo. 1956) (en banc).
190. Lewis v. Lewis, 301 S.W.2d 861 (St. L. Ct. App. 1957).

6. Plain Errors

Under supreme court rule 3.27, "plain errors" affecting substantial rights may, in the discretion of an appellate court, be considered on an appeal, though they were not raised in the trial court or preserved for review or were defectively raised or preserved, when the court deems that a manifest injustice or miscarriage of justice has resulted from such errors.[191]

There have recently been several decisions based on this rule.

For instance, it has been decided that where an affidavit for constructive service by publication was insufficient to warrant the trial court in ordering such service in a divorce suit against a nonresident defendant, but a default judgment was entered against him, there was "plain error."[192]

Again, it has been held that a trial court's remarks which in effect constituted a misdirection of the jury and furthermore directly contradicted what had been said in the previous instruction respecting damages constituted "plain error" and affected the substantial rights of the plaintiff.[193]

On the other hand, it has been ruled that an alleged error of the trial court in the consideration of evidence of attorney's fees incurred by the defendants in a successful appeal from a judgment granting a permanent injunction could not be reviewed on the defendants' appeal from a judgment assessing damages springing from a temporary injunction, where the plaintiffs filed no motion attacking the allowance of attorney's fees and did not appeal therefrom.[194]

7. Question Essential to Determination of Appeal

A reviewing court will consider only those questions necessary to a determination of an appeal.[195]

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191. Sigwerth v. Sigwerth, 299 S.W.2d 581 (Spr. Ct. App. 1957). See also Tillery v. Crook, 297 S.W.2d 9 (Spr. Ct. App. 1957).
192. Sigwerth v. Sigwerth, *supra* note 191.
193. Baker v. Fortney, 299 S.W.2d 563 (K. C. Ct. App. 1957).
194. Hamilton v. Hecht, 299 S.W.2d 577 (St. L. Ct. App. 1957).
195. Logsdon v. Duncan, 293 S.W.2d 944 (Mo. 1956).

I. *Duty of Appellate Court*

1. In Connection With Pleadings

When the sufficiency of the petition is first challenged on appeal, the pleading should be construed with reasonable liberality to prevent entrapment, unless it wholly fails to state a cause of action.[196]

Further, under such circumstances, every reasonable intendment should be indulged in favor of the petition.[197]

On an appeal from a judgment dismissing an amended petition for failure to state a claim on which relief could be granted, where the reply brief admitted the truth of a statement contained in the defendants' brief as to a fact which was unfavorable to the plaintiff, and which was omitted from the amended petition, though such statement was outside the record, a reviewing court would consider the amended petition, for the purpose of determining the sufficiency thereof, as though it included the substance of such statement.[198]

Since the form of an action pleaded is determined by the substance of the petition, in determining the cause of action intended to be pleaded under the code the appellate court may consider both the facts pleaded and the relief sought.[199]

2. In Connection With Transcript

Where a transcript filed in the supreme court was approved by both the plaintiff and the defendant as the transcript on appeal and no entries disclosed that any evidence was adduced by the defendant in support of his motion to dismiss the action on the ground of res judicata, the supreme court stated that it would assume no evidence was adduced.[200]

It is not proper for an appellate court to hear or consider evidence, orally or by affidavit, to complete, correct, or impeach a transcript.[201]

Hence, in determining whether the defendant had consented to

196. Atkinson v. Smothers, 291 S.W.2d 645 (St. L. Ct. App. 1956).
197. McCallum v. Executive Aircraft Co., 291 S.W.2d 650 (K. C. Ct. App. 1956).
198. Nastasio v. Cinnamon, 295 S.W.2d 117 (Mo. 1956).
199. Kesinger v. Burtrum, 295 S.W.2d 605 (Spr. Ct. App. 1956).
200. Rippe v. Sutter, 292 S.W.2d 86 (Mo. 1956).
201. Hendershot v. Minich, 297 S.W.2d 403 (Mo. 1957).

a hearing of the plaintiffs' motion for a new trial outside of the county in which the action involved was brought, the supreme court held that it would not consider contradictory and controversial affidavits of counsel, prepared and filed months after the appeal had been taken.[202]

3. As to Matters Involving Trial Court Discretion

Appellate courts will not reverse decisions of trial courts on matters within their discretion, unless the courts abuse such discretion. During the past year, this doctrine has been applied to one or more rulings relating to the qualifications of veniremen to sit as jurors,[203] motions to set aside dismissals,[204] motions for more definite statements of causes,[205] motions for separate trials of different issues raised in separate counts,[206] the reservation of rulings on evidence,[207] argument,[208] authorization to a foreman of a jury to add to a verdict a certain sum as damages, where the amount thereof had been omitted from the verdict,[209] the allowance of attorney's fees,[210] and the granting of new trials because of the misconduct of jurors,[211] because of alleged perjury of witnesses,[212] because the verdicts were against the weight of the evidence,[213] because of the excessiveness or inadequacy of verdicts,[214] or because of newly discovered evidence.[215]

4. In Connection With Weight of Evidence

In a jury-tried case, a reviewing court does not weigh the evidence and may interfere only when there is a complete absence of probative facts to support the verdict.[216]

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202. *Ibid.*
203. Moss v. Mindlin's, Inc., 301 S.W.2d 761 (Mo. 1957); State *ex rel.* State Highway Commission v. McMurtry, 292 S.W.2d 947 (Spr. Ct. App. 1956).
204. Doughty v. Terminal R.R. Ass'n of St. Louis, 291 S.W.2d 119 (Mo. 1956).
205. Allen v. St. Louis-San Francisco R.R., 297 S.W.2d 483 (Mo. 1957).
206. Brown v. Sloan's Moving & Storage Co., 296 S.W.2d 20 (Mo. 1956).
207. Deichmann v. Aronoff, 296 S.W.2d 171 (St. L. Ct. App. 1956).
208. Davis v. Terminal R.R. Ass'n of St. Louis, 299 S.W.2d 460 (Mo. 1957); Comstock v. Ingles, 296 S.W.2d 68 (Mo. 1956); Marler v. Pinkston, 293 S.W.2d 385 (Mo. 1956); Joshmer v. Fred Weber Contractors, 294 S.W.2d 576 (St. L. Ct. App. 1956).
209. Olsen v. Bernie's, Inc., 296 S.W.2d 3 (Mo. 1956).
210. Haley v. Horwitz, 290 S.W.2d 414 (St. L. Ct. App. 1956).
211. Logsdon v. Duncan, 293 S.W.2d 944 (Mo. 1956).
212. Calvin v. Lane, 297 S.W.2d 572 (K. C. Ct. App. 1957).
213. Moore v. Southwestern Bell Telephone Co., 301 S.W.2d 817 (Mo. 1957); Andres v. Brown, 300 S.W.2d 800 (Mo. 1957); Hendershot v. Minich, *supra* note 201.
214. Combs v. Combs, 295 S.W.2d 78 (Mo. 1956).
215. Deacon v. City of Ladue, 294 S.W.2d 616 (St. L. Ct. App. 1956).
216. Blair v. Hamilton, 297 S.W.2d 14 (Spr. Ct. App. 1956). See also Dixon v. Edelen, 300 S.W.2d 469 (Mo. 1957); Craddock v. Greenberg Mercantile, Inc., 297

Another way of stating this rule is that an appellate court does not weigh conflicting evidence.[217]

Again, the setting aside of verdicts as against the weight of conflicting probative evidence is a function reserved for the trial courts.[218]

This doctrine applies to the evaluation of the credibility of witnesses.[219]

Further, this law applies even where a trial court denies a new trial merely by failing to pass on a motion therefor within ninety days after it is filed.[220]

5. In Connection With Inferences From Evidence

It is not the province of an appellate court to determine what inferences and conclusions should have been drawn from the evidence.[221]

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

1. In General

Where a plaintiff chose to abandon his pleaded primary negligence and to submit his case solely under the humanitarian doctrine, on an appeal by the defendant from the trial court's holding on the defendant's after-trial motion for a directed verdict, the appellate court's inquiry would be whether the plaintiff had made a submissible case on his one submitted assignment.[222]

2. Substantial Evidence

On an appeal from a judgment sustaining the defendants' after-trial motions for judgment in accordance with motions filed at the close

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S.W.2d 541 (Mo. 1957); Hendershot v. Minich, 297 S.W.2d 403 (Mo. 1957); Baker v. Brown's Estate, 294 S.W.2d 22 (Mo. 1956); Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., 293 S.W.2d 913 (Mo. 1956); Deig v. General Ins. Co., 301 S.W.2d 409 (Spr. Ct. App. 1957).

217. Kansas City v. O'Donnell, 296 S.W.2d 914 (K. C. Ct. App. 1956).
218. Huffman v. Mercer, 295 S.W.2d 27 (Mo. 1956).
219. Cook v. Bolin, 296 S.W.2d 181 (Spr. Ct. App. 1956).
220. Baker v. Brown's Estate, *supra* note 216.
221. Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., *supra* note 216.
222. Farmer v. Taylor, 301 S.W.2d 429 (Spr. Ct. App. 1956).

of all of the evidence, the court need only determine whether there was substantial evidence to support a submission, and that is a matter of law.[223]

3. Evidence Considered and View Taken of It

Whenever the question arises on appeal whether or not a party has presented a submissible case, whether this problem exists in connection with a verdict or with a ruling of a trial court, such as a decision upon a motion for a directed verdict, or upon a motion for a judgment in accordance with a motion for a directed verdict, or upon an instruction, the appellate court should give the party who claims that he has presented a submissible case the benefit of all evidence, and of all reasonable inferences arising therefrom, which favor him, including evidence of his opponent and such inferences arising therefrom.[224] The courts appear to be saying the same thing when they declare that in these cases the evidence should be viewed in the light most favorable to such parties.[225]

Evidence of either party to an appeal, and inferences therefrom, which do not support the submissibility of a case should be disregarded by the appellate court in reaching a decision on whether or not a submissible case has been presented before the trial court.[226]

Finally, in determining whether or not a submissible case has

223. Craddock v. Greenberg Mercantile, Inc., *supra* note 216.

224. Farmer v. Taylor, *supra* note 222; Williams v. Ricklemann, 292 S.W.2d 276 (Mo. 1956); Young v. New York, Chicago & St. Louis Ry., 291 S.W.2d 64 (Mo. 1956). In particular as to inferences, see Smith v. Prudential Ins. Co., 300 S.W.2d 435 (Mo. 1957); Stokes v. Four-State Broadcasters, 300 S.W.2d 426 (Mo. 1957); Craddock v. Greenberg Mercantile, Inc., *supra* note 216; Brooks v. Rubin, 293 S.W.2d 295 (Mo. 1956); Williams v. Ricklemann, *supra;* James v. Berry, 301 S.W.2d 530 (Spr. Ct. App. 1957); Conley v. Berberich, 300 S.W.2d 844 (St. L. Ct. App. 1957); Lucas v. Barr, 297 S.W.2d 583 (K. C. Ct. App. 1957).

225. Boese v. Love, 300 S.W.2d 453 (Mo. 1957); Roderick v. St. Louis Southwestern Ry., 299 S.W.2d 422 (Mo. 1957); Combs v. Combs, *supra* note 214; Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., *supra* note 216; Hopkins v. J. I. Case Co., 293 S.W.2d 402 (Mo. 1956); La Fata v. Busalaki, 291 S.W.2d 151 (Mo. 1956); Schaefer v. Rechter, 290 S.W.2d 118 (Mo. 1956); Kolie v. Ruby, 300 S.W.2d 545 (K. C. Ct. App. 1957); Banks v. Koogler, 291 S.W.2d 883 (Mo. 1956); Tockstein v. P. J. Hamill Transfer Co., 291 S.W.2d 624 (St. L. Ct. App. 1956).

226. O'Leary v. Illinois Terminal R.R., 299 S.W.2d 873 (Mo. 1957) (en banc); Huffman v. Mercer, *supra* note 218; Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., *supra* note 216; Peterson v. Tiona, 292 S.W.2d 581 (Mo. 1956); Deig v. General Ins. Co., 301 S.W.2d 409 (Spr. Ct. App. 1957); Salmon v. Brookshire, 301 S.W.2d 48 (K. C. Ct. App. 1957); Blair v. Hamilton, 297 S.W.2d 14 (Spr. Ct. App. 1956); Caffey v. St. Louis-San Francisco Ry., 292 S.W.2d 611 (Spr. Ct. App. 1956).

been presented to a jury, an appellate court should consider as true *all* evidence supporting the admissibility of the case.[227]

The supreme court, on appeal from a Federal Employers' Liability Act decision must approach the question of the submissibility of the case in the light of the decisions of the Supreme Court of the United States.[228]

K. *Appeals on Ground of Excessive or Inadequate Verdict or Judgment*

1. Degree Excessive or Inadequate

It has been ruled that a reviewing court can only interfere with a verdict on the ground that it is excessive where the excessiveness thereof appears as a matter of law, that is, when the verdict is clearly for an amount in excess of the very most that the proof of the damages would reasonably sustain, and then only when the judgment is excessive to a degree that it shocks the conscience of the court.[229]

It has also been held that a jury verdict should not be disturbed as to the amount thereof unless it is grossly excessive.[230]

2. Substantial Evidence

When the question arises on appeal whether a verdict or a judgment is excessive or inadequate, the appellate court does not weigh the evidence, or pass on the credibility of the witnesses, but determines only whether there is evidence that substantially and reasonably supports the view and finding of the jury or of the trial court.[231]

3. Evidence Considered and View Taken of It

In passing on the issue as to the excessiveness of a verdict, the reviewing court must accept as true all of the evidence and all of the

227. Cudney v. Braniff Airways, 300 S.W.2d 412 (Mo. 1957); Shafer v. Southwestern Bell Telephone Co., 295 S.W.2d 109 (Mo. 1956); Nelson v. O'Leary, 291 S.W.2d 142 (Mo. 1956); Antweiler v. Prudential Ins. Co., 290 S.W.2d 652 (K. C. Ct. App. 1956).

228. Wiser v. Missouri Pac. R.R., 301 S.W.2d 37 (Mo. 1957).

229. Rossommano v. Quality Dairy Co., 297 S.W.2d 591 (St. L. Ct. App. 1957); Haley v. Horwitz, 290 S.W.2d 414 (St. L. Ct. App. 1956).

230. Statler v. St. Louis Public Service Co., 300 S.W.2d 831 (St. L. Ct. App. 1957); Joshmer v. Fred Weber Contractors, 294 S.W.2d 576 (St. L. Ct. App. 1956).

231. Combs v. Combs, 295 S.W.2d 78 (Mo. 1956); Huffman v. Mercer, 295 S.W.2d 27 (Mo. 1956); Rossommano v. Quality Dairy Co., *supra* note 229.

inferences raised by the evidence which are favorable to the plaintiff, and must disregard all of the evidence conflicting therewith.[232]

On an appeal from a final judgment in a partition suit fixing and allowing the fees to the plaintiff's attorneys and special commissioner, the reviewing court must disregard the incompetent testimony before the trial court and must reach a conclusion as to the reasonableness of the allowances upon a consideration of the evidence properly bearing on such issue.[233]

L. *Appeals From Administrative Proceedings*

The provision in article 5, section 22, of our constitution that the review of administrative decisions should include a consideration of whether the findings of the administrative body are supported by competent and substantial evidence upon the whole record provides a minimum standard for judicial review, with the result that any statute providing for a narrower scope of review is no longer effective.[234]

However, the legislature has the power and the authority to provide for any scope of judicial review of administrative decisions which it may desire to allow, so long as the provisions made are not in conflict with or repugnant to the federal and state constitutions. Hence, it may permit a broader scope of review of such decisions than is required by our constitution.[235]

As a result, the same scope of judicial review is not necessarily applicable to the decisions of all Missouri agencies.[236]

Under the constitutional standard for the judicial review of the decisions of administrative agencies, the reviewing court is authorized to determine whether, upon the entire record, the agency reasonably could have made the findings and the award under consideration but may not substitute its own judgment on the evidence for that of the agency. It may, however, set aside the agency's findings and award if,

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232. Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Conley v. Berberich, *supra* note 224; Statler v. St. Louis Public Service Co., *supra* note 230, Roderick v. St. Louis Southwestern Ry. Co., *supra* note 225; Rossommano v. Quality Dairy Co., *supra* note 229.

233. Haley v. Horwitz, *supra* note 229.

234. State *ex rel.* St. Louis Public Service Co. v. Public Service Commission, 291 S.W.2d 95 (Mo. 1956) (en banc).

235. *Ibid.*

236. *Ibid.*

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and only if, they were clearly contrary to the overwhelming weight of the evidence when such evidence and all legitimate inferences reasonably deducible therefrom were viewed in the light most favorable to the findings and to the award.[237]

Decisions of administrative bodies are not reviewed "de novo" because, as just stated, the courts have no authority to make findings of fact in such cases.[238]

An inference or conclusion which a jury might, with reason, draw from the evidence in a proceeding before an administrative agency should be taken into consideration by the court reviewing the decision of the agency in that case.[239]

In reviewing such cases, a court should give deference to the findings of the administrative tribunal, including those involving the credibility of witnesses, who gave oral testimony.[240]

The supreme court, on appeal, in a case involving the decision of an administrative agency, is not particularly concerned with the reasons assigned by the trial court for its order, since, if the trial court's decision is correct, it will not be disturbed by the supreme court because the trial court gave a wrong or insufficient reason therefor.[241]

It is specifically provided by section 287.490-1, Missouri Revised Statutes (1955 Supp.) that a court, on appeal, is authorized to modify a final award of the Industrial Commission in a workmen's compensation proceeding. This authority has been exercised recently by the Kansas City Court of Appeals.[242]

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237. Garrison v. Campbell "66" Express, 297 S.W.2d 22 (Spr. Ct. App. 1956). See also Lake v. Midwest Packing Co., 301 S.W.2d 834 (Mo. 1957); Cain v. Robinson Lumber Co., 295 S.W.2d 388 (Mo. 1956) (en banc); Thornsberry v. State Department of Public Health & Welfare, 295 S.W.2d 372 (Mo. 1956) (en banc); Toole v. Bechtel Corp., 291 S.W.2d 874 (Mo. 1956); Damore v. Encyclopedia Americana, 290 S.W.2d 105 (Mo. 1956); Crow v. Missouri Implement Tractor Co., 301 S.W.2d 423 (Spr. Ct. App. 1957); State *ex rel.* Bond v. Simmons, 299 S.W.2d 540 (St. L. Ct. App. 1957); Hogue v. Wurdack, 298 S.W.2d 492 (Spr. Ct. App. 1957); State *ex rel.* Chestnut Inn v. Johnson, 297 S.W.2d 576 (K. C. Ct. App. 1957); Tebeau v. Baden Equipment & Construction Co., 295 S.W.2d 184 (St. L. Ct. App. 1956); Kelting v. Columbia Brewing Co., 294 S.W.2d 572 (St. L. Ct. App. 1956).

238. State *ex rel.* Chestnut Inn v. Johnson, *supra* note 237.

239. Wiser v. Missouri Pac. R.R., 301 S.W.2d 37 (Mo. 1957).

240. Toole v. Bechtel Corp., *supra* note 237; Damore v. Encyclopedia Americana, *supra* note 237; State *ex rel.* Chestnut Inn v. Johnson, *supra* note 237.

241. Producers Produce Co. v. Industrial Commission, 291 S.W.2d 166 (Mo. 1956) (en banc).

242. Clapp v. Brown Shoe Co., 291 S.W.2d 209 (K. C. Ct. App. 1956).

On an appeal from the decision of an administrative agency, a court is not concerned with the question whether some other finding in favor of the claimant would have been supported by substantial evidence, but only with the sufficiency of the evidence to support the award made.[243]

M. *Judgment of Appellate Court*

1. Noncompliance With Rules of Court

Our supreme court has said that when permissible, a court should avoid the disposition of appellate cases on procedural grounds.[244]

With this in mind, our supreme court and courts of appeals, when they were able to determine from the briefs what the facts and rulings objected to were in cases before them, have tended to hear the appeals on the merits, though the briefs were not drawn according to the requirements of rule 1.08 of our supreme court.[245]

Specifically, the supreme court has said, on a motion to dismiss an appeal leveled at the appellant's statement and at some of the points relied on, that where the statement adequately presented the facts and points attacked, when taken in conjunction with the argument thereon, and where the court was sufficiently advised of the questions presented for review, the appeal would not be dismissed.[246]

On the other hand, our appellate courts have decided that, where a party merely files a notice of appeal but takes no further steps to perfect an appeal, it will be dismissed.[247]

Thus, where the appellant had not filed a transcript or a certified copy of the order appealed from, it was held that there was nothing before the court for review and the appeal was dismissed.[248]

As to the necessity of setting out in a brief the points on which the appellant relies to obtain a reversal of a ruling of the trial court

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243. Counts v. Bussman Manufacturing Co., 298 S.W.2d 508 (St. L. Ct. App. 1957).
244. Hahn v. Hahn, 297 S.W.2d 559 (Mo. 1957) (en banc).
245. Turner v. Mitchell, 297 S.W.2d 458 (Mo. 1957); Vest v. Bialson, 293 S.W.2d 369 (Mo. 1956); Herrold v. Hart, 290 S.W.2d 49 (Mo. 1956); Steckler v. Steckler, 293 S.W.2d 129 (Spr. Ct. App. 1956).
246. Fitzpatrick v. St. Louis-San Francisco Ry., 300 S.W.2d 490 (Mo. 1957).
247. Stokes v. Four-State Broadcasters, 300 S.W.2d 426 (Mo. 1957); Parker v. Ford Motor Co., 296 S.W.2d 35 (Mo. 1956).
248. *In re* Jackson's Will, 294 S.W.2d 953 (Spr. Ct. App. 1956).

against him, it has been ruled that an appellate court should not be asked or required to grope through the transcript and the briefs in search of possible errors of the trial court.[249]

And, of course, where an appellate brief does not refer to any of the grounds relied upon by the defendant in his successful motion to dismiss a case, and the statement of facts is inadequate, the appeal will be dismissed.[250]

Again, it has often been held that points in an appellant's brief which are mere abstract statements of law are insufficient and may result in the dismissal of the appeal.[251]

During the year the supreme court has quoted some examples of inadequate points, which they have disregarded.

Examples of these are:

"A. Statutory Liens and Decided Cases. (Two sections of the statutes and eleven cases are cited.)

"B. . . . .

"C. Constitutional Questions Involved. (Art. I of 14th Amendment to U. S. Constitution, 5th Amendment to U. S. Constitution, and Art. I, Sec. 10 of Mo. Constitution are cited.)"[252]

"A. Prefatory remarks.

"B. . . . .

"C. Attorney's fees in receivership. (Citing section 515.260, RSMo. 1949 [V.A.M.S.], and seven cases)

"D. Attorneys' fees for services performed in this matter. (Citing one case)

"E. The constitutional questions. (Citing Art. I, Sec. 10, Mo. Constitution of 1945 [V.A.M.S.]; 5th Amendment to U. S. Constitution; and Art. I of 14th Amendment to U. S. Constitution)"[253]

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249. Onka v. Butkovich, 294 S.W.2d 357 (K. C. Ct. App. 1956).
250. Fisher v. Lavelock, 290 S.W.2d 655 (K. C. Ct. App. 1956).
251. Jacobs v. Stone, 299 S.W.2d 438 (Mo. 1957); Beeler v. Board of Adjustment of Joplin, 298 S.W.2d 481 (Spr. Ct. App. 1957); *In re* Yeater's Trust Estate, 295 S.W.2d 581 (K. C. Ct. App. 1956).
252. Munday v. Thielecke, 290 S.W.2d 88 (Mo. 1956).
253. *Ibid.*

It has likewise been decided that, where an assignment under the points and authorities in a brief stated that the trial court failed to make any finding as to a certain matter and where no authorities were cited and no argument was made in connection with this point, the assignment was insufficient.[254]

However, where some points are found to be adequate and others are not, the appellate court will rule on the former and ignore the latter.[255]

As to briefs of respondents, it has been ruled on an appeal, that where the respondent failed to file a brief as contemplated by the supreme court rules, since the court did not have any rule as to the action to be taken in the event of such a failure, it would proceed to determine the matter on the merits.[256]

With respect to reply briefs, it has been decided that where a reply brief was in direct violation of supreme court rule 1.08(d) providing that a reply brief, if any, shall not exceed 25 pages and shall not reargue the points covered in the main brief, it would be disregarded.[257]

2. Judgment Affirmed or Reversed

a. When, and When Not, Reversed

Where a cause is tried by a jury, an appellate court is bound by the jury's findings of facts if there is substantial evidence to support the verdict, and only where there is a complete absence of probative facts to support the conclusion reached by the jury does reversible error appear.[258]

Similarly, when a case is tried without a jury, the trial judge's finding based on substantial evidence should not be disturbed by the appellate court.[259]

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254. Pizzo v. Pizzo, 295 S.W.2d 377 (Mo. 1956) (en banc).
255. Mannon v. Frick, 295 S.W.2d 158 (Mo. 1956); Munday v. Thielecke, *supra* note 252.
256. Olsen v. Bernie's, Inc., 296 S.W.2d 3 (Mo. 1956).
257. Blair v. Hamilton, 297 S.W.2d 14 (Spr. Ct. App. 1956).
258. Moore v. St. Louis Southwestern Ry., 301 S.W.2d 395 (Spr. Ct. App. 1957).
259. State *ex rel.* Carter County, Missouri & Turley v. Lewis, 294 S.W.2d 954 (Spr. Ct. App. 1956).

It is specifically provided by section 512.160-2, Missouri Revised Statutes (1949) that a judgment may not be reversed unless error by the trial court materially affected the merits of the action.[260]

There have been numerous cases during the past year relating to the question whether trial errors have materially affected the merits of actions.

For instance it has been ruled that the conduct of counsel on the voir dire which purposely results in instilling in the minds of the jurors the idea the defendant is not really interested in the outcome of the case because, whatever may be the result, someone else will have to bear the loss, constitutes ground for reversal.[261]

As to rulings on the admission of evidence, it has been held in an action for injuries, wherein the petition made no claim for damages for the nervous collapse of the plaintiff, that the admission of testimony that about a year after the accident the plaintiff had a nervous collapse was prejudicial error.[262]

Also, where it appeared that the jury, but for erroneously admitted evidence of an accident-scene statement by a truck driver to the effect that his brakes had gone bad, might have found that the head-and-tail collision had been caused by the sudden stopping of the automobile involved, the error in admitting the testimony would require a reversal of a judgment for the plaintiffs, in their action against the truck owner.[263]

An instruction which purports to cover the entire case and to direct a verdict must hypothesize every fact essential to the plaintiff's right of recovery, and a failure to do so constitutes reversible error.[264]

Further, concerning errors in rulings on instructions, it has been held that an instruction is the basis for the reversal of the judgment in the case in which it is given, if it relates to facts and is not based on evidence in the case,[265] if it is a verdict-directing instruction and omits

260. Roush v. Alkire Truck Lines, 299 S.W.2d 518 (Mo. 1957); Young v. New York, Chicago & St. Louis Ry., 291 S.W.2d 64 (Mo. 1956).
261. Murphy v. Graves, 294 S.W.2d 29 (Mo. 1956).
262. Taylor v. Kansas City Southern Ry., 293 S.W.2d 894 (Mo. 1956).
263. Roush v. Alkire Truck Lines, *supra* note 260.
264. McCallum v. Excutive Aircraft Co., 291 S.W.2d 650 (K. C. Ct. App. 1956).
265. Hall v. Clark, 298 S.W.2d 344 (Mo. 1957); State *ex rel.* State Highway Commission v. McMurtry, 292 S.W.2d 947 (Spr. Ct. App. 1956).

an element required to entitle a party to the verdict,[266] if it improperly limits the grounds of liability,[267] if, without exception, it permits the claimant to recover because of the defendant's act though the law permits the defendant to do the act, if it is carefully done,[268] if it allows the jury to give a claimant compensation twice for a single loss,[269] and if it is very confusing.[270]

On the other hand, it has been ruled that it is not reversible error for a court to refuse to discharge a juror who, after he had admitted having heard the case discussed as well as having talked to witnesses who presumed to know the facts, stated that he thought he could try the case impartially.[271]

It has been decided that the admission of evidence, though inadmissible, which merely supported other properly admissible evidence already in the case, was not a reversible error.[272]

The exclusion of portions of a deposition which were pertinent to the proof of the negligence of the defendant was not prejudicial where the plaintiff was guilty of contributory negligence as a matter of law.[273]

Where the defendants in making an offer to prove certain facts did not secure a ruling of the court, the appellate court refused to rule that there had been prejudicial error, since no error as to the exclusion of testimony can be assigned unless the trial court has been apprised of what the nature of the proof will be.[274] This is not clear. Apparently there was a proposal to make an offer of proof, but the offer was not made.

As to instructions, it is not reversible error to omit from a verdict-directing instruction undisputed facts.[275]

Where one instruction correctly states the law, the inclusion of

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266. Elmore v. Missouri Pac. R.R., 301 S.W.2d 776 (Mo. 1957); Elmore v. Illinois Terminal R.R., 301 S.W.2d 44 (St. L. Ct. App. 1957).
267. Elmore v. Missouri Pac. R.R., *supra* note 266.
268. *Ibid.*
269. State *ex rel.* State Highway Commission v. Mink, 292 S.W.2d 940 (Spr. Ct. App. 1956).
270. Fitzpatrick v. St. Louis-San Francisco Ry., 300 S.W.2d 490 (Mo. 1957).
271. State *ex rel.* State Highway Commission v. McMurtry, *supra* note 265.
272. Wyckoff v. Davis, 297 S.W.2d 490 (Mo. 1957).
273. Adkins v. Boss, 290 S.W.2d 139 (Mo. 1956).
274. State *ex rel.* State Highway Commission v. McMurtry, *supra* note 265.
275. Peterson v. Tiona, 292 S.W.2d 581 (Mo. 1956); Powers v. Seibert, 297 S.W.2d 627 (K. C. Ct. App. 1956).

another instruction which incorrectly states the law on the same point does not require a reversal. [276]

In an action to recover for personal injury, an instruction directing a verdict for the defendant, if the jury found that the injuries were caused solely by the failure of the employee to exercise reasonable care for his own safety, was not prejudicially erroneous for failure to define reasonable care, where the plaintiff offered no instruction defining that term.[277]

Further, in such a case an improper instruction on the measure of damages was not prejudicial to the plaintiff where the jury was specifically instructed not to consider the question of damages, unless and until it first determined that the defendant was negligent, and the jury found for the defendant on the question of liability.[278]

Where the plaintiff's three theories of specific negligence were submitted conjunctively in a personal injury action, the submission of the case was not reversibly erroneous if any one of the theories was supported by substantial evidence.[279]

In an action to recover for injuries sustained by the plaintiff in a fall down a flight of steps, the fact that the instruction, which submitted three elements of alleged negligence, failed to require the jury to find that the defendant had either actual or constructive knowledge of the unsafe condition of the handrail by the steps was not prejudicial error, where the hypothesized defect as to the handrail was of such a nature that a finding of its existence carried with it the clear inference of the knowledge of the defendant of its prior existence.[280]

The injection, in the final argument of the plaintiff's counsel to the jury, of the fact that the defendant had insurance coverage was not prejudicial error, where the argument gave the jury no further information than that which had been brought to its attention during the trial.[281]

Where the jury, after having considered their verdict, returned into open court with a verdict for the *plaintiff* written on a printed form which had been provided for a verdict in favor of the defendant, and the

276. State *ex rel.* State Highway Commission v. Mink, *supra* note 269.
277. Young v. New York, Chicago & St. Louis Ry., 291 S.W.2d 64 (Mo. 1956).
278. *Ibid.*
279. Cudney v. Braniff Airways, 300 S.W.2d 412 (Mo. 1957).
280. Taylor v. Kansas City Southern Ry., 293 S.W.2d 894 (Mo. 1956).
281. Moss v. Mindlin's, Inc., 301 S.W.2d 761 (Mo. 1957).

trial court directed the jury to return to the jury room and to read the instructions and the forms for verdicts, and ten or fifteen minutes later it was discovered that the clerk had, before its return to the jury room, provided the jury with two forms for a plaintiff's verdict, and no form for a defendant's verdict, and the jury was recalled from the jury room and was provided with a form for a verdict for the defendant, and the jury then retired to the jury room and subsequently returned a unanimous verdict for the plaintiff, the irregularities were not prejudicial.[282]

That the order sustaining the plaintiffs' motion for a new trial was not made in open court was not a ground for the reversal of an order granting the motion, in view of section 509.380, Missouri Revised Statutes (1949) expressly authorizing hearings on motions in chambers and without the attendance of a clerk.[283]

And finally, if an order sustaining the defendant's motion for a new trial was proper, it must be affirmed regardless of the reason given for the action taken.[284]

b. Burden of Showing Reversible Error

It is presumed on appeal that the trial judge, in weighing the evidence, was governed by correct principles of law and that his decision was correct, hence the appellant has the burden of showing affirmatively that reversible error was committed.[285]

c. Deference to Trial Court's Opinion

Where the trial court grants a new trial, thereby indicating that the judge was of the opinion that there was prejudicial error in the conduct of the case, the appellate court defers to the ruling of the trial court on the question of whether or not the error was prejudicial.[286]

3. Cause Remanded

A case should not be reversed for failure of proof without remanding it, unless the record indicates that the available essential evidence has been fully presented and that no recovery could be had in any event,

282. Howard v. Missouri Pac. R.R., 295 S.W.2d 68 (Mo. 1956).
283. Hendershot v. Minich, 297 S.W.2d 403 (Mo. 1957).
284. Elmore v. Illinois Terminal R.R., *supra* note 266.
285. Gover v. Cleveland, 299 S.W.2d 239 (Spr. Ct. App. 1957).
286. Sho-Me Power Corp. v. Fann, 292 S.W.2d 91 (Mo. 1956).

and the rule is pertinent where the record indicates that additional evidence might be adduced in support of the plaintiff's action which might enable him to make a submissible case.[287]

Where the jury makes two inconsistent findings of fact there is no priority between them and both are bad, and the whole case, where possible, will be remanded.[288]

Also, where the plaintiff misconceived his remedy, it has been said that the case should be remanded so that the plaintiff may amend his petition to bring his action on the theory permitted by law.[289]

However, when a party weighs the hazards and consequences, and voluntarily chooses a course of action for reasons of trial strategy, he is not entitled to have the cause remanded for trial on an abandoned theory.[290]

Where an indispensable party was omitted, and the trial court later refused to permit the plaintiff to amend to join the indispensable party, and the plaintiff's evidence made a submissible case on the merits, the judgment was reversed and the cause was remanded with leave to join the indispensable party plaintiff, even though he was originally omitted for purposes of trial strategy.[291]

Though, on an appeal from the judgment of the trial court affirming the finding of the referee in a statutory proceeding by minority stockholders to have the fair value of their shares determined, the appellate court had the duty to review the case on the facts, where the final appraisement by the appellate court of the fair value of the stock on the record would not have been an "intelligent judgment" or an "informed opinion" but sheer speculation, the cause on its merits was reversed and remanded.[292]

Where the amount of a verdict has probably been induced by the prejudicial admission of improper evidence, the appellate court will

287. Feinstein v. McGuire, 297 S.W.2d 513 (Mo. 1957); Barnhart v. Ripka, 297 S.W.2d 787 (Spr. Ct. App. 1956); Schuler v. Schuler, 290 S.W.2d 192 (St. L. Ct. App. 1956).

288. McGuire v. Southwestern Greyhound Lines, Inc., 291 S.W.2d 621 (St. L. Ct. App. 1956).

289. Deig v. General Ins. Co., 301 S.W.2d 409 (Spr. Ct. App. 1957); Lebcowitz v. Simms, 300 S.W.2d 827 (St. L. Ct. App. 1957).

290. Nelms v. Bright, 299 S.W.2d 483 (Mo. 1957).

291. *Ibid.*

292. Phelps v. Watson-Stillman Co., 293 S.W.2d 429 (Mo. 1956).

remand the case, rather than grant a remittitur, since the admission of such evidence calls for a reversal of the judgment.[293]

Similarly, where improper influences affecting the jurors deprive the defendant of a fair and impartial jury to which he is entitled and where an excessive award of damages for personal injuries is likely induced by the misconduct of a juror or jurors, it has been decided that the error can be cured only by granting a new trial and not merely by the ordering of a remittitur.[294]

Where the appellate court determines that a judgment has given property to the wrong party and that another party in the case has the right to it, the court will not order a new trial, but will reverse and remand the case, with directions to the trial court to enter judgment for the correct party.[295]

N. *Rehearing*

It has been ruled that new points may be argued in a brief on a rehearing, if those points were properly preserved in the trial court.[296]

293. Taylor v. Kansas City Southern Ry., *supra* note 280; Beaty v. N. W. Electric Power Cooperative, 296 S.W.2d 921 (K. C. Ct. App. 1956).
294. Murphy v. Graves, 294 S.W.2d 29 (Mo. 1956).
295. Trenton Motor Co. v. Watkins, 291 S.W.2d 659 (K. C. Ct. App. 1956).
296. Wilson v. Kansas City Public Service Co., 291 S.W.2d 110 (Mo. 1956),