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Work of the Missouri Supreme Court for the Year 1937

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THE WORK OF THE MISSOURI SUPREME COURT FOR THE YEAR 1937

This issue of the *Missouri Law Review* is devoted to a study of work of the Missouri Supreme Court for the year 1937. The purpose of the study is to emphasize the progress of the law in Missouri as found in the decisions by the highest appellate tribunal. In many decisions the court has merely applied well settled principles to facts sufficiently similar to previous cases, so that the case is not especially significant. The various members of the legal profession, who have collaborated in this study, have given special attention to cases of first impression as to the legal doctrines involved, to extensions of previously applied principles to new sets of facts, and to cases particularly interesting because of novel situations. In this manner the Review is attempting to keep in focus before the profession the development in the law in a way that the reading of isolated cases during the year cannot do. It is, of course, quite impossible to cover every topic in the law; hence the more active fields have been selected.

During 1937, one change was made in the membership of the court. Judge Douglas was appointed to fill the vacancy left by the appointment of Judge Collet to the Federal District Court of Missouri.

STATISTICAL SURVEY

OZBERT W. WATKINS, JR.*

Especially significant is the number of cases disposed of by opinions in this period as compared to the two preceding years.[1] In 1935, this number was 331; in 1936, 369; while in 1937 the number of cases so disposed of was 277. This decrease may be due largely to the state of the docket at

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1. See *The Work of the Missouri Supreme Court for the Year 1936 (Statistical Survey)* (1937) 2 MO. L. REV. 393, 394.

the beginning of each year. For example, the number of cases on the docket on January 1, 1935 was 490; on January 1, 1937 it was 288.[2]

Table I shows the disposition of litigation. About the same proportion of affirmances and reversals is found in this period as existed in the preceding one.

TABLE I

DISPOSITION OF LITIGATION

Judgment affirmed	121
Affirmed on condition (enter remittitur)	3
Awarding of new trial by trial court affirmed	4
Awarding of new trial by trial court reversed	4
Affirmed and remanded	4
Reversed and remanded	68
Judgment reversed	23
Modified or corrected and as modified or corrected affirmed	1
Affirmed in part and reversed in part	1
Writ granted	2
Writ quashed	8
Rule absolute	4
Rule discharged	1
Case transferred to court of appeals	13
Record quashed	4
Appeal dismissed	2
Petitioner discharged	2
Petitioner remanded	1
Alternative writ made peremptory	4
Opinion quashed	1
Citation quashed	1
Respondent fined and taxed with costs	2
License to practice law suspended	1
Peremptory writ denied	2

Table II gives an analysis of the decisions for the year 1937 by topics. It will be readily understood that such a classification will reflect only the opinion of the individual who has attempted to classify the cases in this manner. Most cases involve more than one topic of the law. Even to list the case under the principal issue with which it dealt, in many instances, necessarily had to be quite arbitrary. However, the table does

2. It is regrettable that the supreme court docket cannot be published in connection with this study to show by comparison the work presented to the court and the disposition of cases by opinions and by motions. This docket is prepared at the beginning of each legislative year. Hence, it is unavailable at this time.

show the fields of the law to which the litigation pertained in this period, as well as those most active.

TABLE II

TOPICAL ANALYSIS OF DECISIONS.

Administrative Law	4
Agency	1
Appeal and Error	12
Attorney and Client	2
Bills and Notes	2
Constitutional Law	9
Contracts	5
Criminal Law	53
Creditors Rights	3
Damages	1
Equity	7
Evidence	9
Habeas Corpus Proceedings	3
Insurance	8
Mandamus Proceedings	8
Master and Servant	13
Mortgages	2
Municipal Corporations	6
Negligence (Automobiles)	14
Other Negligence	20
Partnership	1
Pleading	4
Practice and Procedure	17
Prohibition Proceedings	7
Quo Warranto Proceedings	3
Real Property	24
Receivership	1
Statutory Construction	7
Taxation	6
Torts (other than negligence)	5
Trusts	4
Wills and Administration	13

The average number of opinions written by members of the Missouri Supreme Court during 1937 is 15; in 1936, it was 18. The average number of opinions written by the Supreme Court Commissioners in 1937 is 28; in 1936, it was 31.

During the year there were three dissents with opinions and three dissents without opinions.

APPELLATE PROCEDURE

CHARLES V. GARNETT*

In the field of Appellate Practice, the year's decisions of the supreme court represent no marked departure from previously established principles. With one or two exceptions, those cases which deal with Appellate Practice merely re-state, but do not attempt to alter, the principles of prior decisions. In general, the trend of the year has been toward the spirit rather than the letter of the law, and toward the preservation of the substantial rights of litigants through common sense application of the rules of procedure, rather than the impairment of rights because of technical infractions of rules.

I. JURISDICTION OF THE SUPREME COURT

As in former years, the court has given close attention to questions involving its own jurisdiction, the reason, as expressed by the late Judge Frank in *Town of Canton v. Moberly, Finance Comm'r*,[1] being that "if we do not have jurisdiction any decision we might render on the merits would be void." In that case, neither party had questioned the jurisdiction of the court, but because it clearly appeared to the court that the jurisdiction was properly vested in the court of appeals, the court of its own motion, transferred the appeal to the latter court. The facts showing jurisdiction must, the court holds, "affirmatively appear."

As is shown in *Hanssen v. Karbe*,[2] the necessity for an affirmative showing of the facts establishing jurisdiction in the supreme court arises from the fact that the supreme court, under the constitution,[3] is a court of limited jurisdiction, that is, confined within the limits of the jurisdiction conferred or authorized by the constitution; whereas the courts of appeals are courts of general appellate jurisdiction, that is, having jurisdiction over all matters of appeal except those in which the jurisdiction is elsewhere. Nor should the showing of jurisdictional facts be such as to require resort to speculative or conjectural calculations to arrive at the

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1. 340 Mo. 610, 101 S. W. (2d) 722 (1937).
2. 106 S. W. (2d) 415 (Mo. 1937).
3. MO. CONST. art. VI, § 12, Amendment 1884, §§ 3, 5.

amount in dispute, the rule being that "the litigants are required to affirmatively establish in the trial court the facts essential to a jurisdictional amount lodging the review proceedings here."

Whether it depends upon the "amount in dispute," or upon constitutional questions, or upon other grounds, jurisdiction is determinable from issues really existing and not from sham or colorable issues. Thus, in *Esmar v. Hæussler*,[4] plaintiff's petition, in an action for an accounting, alleged that the amount involved "exceeds $8500," but plaintiff's own evidence showed that the actual amount in dispute was less than that required to confer jurisdiction on the supreme court. In that case, also, it was contended that the transactions involved were governed and controlled by the laws and decisions of a sister state and that the trial court's failure to follow those laws and decisions was contrary to the full faith and credit clause of the Federal Constitution, thereby raising a constitutional question sufficient to confer jurisdiction of the appeal on the supreme court. The court held, however, that the trial court's action could be reviewed without resort to the full faith and credit clause, and did not involve construction of the constitution in the "jurisdictional sense." In the course of its opinion transferring the cause to the proper court of appeals, the court states: "Appellate jurisdiction does not vest in this court merely because the cause of action calls for a determination of whether the law . . . of this or a sister state governs, or because the cause of action involves a construction of the law of a sister state and its application to given facts, or the correctness of such construction or application. If it did, we perceive little escape from the review of any trial proceedings involving the law of a sister state . . . . They (the courts of appeals) are not to be deprived of their jurisdiction, nor is jurisdiction to be foisted upon this court, by the attempted injection of constitutional issues not essential to or involved in a determination of the cause."

While, as is shown by the court's recognition of its jurisdiction in *Edwards v. Fresco Advertising Co.*,[5] the mere necessity for calculating the total amount of an award of the Workmen's Compensation Commission does not render the question of "amount in dispute" speculative or indefinite, nevertheless, if the award itself is for an indefinite amount, jurisdiction is not established. Thus, in *Hardt v. City Ice and*

4. 341 Mo. 33, 106 S. W. (2d) 412 (1937).
5. 340 Mo. 342, 100 S. W. (2d) 513 (1937).

Fuel Co.,[6] the award appealed from was $20 per week for 300 weeks, and $13.50 per week thereafter for the life of the claimant. In transferring the case to the proper court of appeals, the court points out that "It is true that the respondent may live long enough that he may receive a sum in excess of $7500 but we cannot say with certainty that the amount in dispute at the date of judgment was in excess of $7500." The court then considers whether or not the commutable value of the award is the real amount in dispute, and holds that, because neither party had applied to the commission for an order commuting the compensation allowed, the commutable value of the award being more than $7500 did not serve to vest jurisdiction of the appeal in the supreme court. In so holding, the court expressly overruled the prior case of *Burgstrand v. Crowe Coal Co.*[7] and other cases of similar import. The opinion in the *Hardt* case is by Judge Tipton, for division two. A week after the promulgation of that opinion, the case of *Evans v. Chevrolet Motor Co.*[8] was decided in division one by Judge Hays, in which the same points were covered, and the *Hardt* decision referred to as the basis for the decision. It therefore appears that, although the overruling of the *Burgstrand* and other cases appears in a divisional opinion, that opinion has been approved by all of the judges who would, if so sitting, have comprised the court en banc.

In order that jurisdiction may be supported under the constitutional vesting of jurisdiction of causes where the amount in dispute is in excess of $7500, the amount must be "in dispute." Thus, in *Town of Canton v. Moberly*,[8a] the litigation involved a claim of some $18,000, but the only matter "in dispute" was whether or not that claim was common or preferred. The record did not show what, if any, difference in actual recovery to be effected by the claimant would result from giving the claim a preferred status over the claims of common creditors. Consequently, the amount "in dispute" was not affirmatively shown and the cause was transferred to the proper court of appeals.

Again, in *Rust Sash & Door Co. v. Gate City Building Corp.*,[9] where the court rendered a personal judgment for more than $7500 but declined to declare the judgment a lien under the mechanics lien statute, the de-

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6. 340 Mo. 721, 102 S. W. (2d) 592 (1937).
7. 333 Mo. 43, 62 S. W. (2d) 406 (1933).
8. 102 S. W. (2d) 594 (Mo. 1937).
8a. 340 Mo. 610, 101 S. W. (2d) 722 (1937).
9. 114 S. W. (2d) 1023 (Mo. 1937).

cision being based solely on the ground that the lien statement was defective, the court held that the amount "in dispute" did not confer jurisdiction, and further held that the appeal did not directly affect title to real estate so as to confer jurisdiction under the constitutional provision with reference to actions "involving title to real estate."

In *Massey-Harris Harvester Co. v. Federal Reserve Bank*,[10] the court, while recognizing the rule that, in order to confer jurisdiction on the ground that a constitutional question is involved, the question must be raised at the earliest opportunity, held that where the court of appeals had reversed the case in reliance upon a statute which had not been pleaded by defendant, plaintiff, upon return of the mandate, could then challenge the constitutionality of the statute by filing an amended petition, and thus confer jurisdiction of the second appeal upon the supreme court.

In *DeHatre v. Ruenpohl*,[11] the court was faced with novel questions concerning its jurisdiction. The appeal was from a decree in equity dealing with title to real estate and an accounting. Clearly, at the time of the appeal, jurisdiction was in the supreme court because the action involved title to real estate. But after the appeal was docketed, and before submission, the sole plaintiff (appellant) died, and the cause was revived in the name of his administratrix, his *heirs* not being joined. The court, in a well reasoned opinion, held that, notwithstanding the general rule that jurisdiction depends upon the state of the record at the time of appeal, the failure to revive in the name of the heirs divested the court of its jurisdiction because it could render no binding decree affecting title to the real estate without having jurisdiction over the heirs, and because the amount involved in the accounting feature of the case was less than $7500. Having no jurisdiction of the case without the heirs, the court transferred the appeal to the court of appeals.

II. Foundation for Appeal

In *Pedigo v. Roseberry*,[12] the court again made it plain that an affidavit for appeal which follows the statutory form is sufficient even though the appeal is from an order granting a new trial, and the affidavit merely recites that appellant is aggrieved by the "judgment or decision" of the

10. 340 Mo. 1133, 104 S. W. (2d) 385 (1937).
11. 341 Mo. 749, 108 S. W. (2d) 357 (1937).
12. 340 Mo. 724, 102 S. W. (2d) 600 (1937).

court. Such affidavits, said the court, are to be construed "according to their spirit and intent."

The pitfalls surrounding the taking of involuntary nonsuit are still proving a source of danger for the inexperienced practitioner. In *Bueker v. Aufderheide*,[13] appellant neglected the formality of waiting for the entry of a judgment of dismissal before taking his appeal from the order overruling his motion to set the involuntary nonsuit aside, and, as a result, his appeal was dismissed because not prosecuted from an appealable order.

The court, however, still broadening the constructive results reached in such cases as *Boonville Nat. Bank v. Thompson*,[14] and *Wallace v. Woods*,[15] decided in the previous year,[16] again indicated, in *Rowe v. Strother*,[17] that if the taking of an involuntary non-suit is actually brought about by an adverse ruling which precludes recovery, and is actually intended by the appellant, no set formula of words is required to make the non-suit involuntary. In the *Rowe* case the court, at the conclusion of the evidence, ruled "I shall be very attentive to the sustaining of a demurrer." Without waiting the formal filing of the demurrer, plaintiff announced his desire to take an involuntary non-suit, asked the court to give a binding declaration of law in plaintiff's favor, and then took, and later moved to set aside, the non-suit. The court on appeal said "We are inclined to think the non-suit should be treated as involuntary," but did not discuss the question because the court decided on the merits adversely to appellant.

Perhaps the most outstanding opinion of the year, in the field of Appellate Practice, is the opinion of the court en banc in *City of St. Louis v. Senter Commission Co.*,[18] where the court, overruling many previous decisions, declares motions in arrest of judgment to be obsolete insofar as their functions in appellate practice are concerned. Pointing to the statutory duty of the court to "examine the record," the court takes the position that the statute itself renders it unnecessary to preserve matters appearing on the face of the record. The court rules ". . . those cases which hold expressly or by implication that errors appearing upon the

13. 111 S. W. (2d) 131 (Mo. 1937).
14. 339 Mo. 1049, 99 S. W. (2d) 93 (1936).
15. 340 Mo. 452, 102 S. W. (2d) 91 (1937).
16. See Atkinson, *The Work of the Missouri Supreme Court for the Year 1936 (Appellate Practice)* (1937) 2 Mo. L. REV. 413, 422.
17. 341 Mo. 1149, 111 S. W. (2d) 93 (1937).
18. 340 Mo. 633, 102 S. W. (2d) 103 (1937).

face of the record proper will not be considered on appeal when not raised by motion in arrest should be no longer followed. We will consider all such errors on appeal in the absence of such motion but reversals will result therefrom only when substantial justice requires that action." The decision represents a forward step toward the goal of substantial justice unimpeded by blind adherence to technical formula.

In *Banner Iron Works v. Rosemond Co.*,[19] the court again held that, in an equity case, where exceptions to the referee's report are overruled, the motion for new trial must challenge that ruling before it can be reviewed on appeal.

III. Forms of Briefs and Abstracts

The repeated warnings given by the court in other years[20] seem to have improved the situation with respect to the filing of defective briefs and records. In only one case, *Lampson v. New Cole County Building & Loan Ass'n*,[21] was an appeal dismissed because appellant's points and authorities contained only abstract statements of law, the court pointing out that it could not cast aside its judicial functions and assume the role of counsel for appellant.

In *Clark v. Reising*,[22] the court held that, while it is not good practice to use the sub-heads of points and authorities as assignments of error, appeals should not be dismissed upon that ground. And in *Moberly v. Watson*,[23] where the abstract set out only the effect of the evidence, and in *Polk v. Missouri-Kansas-Texas R. R.*,[24] where complaint was made that the condensation of evidence was too great and some evidence omitted, the court refused to dismiss the appeals, holding that the facts necessary for determination of the questions of law raised by the appeal were sufficiently set forth.

In *Harris v. Missouri Pacific R. R.*,[25] respondent failed to discover a defect in the abstract in time to serve written objections thereto, but the court held that, in the absence of fraud, or sharp practice, he had waived his right to complain, and denied the motion to dismiss the appeal.

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19. 107 S. W. (2d) 1068 (Mo. 1937).
20. See Atkinson, *supra* note 16, at 423.
21. 341 Mo. 168, 106 S. W. (2d) 911 (1937).
22. 341 Mo. 282, 107 S. W. (2d) 33 (1937).
23. 340 Mo. 820, 102 S. W. (2d) 886 (1937).
24. 341 Mo. 1213, 111 S. W. (2d) 138 (1937).
25. 114 S. W. (2d) 988 (Mo. 1937).

IV. Effect of Decision

In *Barker v. St. Louis County*,[26] the court, in overruling prior decisions on the constitutionality of a procedural statute affecting property rights, limited the effect of its decision to the case at bar and future actions, but declined to give it a retroactive effect. The decision is based upon the distinction between substantive and objective law, the court holding that, with respect to the former, its decisions were retroactive as well as prospective, but that, where matters of procedure were involved, the court could declare the effect of its decision to be prospective only.

In *Hoelzel v. Chicago, Rock Island & Pacific Ry.*,[27] plaintiff had sued the railroad, its engineer and its fireman, jointly, for a tort. On the first appeal, because of an error affecting only the rights of the engineer, the appellate court, in remanding the cause, directed that the verdict, both as to liability and as to the amount of damages, be held in abeyance until the liability of the engineer was properly determined. When the mandate reached the trial court, plaintiff dismissed as to the engineer, and entered judgment on the original verdict against the other defendants. Upon the second appeal, the supreme court held that the dismissal was proper, and that plaintiff was entitled to have judgment against the other defendants on the original verdict.

While this review of the decisions dealing with Appellate Practice is not intended to cover matters of criminal procedure, attention should be called to one criminal case, *State v. Wolzenski*,[28] where, although the court en banc accepted the result reached in the opinion of its commissioner, all seven of the judges joined in a concurring opinion in which it is held that the failure to show an exception to the overruling of the motion for new trial in a criminal case does not deprive appellant of all right to have his matters of exception reviewed on appeal. In the concurring opinion the view is expressed that a contrary holding only "binds us more tightly to an archaic and unjust rule, which long ago ought to have been abandoned."

Thus, in the field of Appellate Practice the year's work of the court has been in the direction of looking to the spirit of the law and requiring subservience of technical requirements to the ultimate goal of substantial justice. The aim of the court has been to broaden the purposes of courts

26. 340 Mo. 986, 104 S. W. (2d) 371 (1937).
27. 340 Mo. 793, 102 S. W. (2d) 577 (1937).
28. 340 Mo. 1181, 105 S. W. (2d) 905 (1937).

as institutions "for the enforcement of the laws," and to add, as does Judge Collet, in his opinion in *City of St. Louis v. Senter Commission Co.*,[29] "to see that justice is done."

CONFLICT OF LAWS

J. Coy Bour*

Last April the writer published in this Review an article[1] in which an attempt was made to organize and classify the Missouri decisions in this field which had appeared in volumes 71(2d)-111(2d) of the South Western Reporter. The material presented in that article includes the decisions of the Supreme Court of Missouri for the year 1937. The reader is referred to that article.

CONSTITUTIONAL LAW

Solbert M. Wasserstrom*

During the year 1937, there were ten cases before the Missouri Supreme Court dealing with questions of Constitutional Law. In six of these, the statute or course of activity or procedure was held constitutional; while in four, it was declared unconstitutional.

I. Interstate Commerce—Division of Power Between State and Federal Government

The question was presented, in *State* ex rel. *Illinois Greyhound Lines, Inc. v. Public Service Comm.*,[1] of the power of the state, through the Public Service Commission, to regulate all tax carriers operating in interstate com-

29. 340 Mo. 633, 102 S. W. (2d) 103, 110 (1937).

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1. Bour, *Recent Missouri Decisions and The Restatement of the Conflict of Laws* (1938) 3 Mo. L. Rev. 143.

*Attorney for National Labor Relations Board, Washington, D. C. A. B., University of Missouri, 1932, LL. B., 1935.

1. 108 S. W. (2d) 116 (Mo. 1937).

merce. The carrier here operated between Chicago, Illinois, and St. Louis, Missouri. The commission ordered the carrier to take out an inter-state permit under the Missouri Bus and Truck Act. The court held that in the interest of safety and economy, the state may exclude unnecessary vehicles, particularly large ones, from the highways. The limitation to this doctrine, that a tax imposed under the power to control the highways be a reasonable charge and a fair contribution to the expense of construction and maintenance of the highways, was held to have been met since the tax here sought to be imposed was expressly allocated for highway purposes. It is further pointed out by the court that the permit is issued by the commission on petition of the carrier, and is not withheld until determination by the commission of the public convenience and necessity.

In this case, the court specifically reserves judgment on what the result would have been had the case been tried below subsequent to the effective date of the Federal Motor Carrier Act.

II. Framework of State Government

The question was presented, in *Wippler v. Hohn*,[2] as to whether the state has authority to legislate on zoning in St. Louis. It was contended that zoning is a purely local matter governed solely by the city charter adopted under Section 20, article IX, of the Missouri constitution. Held that zoning is not purely of municipal concern; it operates locally but is governmental and referable to the police power.[3]

The court declared the proposition, in *State* ex rel. *Gaines v. Canada*,[4] that the constitution is a limitation on legislative power and not a grant of power to the legislature. Hence the legislature has authority to enact any law, provided there is no constitutional prohibition against it.

III. Separation of Powers—Executive, Legislative and Judicial

The authority of the legislature with reference to regulation of the practice of law before the Public Service Commission was questioned in *Clark v. Austin*.[5] Judge Frank, in the principal opinion, says that the power of the court to regulate the practice of law is exclusive, and that

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2. 110 S. W. (2d) 409 (Mo. 1937).
3. This question had already been adjudicated in State *ex rel.* Kramer v. Schwartz, 336 Mo. 932, 82 S. W. (2d) 63 (1935); State *ex rel.* Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S. W. 720 (1927).
4. 113 S. W. (2d) 783 (Mo. 1937).
5. 340 Mo. 467, 101 S. W. (2d) 977 (1937).

therefore statutes enacted by the legislature, restricting practice of law to those licensed by the supreme court, cannot limit the power of the courts and is therefore invalid. Judge Frank would overrule *In re Richards,*[6] *State* ex rel. *Selleck v. Reynolds,*[7] and *Ex parte Creasy.*[8]

Judge Ellison, speaking for himself and Judges Hays, Tipton, Leedy, and Collett, concurs in the result only, saying the statute is a valid exercise of police power and defendants were properly convicted under the statute. Gantt, J., also concurred in a special opinion, saying the statutes are constitutional.

In *State* ex rel. *Wabash Ry. v. Shain,*[9] it was held that the legislature is without authority to route appeals directly from the circuit court to the supreme court in cases involving review of the action of the Public Service Commission; the legislature is without power to expand the jurisdiction of the supreme court or contract that of the court of appeals, as set by Section 12, article VI, of the Missouri constitution, and Section 5 of the amendment of 1884 to article VI.[10]

The power of the legislature to regulate actions against the Public Service Commission was affirmed in *Ward v. Public Service Comm.*[11] Section 5234 declares that no circuit court, except that of the county where the hearing was held or in which the commission has its principal office, shall have jurisdiction to enjoin or interfere with the commission in the exercise of its official duties. In this case, the Circuit Court of the City of St. Louis enjoined the commission, and on this appeal the authority of that court is challenged under the statute. It is conceded that St. Louis is not the principal office of the commission and that no hearing was held before the St. Louis Circuit Court; but respondent claims this statute is an interference with the judicial power set forth in Sections 1 and 22, article VI, of the Missouri constitution. It was held that, while the legislature is powerless to diminish or otherwise infringe on the jurisdiction fixed by the constitution, here the legislature had a right to say in what circuit courts the commission could be sued when it gave authority for it to be sued. In reaching this result, the court repeated the familiar axiom that every presumption will be indulged in favor of constitutionality of a statute.

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6. 333 Mo. 907, 63 S. W. (2d) 672 (1933).
7. 252 Mo. 369, 158 S. W. 671 (1913).
8. 243 Mo. 679, 148 S. W. 914 (1912).
9. 106 S. W. (2d) 898 (Mo. 1937).
10. See article by the writer, *The Work of the Missouri Supreme Court for 1936 (Constitutional Law)* (1937) 2 Mo. L. Rev. 433.
11. 108 S. W. (2d) 136 (Mo. 1937).

IV. Delegation of Legislative Power

The validity of the proviso of the Jones-Munger Law,[12] relating to enforcement of tax liens, was challenged as an unlawful delegation of power in *State* ex rel. and to Use of *Bair v. Producers Gravel Co.*[13] The statute authorized the collector, under the facts of this case, to continue with the proceedings already commenced under the old statute or to dismiss the suit under the old statute and commence a new suit under the new statute. The court disposes of the objection, saying the proviso gives no "rights" to the collector which he would not have had anyway under established statutory principles.

V. Due Process

Discrimination against negroes in selection of the jury panel in a criminal case was the issue in *State v. Logan.*[14] The sheriff testified he went out and chose thirty good men as talesmen; he admitted, however, that he would not have selected any negroes even though he had come across them and even though they were qualified, because that was contrary to the custom of the community. The court held this to be grounds for reversal on the basis of the *Scottsboro* case.[15] The court says the latter case had the effect of limiting or overruling *State v. Thomas.*[16] However, the court points out that absence of negroes from the jury, or even from the panel, is not objectionable if it happens in due course and in good faith. Defendant is only to be protected against being deprived by design of the *chance* of having negroes on the jury.

In *Wippler v. Hohn,*[17] the court reiterated its established ruling that zoning ordinances are valid in their general scope.[18]

A negro student contested his exclusion from Missouri University Law School, in *State* ex rel. *Gaines v. Canada.*[19] Petitioner contended that he was a citizen and taxpayer of the state, as such he had a proprietary interest in Missouri University, and that his exclusion from the Law School

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12. Mo. Laws 1933, § 9962 b, p. 444.
13. 111 S. W. (2d) 521 (Mo. 1937).
14. 111 S. W. (2d) 110 (Mo. 1937).
15. Norris v. Alabama, 294 U. S. 587 (1935).
16. 250 Mo. 189, 157 S. W. 330 (1913). The court also held that evidence of the exclusion of negroes in the past is not competent.
17. 110 S. W. (2d) 409 (Mo. 1937).
18. State *ex rel.* Kramer v. Schwartz, 336 Mo. 932, 82 S. W. (2d) 63 (1935); State *ex rel.* Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S. W. 720 (1927).
19. 113 S. W. (2d) 783 (Mo. 1937).

deprived him of property without due process of law. It was held that petitioner is entitled to school advantages substantially equal to those given white students; but *equality and not identity* of school advantages is what is guaranteed to him. The court, after a close study of the factual situation, decided that Section 9622 of the Missouri Revised Statutes 1929, providing for attendance of negroes at universities of adjacent states to study courses not offered at Lincoln University, the tuition fees to be paid by the state of Missouri, affords petitioner educational opportunity substantially equal to that offered to white students.

VI. Equal Protection

In *State* ex rel. *Illinois Greyhound Lines, Inc. v. Public Service Comm.*,[20] the carrier objected that it, an interstate carrier, was subject to regulations from which carriers operating solely within the municipality of St. Louis are exempt. The court answered that the legislature is permitted to make reasonable classification. The classification here, leaving the cities to deal with their own local problems, is reasonable.

In *State* ex rel. and to Use of *Bair v. Producers Gravel Co.*,[21] it was argued that a proviso, allowing the tax collector to continue proceedings instituted under the old statute for enforcement of tax liens or in the alternative to drop those proceedings and institute a new suit under the new statute, offends the equal protection clause of the Federal Fourteenth Amendment. The court had two answers: (1) a mere difference of forum, which was the only practical effect of the collector choosing one statute instead of the other, does not offend the equal protection clause; and (2) since all who are pursued under the new statute are treated alike and all who are pursued under the old statute are treated alike, the law or course of procedure operates alike on all persons in the same class.

It was held, in *State* ex rel. *Gaines v. Canada*,[22] that separation of students in the schools on the basis of race is a reasonable classification under the police power, and that exclusion of a negro from Missouri University Law School was therefore valid. This ruling follows well established precedent.[23]

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20. 108 S. W. (2d) 116 (Mo. 1937).
21. 111 S. W. (2d) 521 (Mo. 1937).
22. 113 S. W. (2d) 783 (Mo. 1937).
23. Gong Lum v. Rice, 275 U. S. 78 (1927); Plessy v. Ferguson, 163 U. S. 537 (1896); Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765 (1890).

VII. Just Compensation

The statute,[24] under which plaintiff's land was condemned, provided that if the landowner made no claim for damages within twenty days after publication of notice of condemnation, then the claim would be forever barred. The court, in *Barker v. St. Louis County,*[25] overruled an earlier case,[26] and ruled that Section 21, article II, of the Missouri constitution, providing against taking of private property without just compensation, is self-enforcing and that the twenty-day limitation provided by the statute attempts to limit the constitutional provision and is void. The court distinguishes cases involving true waivers of constitutional rights from the situation here, where the "waiver" would arise from non-action.

An interesting subsidiary point was as to the prospective or retrospective effect of the decision. The court held that since this matter is one of procedural law, the effect should be prospective only; however, plaintiff is to have the benefit of the decision in consideration of his having borne the expense of this litigation.

VIII. Obligation of Contracts

Washington University is the successor of Eliot Seminary which in 1853 was exempted by statute from taxation on all its property. After adoption of a new constitution which forbade exemption of any person or corporation from taxation, the Supreme Court of the United States held, in *Washington University v. Rouse,*[27] that the exemption was protected against the new constitutional provision by virtue of Section 10, Article 1 of the United States Constitution. However, the *Rouse* case stated that if the university should absorb more property than necessary to accomplish its object, the rights might be different. The collector, relying on that statement, attempted to tax certain income property of the university which was not used for school purposes. The Missouri Supreme Court, in *Washington University v. Baumann,*[28] held that the exemption is not confined to real estate actually occupied and directly used for educational purposes; all that is necessary is that the land be used to support its educational establishments.

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24. Mo. Rev. Stat. (1929) § 7840.
25. 340 Mo. 986, 104 S. W. (2d) 371 (1937).
26. Petet v. McClanahan, 297 Mo. 677, 249 S. W. 917 (1923).
27. 75 U. S. 439 (1869).
28. 108 S. W. (2d) 403 (Mo. 1937).

IX. Statute Confined to One Subject

In *State* ex rel. *Gaines v. Canada*,[29] it was held that an appropriation bill may not include a separate and different subject; and that a proviso of the 1935 appropriation act which attempted to amend Section 9622, a general statute granting certain authority to the Board of Curators of Lincoln University, is void.

X. Reenactment of a Statute by Reference

It was held in *State* ex rel. and to Use of *Bair v. Producers Gravel Co.*,[30] that the Jones-Munger Law, which gives the tax collectors permission to proceed under the former statute in cases which had been already commenced under the former statute, does not revive the previous statute by mere reference, contrary to Section 33, article IV, of the Missouri constitution.

XI. Uniformity of Taxation

It was held in *State* ex rel. and to Use of *Bair v. Producers Gravel Co.*,[31] that permitting tax collectors to proceed under an old statute, if proceedings had been already instituted thereunder, or in the alternative to drop that proceeding and proceed anew under the new statute, did not offend Section 3 or 4, article X of the Missouri constitution, referring to uniformity of taxation.

XII. Separability of Statutory Provisions

Two cases, *Barker v. St. Louis County*,[32] and *State* ex rel. *Wabash Ry. v. Shain*,[33] lay down a test to determine when a statute may be deemed still valid and enforceable after part thereof has been declared void. The rule is that the remainder of the statute may stand if, after eliminating the invalid provisions, it shows the intent of the legislature and affords a working plan to carry out the intention.

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29. 113 S. W. (2d) 783 (Mo. 1937).
30. 111 S. W. (2d) 521 (Mo. 1937).
31. *Ibid.*
32. 340 Mo. 986, 104 S. W. (2d) 371 (1937).
33. 106 S. W. (2d) 898 (Mo. 1937).

CRIMINAL LAW

J. HUGO GRIMM*

During the year 1937 appeals were taken to the supreme court in fifty-three cases in which there were judgments of affirmance in thirty-five. In some fourteen of the cases the judgment of the lower court was reversed and the cases remanded and in three or four there was an outright reversal. Questions of substantive law, as might have been expected since the law defining crimes and their constituents has been pretty well settled, arose in only a few cases and were not questions of great importance. In by far the greater number of cases the questions which the court was called upon to decide were the proper application of recognized principles, and many cases turned upon questions of procedure. There were a number of very interesting opinions written, however, to which particular reference will be made.

I. PRELIMINARY MATTERS

A. *Disqualification of Judge, Change of Venue*

When in a criminal case the judge of a circuit court requests the judge of another circuit court to try the case, no reasons being shown by the record, it will be presumed that statutory reasons exist.[1] Where the record fails to show that the trial judge gave the attorneys an opportunity to agree upon a special judge, before he called in a judge from another circuit, it will be presumed that either no suitable attorney to try the case would serve, if selected, or that no suitable person was available.[2] Where a defendant in a county of less than 75,000 inhabitants files petition for a change of venue, supported by five affidavits, the court cannot deny the application where two of the affidavits sufficiently set out the prejudice, without making an issue on the question and hearing evidence. The court in this case held that the five affidavits filed did sufficiently state the

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1. State v. Huett, 340 Mo. 934, 104 S. W. (2d) 252 (1937). While the language of the decision is quite broad it will be observed that the trial judge in his order disqualifying himself did set out facts which indicated clearly that he had reason to fear that he might be biased or prejudiced in the case.

2. *Ibid.*

existence of prejudice and, therefore, petition should have been sustained on the strength of these affidavits themselves.[3]

The prosecuting attorney is without authority to file an information charging a felony until after a preliminary examination has been held and the magistrate has found probable cause to believe that a felony has been committed, and that accused is guilty.[4]

B. *Application for Continuance*

An application for continuance must show diligence and where it appeared that other witnesses on the same point, who were friendly to the defendant, were available, the application was properly denied.[5]

C. *Indictment and Information*

An information charging that accused kept a crap table, designed for playing games of chance for money and property, and enticed persons to play thereon did not state an offense, since the statute did not specifically prohibit crap tables and the information did not describe the table.[6]

Where a plea in abatement of an information is sustained, the prosecuting attorney must refile the original information or a new information; otherwise there is a complete absence of a formal accusation, and this objection may be made at any time, as it is jurisdictional.[7]

II. Trial Procedure

A. *Evidence*

Where information charged a homicide was committed with a pistol, and the evidence shows that the weapon was a revolver, the court held that there was no variance inasmuch as a revolver is a pistol.[8] A witness cannot be impeached by evidence of his arrest, but a conviction must be shown. Hence, evidence of arrest alone is properly excluded.[9] Evidence of dying

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3. State v. McGee, 341 Mo. 148, 106 S. W. (2d) 478 (1937). Citing State v. Smith, 339 Mo. 870, 98 S. W. (2d) 572 (1936).
4. State v. McKinley, 341 Mo. 1186, 111 S. W. (2d) 115 (1937). However, the preliminary examination may be waived by the accused.
5. State v. Gadwood, 116 S. W. (2d) 42 (Mo. 1937).
6. State v. Chaney, 106 S. W. (2d) 483 (Mo. 1937). In State v. Rosenblatt, 185 Mo. 114, 122, 83 S. W. 975 (1904), an indictment in the language involved in the case just cited was held sufficient. However, that case was overruled in State v. Wade, 267 Mo. 249, 183 S. W. 598 (1916), which the court has consistently followed.
7. State v. McKinley, 341 Mo. 1186, 111 S. W. (2d) 115 (1937).
8. State v. Barr, 340 Mo. 738, 102 S. W. (2d) 629 (1937).
9. State v. Menz, 341 Mo. 74, 106 S. W. (2d) 440 (1937).

declaration should be restricted to identification of the deceased, the act of killing and circumstances immediately attending the act and from a part of *res gestae*.[10] An expert in identification of fire arms and bullets by comparison method by means of a microscope is qualified to express his opinion that test disclosed that certain shells had been fired from the gun of deceased officer and another shell from a revolver which the accused had borrowed, notwithstanding the witness testified he was not a ballistic expert.[11] The refusal of the prosecutor to permit defendant's counsel to inspect a paper, which the prosecutor handed to a state's witness to refresh his memory during direct examination, was improper and reversible error, notwithstanding the court's statement that the accused's counsel would be entitled to examine the paper if it was offered in evidence.[12]

Where the prosecutor asked the defendant on cross examination if he did not have a criminal charge pending against him the court sustained the objection and charged the jury to disregard the question, but refused to declare a mistrial; held that there was no error.[13]

B. *Instructions*

In a murder case where there was a plea of self defense it was error to instruct the jury that if they believed the defendant was guilty as defined in the instructions, then no words, epithets, slanders or charges against defendant's wife, however vile, revolting and insulting, would excuse him, was erroneous because misleading under the facts of the case.[14]

The giving of an instruction which told the jury what the defendant said against himself would be presumed to be true unless negatived by other evidences, because said against himself, without the additional instruction that these statements made by him must have been voluntarily made, held reversible error as against the contention that the instruction involved collateral matter on which the court was not required to instruct in the absence of request.[15]

The court did not err in failing to instruct the jury that the fact that

10. State v. Matthews, 341 Mo. 1121, 111 S. W. (2d) 62 (1937).
11. State v. Couch, 341 Mo. 1239, 111 S. W. (2d) 147 (1937).
12. State v. Gadwood, 116 S. W. (2d) 42 (Mo. 1937).
13. State v. Hamilton, 340 Mo. 768, 102 S. W. (2d) 642 (1937).
14. State v. Matthews, 341 Mo. 1121, 111 S. W. (2d) 62 (1937).
15. State v. Hancock, 340 Mo. 918, 104 S. W. (2d) 241 (1937).

defendant had not testified in his own behalf could not be considered by the jury.[16]

Where defendant was charged with murder in first degree and convicted of murder in second degree, it was contended by appellant that the evidence disclosed that appellant was either guilty of first degree murder, or not guilty at all; that it was reversible error to instruct on murder in second degree; but this contention was overruled, the court referring to a line of cases sustaining appellant's contention, but cited later cases based on Section 4451, Missouri Revised Statutes 1929 holding differently.[17]

C. *Conduct of Counsel*

The prosecutor must act in good faith in drawing and filing information alleging accused's prior conviction of another felony and cannot pro-

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16. State v. Revard, 341 Mo. 170, 106 S. W. (2d) 906, 910 (1937). No such instruction was requested, but the court held that even if it had been it would not have been error to have refused it. In State v. Robinson, 117 Mo. 649, 23 S. W. 1066 (1893), such an instruction was asked, but the court refused to give it, and the Supreme Court sustained this ruling saying that if the trial court had given such an instruction "it would have disobeyed the *spirit* if not the letter of the law." In the later case of State v. DeWitt, 186 Mo. 65 (1905), the court gave such an instruction of its own motion, and the defendant on appeal decided this is error, claiming that it was a prejudicial comment on the evidence. Judge Gantt in his opinion said that this objection was untenable as the instruction did not prejudice the defendant. In the opinion it was further stated that the giving of the instruction was not a violation to the statute, that it was not a comment on the failure of defendant to testify, but a statement of the law. The court concluded the opinion in this language: "We think that, while it was unnecessary to give the instruction, it was not reversible error to do so." In State v. Long, 324 Mo. 205, 22 S. W. (2d) 809 (1929), the court held that it would be a violation of the statute to give such an instruction as it would amount to a comment on the testimony. In State v. Taylor, 261 Mo. 210, 168 S. W. 1191 (1914), the court, excepting through Judge Faris, said that on authority the contention that such an instruction should be given must be disallowed, but suggested "that in a proper case, it would seem a little fairer to the defendant to give this instruction if he wants it. . . ." It would seem to the reviewer that fairness to the accused would require the giving of such an instruction if he requested it. At common law the accused was not permitted to testify as he was regarded as an incompetent witness. The statute of this state, which is also to be found in every other state of the union, removes this disability, but these statutes without an exception contain a proviso that the defendant's failure to testify shall not be regarded as raising any presumption of guilt on his part, nor shall be referred to by counsel, since the constitution provides that no person shall be required to give evidence against himself in a criminal case. It seemed that, in order to give effect to the constitution the fact that an accused availed himself of its protection, it should not be considered as any evidence of guilt on his part, and so the statutes provide that his failure to testify shall not raise any presumption of guilt nor be referred to by counsel. In other words no argument should be made based upon his failure to testify. The statute manifests which passed for the benefit of the accused and it would seem only fair to him to have the court instruct the jury as to the provision and meaning of the statute.

17. State v. Murphy, 341 Mo. 1229, 111 S. W. (2d) 132, 137 (1937). See also, State v. Huett, 340 Mo. 934, 104 S. W. (2d) 252, 262 (1937).

ceed before a jury under the habitual criminal statutes without having means and intention to rely thereon. When a prosecutor closes his case without adducing proof of the alleged's prior conviction the defendant's counsel should raise the question of good faith if they desire to make the point, so that the state would have an opportunity to explain the reason for the omission. Aspersions by the prosecuting attorney on the character of the defendant's attorney (there was no evidence concerning the character of the attorney) were unwarranted and called for rebuke by the trial court. The matter of rebuking counsel rests somewhat in the discretion of the court.[18] A statement by the state's attorney to a panel of jurors that defendant had obtained a change of venue was reversible error where the court could not say that the verdict was not influenced by the improper remark.[19]

D. *Composition of the Jury*

The contention was advanced that in a felony case defendant was entitled to be tried by a jury of twelve; that this meant twelve competent jurors, and that one whose hearing was so defective that he could not hear all the evidence was not a qualified juror, hence not a juror within the intendment of the constitution. The court held that the lack of qualification of a juror was a matter of exception and that the objection to the juror's qualification must be made before the jury is sworn, in the absence of a showing that counsel was deceived or imposed upon.[20]

In a prosecution for assault with intent to rape where the defense was an alibi, the sending of two pair of binoculars to the jury, which had been introduced with objection, and through which witnesses had testified that they had observed the alleged assault, was not error, since the court could have permitted the jury to inspect the binoculars during the trial.[21]

E. *Verdict*

Where defendant was charged with arson in two different counts, one charging that he had set fire to another's cafe, and one charging burning of

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18. State v. Mosier, 102 S. W. (2d) 620 (Mo. 1937). The prosecuting attorney in his zeal overstepped the bounds of strict propriety and the court went into the matter of his conduct at the trial quite fully. The court reversed and remanded the case on the ground that the prosecutor's conduct was prejudicial to the defendant.
19. State v. Banton, 111 S. W. (2d) 516 (Mo. 1937).
20. State v. Watson, 104 S. W. (2d) 272 (Mo. 1937).
21. State v. Rusow, 106 S. W. (2d) 429 (Mo. 1937).

a stock of merchandise with intent to defraud the insurer, a general verdict of guilty was held bad and the case reversed and remanded.[22]

F. *Judgment and Sentence*

1. Allocution

A judgment passing sentence of imprisonment for murder was reversed because of the absence of a showing of record that defendant was accorded allocution at the time of the rendition of the judgment, where defendant had not been heard on a motion for new trial.[23] In this case it appeared that the verdict of the jury was returned September 6, 1934 and on the same day judgment and sentence were pronounced. The next record entry was under date of December 10, 1934, and read "motion for new trial filed and overruled."

2. Change in Punishment

A statute changing the mode of capital punishment from hanging to death by lethal gas is not derogatory to any right which the accused had prior to the enactment thereof.[24]

III. Appellate Procedure

A. *Exceptions*

It is not necessary to save an exception to the order overruling motion for new trial.[25]

B. *Sufficiency of Assignment of Error in Motion for New Trial*

An assignment of error in a motion for new trial that "the verdict is against the law, against the evidence, and is the result of bias, prejudice and passion and not based upon the law and competent evidence" is too general to comply with the requirements of Section 3735, Missouri Revised Statutes 1929.[26]

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22. State v. Highley, 102 S. W. (2d) 563 (Mo. 1937).
23. State v. Broyles, 340 Mo. 962, 104 S. W. (2d) 270 (1937).
24. State v. Brown, 112 S. W. (2d) 568 (Mo. 1937); State v. Wright, 112 S. W. (2d) 571 (Mo. 1937).
25. State v. Wolzenski, 340 Mo. 1181, 105 S. W. (2d) 905 (1937). In this case the commissioner, in the opinion written by him, followed decisions of the Missouri Supreme Court, holding that it was necessary to except to the order overruling the motion for new trial. However, Judge Ellison filed an opinion concurred in by all of the judges of the court en banc, in which he held that it is not necessary to save such exceptions. The opinion contains an interesting discussion of the question.
26. State v. Kelly, 107 S. W. (2d) 19, 20 (Mo. 1937).

During the year 1937 the court held in twelve cases that assignments of error in the motions for new trial could not be considered because they did not set forth in detail and with particularity in separate numbered paragraphs the specific grounds and causes therefore, as required by Section 3735, Missouri Revised Statutes 1929. The court has enforced this statute strictly, and in a few cases has been rather severe in holding that the assignment did not set forth the grounds for the assignment in sufficient detail and with adequate particularity.

EQUITY

SAMUEL H. LIBERMAN*

I. SALE BY TRUSTEE UNDER DEED OF TRUST

Notwithstanding the fact that numerous sales of real estate under mortgages or deeds of trust at depression prices have been made in recent years, there apparently was but one case which reached the supreme court in 1937 dealing with the obligations of trustees under deeds of trust.

In *Lange v. McIntosh*,[1] the supreme court directed the entry of judgment setting aside a foreclosure sale in which the trustee under the deed of trust had sold property to his wife, who was the owner of the note secured by the deed of trust, for $100.00, the evidence showing that the property was worth from $2,000.00 to $2,500.00, and that within ten days of the date of the sale it had been resold for $1,500.00. The wife was the only bidder present at the sale and the mortgagor had not received actual notice although he was a subscriber to the newspaper in which notice of foreclosure had been advertised. The court held that the trustee, in selling the land for $100.00, did not exercise proper consideration for the rights of the debtor.

II. ACTIONS TO SET ASIDE CONVEYANCES

In *Franklin v. Moss*,[2] the court refused to set aside a deed on the ground that the evidence showed a completed gift from the grantor to the grantee and an absence of fraud and undue influence.

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1. 340 Mo. 247, 100 S. W. (2d) 456 (1937).
2. 101 S. W. (2d) 711 (Mo. 1937).

In *Hale v. Weinstein*,[3] the supreme court refused to interfere with the finding of the chancellor below that a deed had been validly delivered.

In *Brennecke v. Riemann*,[4] which was an action to set aside a conveyance of homestead property made by a father to his daughter upon the ground that it was fraud to her father's creditors, it was held that the fact that the indebtedness of the father to the daughter was barred by the Statute of Limitations did not in itself conclusively render the conveyance fraudulent but that such fact was merely a circumstance. It was further held that since the value of the property conveyed in excess of the grantor's exemption was less than the indebtedness owed to the daughter the transaction would not be set aside in the absence of fraud.

Moberly v. Watson[5] also involved a deed from the father to daughter which creditors sought to set aside. The consideration of the deed was the cancellation of a note and the agreement by the daughter that she would take care of her mother. It was held that where a grantee in good faith, after conveyance, in consideration of the grantee's agreement to support, does in fact furnish support of substantial value the conveyance is valid to that extent.

In *Castorina v. Herrmann*,[6] wherein the action of the trial court in granting a new trial was sustained, Judge Hyde makes reference to certain circumstances which have come to be "recognized indicia or badges of fraud." Included therein are: "Transactions different from the usual method of doing business, confidential or close relationship of the parties, transfers just before suit and steps toward execution, withholding of conveyance from record, incorrect statements as to consideration or amount secured, and fictitious consideration in whole or in part. . . ."

In this case also the court points out that a resort to a court of equity is necessary in suits involving fraudulent conveyances as there is no full, complete and adequate remedy at law, for even though a judgment creditor may disregard a fraudulent conveyance and levy on the property, he must thereafter sue to cancel the fraudulent conveyance as a cloud on the title.

In *Langwell v. Willbanks*,[7] which was an action to rescind a contract for purchase of real estate on account of fraudulent misrepresentations of the vendor's agent, the somewhat novel argument was made by the

3. 102 S. W. (2d) 650 (Mo. 1937).
4. 102 S. W. (2d) 874 (Mo. 1937).
5. 340 Mo. 820, 102 S. W. (2d) 886 (1937).
6. 340 Mo. 1026, 104 S. W. (2d) 297 (1937).
7. 106 S. W. (2d) 417 (Mo. 1937).

vendor that, since the vendor had spent the purchase money, equity may not decree rescission since the status quo could not be restored. In disposing of this contention the court said:

> "Appellants' contention that since they had spent the $600 received from respondents equity may not decree rescission is devoid of merit. Appellants seek to invoke the rule requiring the restoration of the status quo, which has its foundation in the maxim 'He who seeks equity must do equity,' generally, possibly not universally, applicable to the injured party seeking rescission. Respondents tendered a deed reconveying the real estate to appellants. Appellants' contention would permit one to benefit by his own wrongful act and proceeds upon the theory two wrongs make a right: First, appellants wrongfully obtained respondents' property. Second, appellants dissipated a portion of respondents' property. Ergo, a court of equity is rendered impotent to decree rescission against the fraud feasor. Such is not the law."[7a]

In *Cook v. Branine*,[8] the court set aside a deed made by a brother to his sister, which was without consideration and which was delivered by the brother without the intention of conveying absolute title.

In *Farmers and Traders Bank v. Kendrick*,[9] and in *Bewes v. Buster*,[10] both of which were suits by creditors to set aside conveyances as being in fraud of their rights, the court held that an action in equity might be maintained by a simple contract creditor where the amount of the indebtedness was either admitted or undisputed.

Liflander v. Bobbitt[11] was an action to determine title in which the defendant sought to set aside a sheriff's deed to the plaintiff. It appeared that the execution debtor had purchased the land and had used moneys belonging to his minor son, as part of the purchase price. While sustaining the sale of the interest of the execution debtor, the court held that the plaintiff took the land subject to a trust for the minor son to the extent that the funds of the minor had gone into the purchase of the property.

III. Reformation of Instruments

In *Phillips v. Cope*,[12] it was held that in the absence of intervening equities a deed will be reformed on behalf of successors in interest under the same circumstances as it would be between the original parties.

7a. *Id.* at 419.
8. 341 Mo. 273, 107 S. W. (2d) 28 (1937).
9. 341 Mo. 571, 108 S. W. (2d) 62 (1937).
10. 341 Mo. 578, 108 S. W. (2d) 66 (1937).
11. 111 S. W. (2d) 72 (Mo. 1937).
12. 111 S. W. (2d) 81 (Mo. 1937).

In *Woods v. Wilson,*[13] which was an action to correct the description of a deed and determine title, the court held that the lien of the judgment, absent of revival, does not attach to real estate acquired by the judgment debtor more than three years after the judgment has been rendered.

IV. Specific Performance

The plaintiff, in *Finn v. Barnes,*[14] brought a suit to compel the specific performance of a contract between plaintiff and the deceased, whereby they agreed to execute reciprocal wills. The evidence showed the plaintiff had fully performed and specific performance was decreed.

In *Roth v. Roth,*[15] the plaintiffs had agreed with their stepmother that they would refrain from suing to set aside certain conveyances from their deceased father to the stepmother in consideration of the stepmother's oral promise to leave one-half of her estate, at her death, to the plaintiffs. The stepmother inherited a life estate from her own family and from the use thereof obtained funds to discharge incumbrances on the property which she had obtained from the father of the plaintiffs. At her death she devised her property to her own children. It was held the plaintiffs were entitled to the performance of the contract, subject, however, to an equitable lien in favor of the stepmother's own children to the extent that the proceeds of the life estate were used to discharge the incumbrance.

In *Schweizer v. Patton,*[16] specific performance was decreed of the contract between plaintiff and the deceased, whereby plaintiff agreed to take care of the deceased until his death and the deceased agreed to leave her one-half of his property.

V. Injunction

In *Hill-Behan Lumber Co. v. Skrainka Construction Co.,*[17] plaintiff sought to enjoin the building of a viaduct along property adjacent to the plaintiff's property until the damages resulting to the plaintiff's property had been ascertained and paid. The injunction was denied upon the ground that the landowner is not entitled to have damages assessed and paid prior to the construction of the improvement if the damage is consequential; otherwise, however, where the damage is direct.

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13. 341 Mo. 479, 108 S. W. (2d) 12 (1937).
14. 340 Mo. 445, 101 S. W. (2d) 718 (1937).
15. 340 Mo. 1043, 104 S. W. (2d) 314 (1937).
16. 116 S. W. (2d) 39 (Mo. 1937).
17. 341 Mo. 156, 106 S. W. (2d) 483 (1937).

In *Macklind Investment Co. v. Ferry,*[18] which was a suit to enjoin the sale of real estate under a special execution issued in an equitable mechanic's lien proceeding, the injunction was denied on the ground that the plaintiff was required to make his defense in the equitable mechanic's lien suit.

VI. Resulting Trusts

In *Milligan v. Bing,*[19] title to the property had been taken by a husband and wife as tenants by the entirety. Upon the death of the wife the children sought to establish a trust in the land upon the ground that the property was purchased with the separate money of their mother under directions that title be taken in the name of the wife only. It was held that, notwithstanding that the deed purported to convey the property to the husband and wife as tenants by the entirety, parol evidence was permissible to establish a resulting trust. However, in this particular case the court held that the evidence did not show an intention that the property be taken in the name of the wife only.

VII. Express Trusts

An interesting situation was presented to the court in *Tootle-Lacy National Bank v. Rollier.*[20] The testator carried policies of life insurance in which his wife had been designated as the sole and unconditional beneficiary. The wife was adjudged of unsound mind and thereafter the policies of insurance were changed so as to make the proceeds thereof payable to the bank as trustee but the endorsements did not specifically designate the beneficiary of the trust or declare the terms and conditions thereof. Some years after the change in beneficiary of the insurance policies the testator executed a will in which his residuary estate was put in trust for the use of his wife for her support and maintenance. One of the specific legatees under the will took the position that the proceeds of the insurance policies belonged in equity to the estate of the deceased and were subject to the payment of her specific legacy upon the ground that the endorsement of the policies to the bank as trustee created no trust in favor of any beneficiary and, therefore, a resulting trust arose in favor of the estate. This con-

18. 341 Mo. 493, 108 S. W. (2d) 21 (1937).
19. 341 Mo. 648, 108 S. W. (2d) 108 (1937).
20. 341 Mo. 1029, 111 S. W. (2d) 12 (1937).

tention, however, was rejected by the supreme court, which held that a valid express trust in favor of the wife was created by the policies and by the will.

EVIDENCE

J. A. WALDEN*

I. JUDICIAL NOTICE

In *State* ex rel. *F. T. O'Dell Construction Co. v. Hostetter*,[1] the court had before it, on certiorari, an opinion of the St. Louis Court of Appeals wherein judicial notice had been taken of the fact that the presence of a workman in a barn, under certain circumstances, intensified and magnified the risk of his being struck by lightning, over and above what would have otherwise reasonably been expected from his employment. The court did not pass on whether the court of appeals was correct in taking judicial notice that deceased's presence in the barn, in the course of his employment, brought about an excessive exposure to lightning, but did hold that the declaration of the character of facts of which a court may take judicial notice, as made by the court of appeals, was not in conflict with anything which the supreme court had said on the subject. Approval was given to the declaration of the court of appeals that judicial notice may be taken of any and all facts which are a part of the general knowledge of the country, and which are generally known and accepted and have been duly authenticated in repositories, and are facts open to all, and especially so of facts of official, scientific or historical character, as the same may be set down and recorded in encyclopedias, dictionaries and the like, to which the court may turn to verify its information or refresh its recollection, and to the further holding that the doctrine of judicial notice is not a hard and fast one but is generally a matter for the judicial discretion of the court.

The court further took judicial notice that the lights of an automobile of standard height are about three feet above the ground;[2] that light rays

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1. 340 Mo. 1155, 104 S. W. (2d) 671 (1937).

2. State *ex rel.* Kansas City Southern Ry. v. Shain, 340 Mo. 1195, 105 S. W. (2d) 915 (1937).

from an automobile's headlights diverge and illuminate not only the road ahead but the sides of the road for a considerable distance;[3] judicial notice was taken of the fact that electricity has very generally supplanted gas for highway illumination in this country;[4] of the fact that in quite a number of counties in the state, the jail and court house are located in the same building;[5] that the population of Kansas City was in excess of 150,000.[6]

In *State* ex rel. *W. A. Ross Construction Co. v. Skinker*,[7] in a proceeding for a writ of prohibition, directed to a judge who entered judgment denying relator the right to require defendant to inter-plead in a suit in the nature of equitable inter-pleader, judicial notice was taken of the fact that an appeal was lodged in the supreme court to correct the error of respondent, if any, in denying the inter-plea.

Judicial notice was further taken that demands against a decedent's estate might be exhibited for allowance anytime within one year after the grant of the first letters.[8]

In *Karr v. Chicago, Rock Island & Pacific Ry.*,[9] the question of an engineer's negligence in not having stopped or slowed down the speed of his train when he had a very short time in which to act was before the court. Judicial notice was taken of the fact that an appreciable time was required for realization and appreciation of the situation on the part of the engineer, and for action thereafter by the engineer in operating the emergency brake, and for the brake to become effective, during which time the train was moving at undiminished speed.

In *State v. Barr*,[10] the court refused to take judicial notice that a headache on the morning after constituted proof that the whiskey consumed the evening before was drugged.

II. Presumption and Inference

In *Morris v. E. I. DuPont de Nemours & Co.*,[11] it was ruled that several inferences may properly be drawn from and sustained by the same set or

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3. Grimes v. St. Louis-S. F. Ry., 106 S. W. (2d) 462 (Mo. 1937).
4. State *ex rel.* City of St. Louis v. Public Service Comm., 110 S. W. (2d) 749 (Mo. 1937).
5. White v. Scarritt, 111 S. W. (2d) 18 (Mo. 1937).
6. Newdiger v. Kansas City, 114 S. W. (2d) 1047 (Mo. 1937).
7. 106 S. W. (2d) 409 (Mo. 1937).
8. Nies v. Stone, 108 S. W. (2d) 349 (Mo. 1937).
9. 108 S. W. (2d) 44 (Mo. 1937).
10. 340 Mo. 738, 102 S. W. (2d) 629 (1937).
11. 109 S. W. (2d) 1222 (Mo. 1937).

phase of the facts in evidence, and although several inferences may be necessary to take out a *prima facie* case, nevertheless, plaintiff is entitled to the benefit of all, where each is based on facts and circumstances in evidence. The rule against arriving at an ultimate inference solely by basing an inference upon an inference is said to be aimed at inferences drawn solely from previous inferences and otherwise unsupported, so that the evidence becomes too remote.

In *McInnis v. St. Louis-Southern, Inc.*,[12] the failure of the plaintiff to call as witnesses the doctors who treated him was said to raise a presumption that their evidence would have been unfavorable to him, and it was further held that the plaintiff could not rid himself of this unfavorable inference by suggesting to the defendants during the trial that defendants could call the doctors as their witnesses.

III. Admissions and Declarations

The case of *King v. Rieth*[13] was a motorist's action for injuries in an automobile collision with a truck allegedly owned by three defendants as partners. The declarations of one defendant were admissible against himself and another unidentified defendant who was present to prove their membership in the partnership and their liability for partnership torts, but the declarations were not admissible to prove that a defendant, who was not present at their making, was driving the truck at the time of the accident. Emphasis was placed upon the fact that the declarations were not part of the *res gestae,* were not made in the presence of the partner to whom they referred, were not made concerning an act of declarant or the partner who heard them, and were not based on the personal knowledge of the declarant.

In the case of *Fawkes v. National Refining Co.*[14] is found an action for damages, for personal injuries, against the National Refining Company and one of its filling station operators, based on the alleged negligence of the operator in pushing an unlighted truck along the highway, where the plaintiff ran into it. The operator, Howell, defaulted by withdrawing his answer in open court and acknowledging that his action was a confession of liability on his part. This was at the instance of attorneys for the Refining Company. It was held that Howell's statement was not an ad-

12. 108 S. W. (2d) 113 (Mo. 1937).
13. 108 S. W. (2d) 1 (Mo. 1937).
14. 108 S. W. (2d) 7 (Mo. 1937).

mission against interest, binding on the co-defendant company. It was further ruled that even if the statements of Howell, in connection with the withdrawal of the answer, were an admission against interest, it still would not be binding on the co-defendant, for the reason that in this case judgment was possible against Howell alone. An admission against interest by one co-defendant is not binding upon another co-defendant except where the common interest of the co-defendants extends not only to the entire recovery but also covers the entire ground of liability, and the co-defendants, if liable at all, are liable jointly.

It was held in a malicious prosecution case that defendant's admission that the prosecution was dismissed, and that no prosecution was now pending, was binding on it, and conclusively established that the prosecution terminated in plaintiff's favor prior to the institution of the malicious prosecution action, and that plaintiff was therefore not entitled to introduce in evidence the prosecutor's statement of his reasons for not filing an information in the prosecution.[15]

IV. Parol and Extrinsic Evidence Affecting Writings

Where corporation directors placed their names on the back of the corporation's non-negotiable note, prior to the consummation of the transaction, it was held that the payee could, by parol evidence, establish the liability of the directors as joint makers, sureties or guarantors, where such testimony was in harmony with the written contract, and that the directors were not entitled to establish a contemporaneous parol agreement that they were not to be held liable as promissors on such note. The striking out of the word "secretary" following the signature of a director on the back of the note, and prior to the signature of the others, did not constitute a latent ambiguity, so as to justify the admission of parol testimony to establish the director's non-liability on that ground.[16]

In *Meinhardt v. White*,[17] it was held that in a law action to try title, parol evidence is admissible where a latent ambiguity exists in a deed, to explain such ambiguity, since the purpose of such evidence is not to correct, alter, amend, contradict or vary the description in the deed, but to explain the ambiguity and apply the description to the parcel intended to be con-

15. Polk v. M. K. & T. R. R., 111 S. W. (2d) 138 (Mo. 1937).
16. Farm and Home Savings and Loan Ass'n v. Theiss, 111 S. W. (2d) 189 (Mo. 1937).
17. 107 S. W. (2d) 1061 (Mo. 1937).

veyed. It is said that where the description in a deed is impossible, and the tract of land could not exist, or the description is so contradictory, inconsistent or uncertain that location and identity of the land is impossible of determination, a patent ambiguity exists and parol evidence may not be resorted to, to explain or remove such ambiguity. A latent ambiguity in a description is said to be an uncertainty not appearing on the face of the instrument, but shown to exist for the first time by matter outside the writing, when an attempt is made to apply the language to the tract of land, and such an ambiguity may be explained and removed by parol evidence.

In *Missouri Service Co. v. City of Stanberry,*[18] it was held that parol testimony was admissible to explain certain ambiguous language in a contract.

V. Opinion Evidence

In *Pedigo v. Roseberry,*[19] a malpractice action, the court considered the question of testimony by medical experts. It is said that ordinarily, litigation relates to subjects within the experience and knowledge common to mankind in general, and that opinion testimony in such cases is excluded as superfluous. Lay witnesses, for want of better evidence, may state their opinions, when derived from observations, on certain subjects, to-wit, time, quantity, dimensions, speed and the like. Other subjects of litigation may embrace, as one or more elements of a main determinable fact issue, a subject or topic whereon the opinion of one possessing special qualifications will aid the jury in its conclusions, and the opinion of such a qualified witness is therefore admissible. There are said to exist, however, a comparatively few subjects of litigation involving a main ultimate fact issue beyond the general experience and common knowledge of mankind, for the determination of which scientific experience is indispensable and the necessary testimonial qualifications may be acquired only through the systematic and thorough study of, training in and application of knowledge to the science or art involved. The logic of such a situation, the court says, requires the establishment of the ultimate fact through the testimony of those possessing the necessary testimonial qualifications to observe accurately, reason correctly and report truly thereon.

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18. 108 S. W. (2d) 25 (Mo. 1937).
19. 340 Mo. 724, 102 S. W. (2d) 600 (1937).

In *Frank v. Greenhall*,[20] the rule was reaffirmed that medical experts should not be permitted to express an opinion, in response to a hypothetical question, that a testator was of unsound mind, unless there was substantial evidence tending to show such unsoundness of mind.

In *Clevinger v. St. Louis-San Francisco Ry.*,[21] the plaintiff, who was injured while getting ties out of a ditch from which they might wash against a culvert, testified that the removal of the ties was necessary for the physical maintenance of inter-state tracks, otherwise, the ties might stop up the culvert and cause the inter-state tracks to wash out. The court said that such an opinion could not be treated as an expert opinion, and was a mere statement of plaintiff's conclusions, and was necessarily controlled by and of no greater weight than the facts given in his testimony.

In *Nute v. Fry*,[22] the court reaffirms its rule that lay witnesses, before expressing an opinion that a testator was of unsound mind, must first relate facts upon which they base their opinion, which facts must be inconsistent with sanity; and further, that the opinion of medical experts in response to hypothetical questions is not admissible to establish insanity unless the facts upon which the opinion is based are inconsistent with sanity.

In *Webb v. Missouri-Kansas-Texas R. R.*,[23] it was shown that plaintiff received injuries in the accident in question, and a doctor was permitted to testify that plaintiff's condition could have been the result of injuries sustained. An expert may testify that a certain thing might, could or did produce a certain result. The testimony of an expert that a certain thing is scientifically possible is of some aid to a jury in determining what are the reasonable inferences to be drawn from the facts.

It was further held that a doctor may testify from his observations during an examination of the patient, and, in giving his opinion, may state not only what he found but also what the patient told him concerning his present symptoms, but not anything the patient may have said with respect to past physical condition, the circumstances of his injury or the manner in which it was received. The court intimates that the rule might be different if the attendance of a physician is for the purpose of preparing himself as a witness in a pending case, or one expected to arise, on account of the temptation to magnify the true condition on the patient's part.[24]

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20. 340 Mo. 1228, 105 S. W. (2d) 929 (1937).
21. 109 S. W. (2d) 369 (Mo. 1937).
22. 111 S. W. (2d) 84 (Mo. 1937).
23. 116 S. W. (2d) 27 (Mo. 1937).
24. Evans v. Mo. Pac. R. R., 116 S. W. (2d) 8 (Mo. 1937).

In *Ambruster v. Levitt Realty and Investment Co.*,[25] the court held that the opinion of an expert would be necessary to establish whether a defect in a gas refrigerator would cause the formation of carbon monoxide gas in dangerous amounts.

In *State v. Kennedy*,[26] a witness who had seen defendant write letters and was familiar with his handwriting, was allowed to express an opinion that certain other notes were written by defendant, even though the witness was not a handwriting expert.

A witness who is expert in the identification of firearms and bullets, by comparison methods through microscopic examination, may testify that a certain shell was fired from a certain gun, even though he is not a ballistic expert.[27]

VI. Weight and Sufficiency of Evidence

In *Jones v. Chicago, Rock Island & Pacific Ry.*,[28] plaintiff instituted an action against the railroad and the motorman, and placed the motorman on the stand. The court held that a party may prove an essential part of his case by his opponent, and is only bound by such part of his adversary's testimony as he offers and vouches for as true. The jury was entitled to accept the motorman's testimony as to where the train was when he first saw the automobile, and to disregard it as to where the automobile was when he first saw it, and accept plaintiff's testimony on that point, thereby making a case under the humanitarian doctrine for plaintiff. A party may not impeach his own witness, but may offer contradictory evidence of independent probative force.

In *Smithers v. Barker*,[29] the plaintiff, in an action submitted on the humanitarian theory, arising out of the collision of two automobiles, introduced the deposition of a defendant, in which the defendant gave his rate of speed and the distance in which he could and did stop. A witness for plaintiff said defendant did not stop. The defendant argued, in support of his demurrer, that the plaintiff could not aid his case by the defendant's testimony in the deposition, because plaintiff's evidence as to speed, and that of plaintiff's witnesses, thus contradicting the evidence

25. 107 S. W. (2d) 74 (Mo. 1937).
26. 108 S. W. (2d) 384 (Mo. 1937).
27. State v. Couch, 111 S. W. (2d) 147 (Mo. 1937).
28. 108 S. W. (2d) 94 (Mo. 1937).
29. 111 S. W. (2d) 47 (Mo. 1937).

of defendant raised an inference that because of his speed defendant could not have avoided the collision. The court said that plaintiff was entitled to the benefit of the testimony in defendant's deposition, unless it was contrary to plaintiff's own testimony or contradictory to the fundamental theory of his case, which was not true in this instance.

In *Castorina v. Herrmann*,[30] the court ruled that the fact that some of the circumstances tending to show fraud in the conveyance of a trust deed came from defendant's evidence, did not prevent them from being substantial evidence in support of plaintiff's action.

VII. Documentary Evidence

In *Clark v. Reising*,[31] plaintiff complained because X-ray films of his injuries were excluded. The court, apparently for the first time in this state, held that the sufficiency of the verification of X-rays is within the discretion of the trial judge. In this particular case, neither the nurse in charge of the X-ray records nor the doctor under whose supervision, and who was present when they were taken and labelled, testified. The ruling of the lower court in excluding them was sustained. Plaintiff contended that because the films bore his name, a presumption arose that they were his pictures. Such presumption from identity of name can only arise where there is evidence before the court on which to base it, and here the X-rays were not admitted, so that the presumption did not arise.

In *Whalen v. Buchanan County*,[32] it was held, where the order of record of a county court, approving the appointment of deputies by the county clerk, referred to such appointment by the county clerk, which appointment was in writing and on file in the archives of the court, that such written appointment was admissible in evidence as a part of the order of record.

VIII. Witnesses

A. *Competency*

In *Bernblum v. Travelers Ins. Co.*,[33] it was ruled that the death of one party to a contract does not disqualify the agent of the other party from

30. 340 Mo. 1026, 104 S. W. (2d) 297 (1937).
31. 107 S. W. (2d) 33 (Mo. 1937).
32. 111 S. W. (2d) 177 (Mo. 1937).
33. 340 Mo. 1217, 105 S. W. (2d) 941 (1937).

testifying, but the death of the agent would disqualify the other party. This is true, because our statute on the subject is a qualifying and not a disqualifying statute, except where it adds a new specific disqualification of its own, and since the agent was a qualified witness at common law, it was not intended by the statute that he be disqualified. On the other hand, at common law, a party was disqualified on account of interest in any event, and the statute does not qualify him where the other party is dead.

In *Farmers and Traders Bank v. Kendrick*,[34] it was ruled that in a suit to set aside a conveyance from a deceased husband to his wife, on the ground that the conveyance was in fraud of creditors, the wife is incompetent as a witness to prove that the deceased husband was indebted to her, to establish a consideration for the conveyance.

B. *Examination*

The cross-examination of defendant's witnesses, in a malicious prosecution action, by reading questions and answers from the transcript of a preliminary examination, was improper where the transcript was never identified or introduced in evidence.[35]

In an assault and battery case, defendant was allowed, on cross-examination of plaintiff, under the guise of impeachment, to prove a number of things of an aggravating nature which plaintiff had done, but none of which constituted any justification for assault by the defendant. This was held improper.[36]

In several criminal cases, the court reaffirmed the rule that where defendant testifies, his cross-examination is not confined to a categorical review of the questions and answers asked on direct examination, but he may be questioned on any subject within the range of direct examination.[37]

Where a prosecuting attorney uses a paper to refresh a witness's recollection while testifying, it is error to refuse opposing counsel the right to examine it unless it is introduced in evidence, since such a course would tend to facilitate fraud and perjury.[38]

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34. 108 S. W. (2d) 62 (Mo. 1937).
35. Polk v. M. K. & T. R. R., 111 S. W. (2d) 138 (Mo. 1937).
36. O'Shea v. Opp, 111 S. W. (2d) 40 (Mo. 1937).
37. State v. Jackson, 340 Mo. 748, 102 S. W. (2d) 612 (1937); State v. Couch, 111 S. W. (2d) 147 (Mo. 1937).
38. State v. Gadwood, 116 S. W. (2d) 42 (Mo. 1937).

C. *Credibility, impeachment and corroboration*

Where state's witnesses had identified another as the killer in a murder prosecution, and the state had accepted a plea of guilty entered by such other party, such fact was competent as affecting the credibility of the state's witnesses and the weight to be given their testimony.[39]

IX. Relevancy and Res Gestae

In a workmen's compensation death claim, the question was whether the death resulted from an accident arising out of and in the course of the employment; deceased, a salesman, borrowed a car to make a trip on which he was killed, and claimant contended that he was going to see some people, with the thought in mind that they might help him increase the business of the company. Declarations of deceased in borrowing the car to make the trip, and tending to show that he was going on the trip for the purpose aforesaid, were held admissible as *res gestae.* Declarations made immediately preceding a particular litigated act, which tend to illustrate and give character to the act in question, are admissible as *res gestae,* and are not rendered inadmissible because they are also self-serving. A distinction is drawn between declarations of the nature in question and declarations made subsequent to a litigated act which are mere narrations of a past event and therefore not a part of the *res gestae.*[40]

In *State v. Rodgers,*[41] a statement by defendant, made a moment or so after the fatal fight, to the brother of the deceased, "If you don't be careful, that is what you will get," was held admissible as *res gestae,* under the ultimate test of spontaneity and logical relation to the main event.

X. Criminal Law

A. *Acts and declarations of co-conspirators and co-defendants*

In *State v. McGee,*[42] it was held that where, in the course of a burglary, one conspirator ran and another stayed and killed deceased, that the state was entitled to prove the acts and statements of the conspirator who stayed after the defendant had run, for the reason that statements and acts in furtherance of conspiracy, made by one conspirator, are admissible against his co-conspirator, although occurring out of his presence.

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39. State v. Couch, 111 S. W. (2d) 147 (Mo. 1937).
40. Edwards v. Ethyl Gas Corp., 112 S. W. (2d) 555 (Mo. 1937).
41. 102 S. W. (2d) 566 (Mo. 1937).
42. 106 S. W. (2d) 478 (Mo. 1937).

In *State v. Schnelt*,[43] it was held that acts of a co-conspirator, after the commission of a crime, for the purpose of avoiding exposure, concealing evidence of crime, or preventing or defeating prosecution, are admissible in evidence against a co-conspirator. It was further ruled that while proof of the conspiracy must exist before an act of a co-conspirator may be shown in evidence against a co-conspirator, still the order of proof is discretionary with the court, and proof of the act may be admitted before proof of the conspiracy is made.

B. *Confessions*

The statement of a defendant, made to police, was held not inadmissible, because the defendant did not have a lawyer at the time, since police are not required to procure a lawyer for a defendant before questioning him about a crime.[44]

Confessions of defendants are presumed to be voluntary until the contrary is shown. Failure to release a defendant in twenty hours, where a charge has not been filed against him, does not, as a matter of law, constitute duress, so as to render any statement or confession thereafter made to an officer presumptively involuntary.[45]

EXTRAORDINARY LEGAL REMEDIES

RUSH H. LIMBAUGH*

I. CERTIORARI

In the exercise of its right to review opinions of the courts of appeals upon writs of *certiorari*, the Supreme Court of Missouri during the year 1937 quashed the record and opinion in four cases[1] and quashed the writ and permitted the opinion to stand in four cases.[2] Pending a hearing on

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43. 108 S. W. (2d) 377 (Mo. 1937).
44. State v. Richardson, 340 Mo. 680, 102 S. W. (2d) 653 (1937).
45. State v. Menz, 106 S. W. (2d) 440 (Mo. 1937).

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1. State *ex rel.* State Highway Comm. v. Shain, 340 Mo. 802, 102 S. W. (2d) 666 (1937); State *ex rel.* Kansas City Southern Ry. v. Shain, 340 Mo. 1195, 105 S. W. (2d) 915 (1937); State *ex rel.* Randall v. Shain, 341 Mo. 201, 108 S. W. (2d) 122 (1937); State *ex rel.* Golloday v. Shain, 341 Mo. 889, 110 S. W. (2d) 719 (1937).

2. State *ex rel.* Kinealy v. Hostetter, 340 Mo. 965, 104 S. W. (2d) 303 (1937); State *ex rel.* F. T. O'Dell Construction Co. v. Hostetter, 340 Mo. 1155,

the writ of *certiorari* in three other companion cases, the supreme court issued a peremptory writ of *mandamus,* thus making it unnecessary to determine the merits of those cases on *certiorari.*[3] Of the cases thus reviewed, four were determined by division one of the court,[4] one by division two of the court,[5] and three by the court *in banc.*[6]

Adhering to its settled policy, the court held in *State* ex rel. *State Highway Comm. v. Shain*[7] that, although it may on *certiorari* consider conflicts not assigned, it will not substitute its opinion for that of a court of appeals, in the absence of a conflict, even though it is of the opinion that the decision of a court of appeals is erroneous. *State* ex rel. *F. T. O'Dell Construction Co. v. Hostetter*[8] had its origin in a claim filed before the Workmen's Compensation Commission by a widow for the death of her husband from lightning, while taking refuge from a storm by going into a barn in the course of his employment. The court of appeals, in reversing the judgment of the circuit court and affirming the award of compensation to the widow made by the commission, took judicial notice of the fact that fatalities from lightning are increased by the tendency of persons to take shelter in or under barns or trees, and that such fact was a part of the general knowledge of the country and was authenticated in repositories of fact, such as encyclopedias, to which the court may turn to verify its information or refresh its recollection. The supreme court held that, on *certiorari,* it could not determine whether the court of appeals was right in taking judicial notice of the particular fact that deceased's presence in a barn in the course of his employment brought about an excessive exposure to lightning; but so long as the declaration of the court of appeals of the character of facts of which it may take judicial notice is not in conflict

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104 S. W. (2d) 671 (1937); State *ex rel.* Govro v. Hostetter, 341 Mo. 262, 107 S. W. (2d) 22 (1937); State *ex rel.* Ocean Accident and Guarantee Corp. v. Hostetter, 341 Mo. 488, 108 S. W. (2d) 17 (1937).

3. State *ex rel.* Pitcairn v. Shain, 106 S. W. (2d) 902 (Mo. 1937).

4. State *ex rel.* State Highway Comm. v. Shain, 340 Mo. 802, 102 S. W. (2d) 666 (1937); State *ex rel.* F. T. O'Dell Construction Co. v. Hostetter, 340 Mo. 1155, 104 S. W. (2d) 671 (1937); State *ex rel.* Govro v. Hostetter, 341 Mo. 262, 107 S. W. (2d) 22 (1937); State *ex rel.* Ocean Accident and Guarantee Corp. v. Hostetter, 341 Mo. 488, 108 S. W. (2d) 17 (1937).

5. State *ex rel.* Randall v. Shain, 341 Mo. 201, 108 S. W. (2d) 122 (1937).

6. State *ex rel.* Kinealy v. Hostetter, 340 Mo. 965, 104 S. W. (2d) 303 (1937); State *ex rel.* Kansas City Southern Ry. v. Shain, 340 Mo. 1195, 105 S. W. (2d) 915 (1937); State *ex rel.* Golloday v. Shain, 341 Mo. 889, 110 S. W. (2d) 719 (1937).

7. 340 Mo. 802, 102 S. W. (2d) 666 (1937).

8. 340 Mo. 1155, 104 S. W. (2d) 671 (1937).

with anything the supreme court has said on the subject, such opinion must stand.

And, following further its policy of quashing its writ of *certiorari* on finding that the opinion of a court of appeals does not conflict with a prior decision of the supreme court, it was held in *State* ex rel. *Kinealy v. Hostetter*[9] that the supreme court is limited to facts as found in the opinion by the court of appeals; in *State* ex rel. *Govro v. Hostetter,*[10] that a decision by a court of appeals, holding an instruction authorizing a smokestack painter to recover for injuries resulting from a fall due to a defective rope, if the rope furnished by the employer was defective, was reversible error in not requiring the jury to find as a condition of liability that the owner knew of, or by the exercise of ordinary care could have discovered, the defect in the rope; and in *State* ex rel. *Ocean Accident and Guarantee Corp. v. Hostetter,*[11] that a decision by a court of appeals finding certain provisions of an insurance policy under consideration ambiguous, and proceeding judicially to construe such ambiguous provisions and deciding the case on the basis of such construction, was not in conflict with a proper decision of the supreme court. In each of such cases the writ of *certiorari* was quashed.

But where there was a conflict of a decision of a court of appeals with a former decision of the supreme court, as in *State* ex rel. *State Highway Comm. v. Shain,*[12] where, in a condemnation case, a court of appeals determined that evidence that the landowner whose land was condemned was active in securing the location of the road by his farm, when he knew it would cut through the farm, was not admissible, it was held that this decision was directly in conflict with prior decisions of the supreme court.[13] And, in *State* ex rel. *Kansas City Southern Ry. v. Shain,*[14] it was held that a determination by a court of appeals that a motorist was not guilty of contributory negligence as a matter of law in failing to observe a freight car on a railroad crossing in time to stop and avoid a collision when he was within ten or twelve feet of it, because of swirling snow and dust, was contrary to controlling decisions of the supreme court, it being the

9. 340 Mo. 965, 104 S. W. (2d) 303 (1937).
10. 341 Mo. 262, 107 S. W. (2d) 22 (1937).
11. 341 Mo. 488, 108 S. W. (2d) 17 (1937).
12. 340 Mo. 802, 102 S. W. (2d) 666 (1937).
13. Johnson v. Quarles, 46 Mo. 423 (1870); Bragg v. Metropolitan Street Ry., 192 Mo. 331, 91 S. W. 527 (1905); State v. Donnington, 246 Mo. 343, 151 S. W. 975 (1912).
14. 340 Mo. 1195, 105 S. W. (2d) 915 (1937).

duty of the motorist, under such prior decisions, when confronted with such conditions, to exercise care commensurate with the circumstances. Likewise, a decision by the court of appeals that the full commission could not legally consider additional evidence following the award made by one of the commissioners in a case pending before the Workmen's Compensation Commission, was held in conflict with a prior decision in *State* ex rel. *Randall v. Shain.*[15] In the latter case it was also held that a court of appeals is not authorized under the law to make its own finding and peremptorily direct an award in a case originating before the Workmen's Compensation Commission, such action being contrary to former decisions of the supreme court; and that a claimant who fails to make a request that all members of the commission be present to hear the evidence waives the right, and the decision by the court of appeals to the contrary was in conflict with prior decisions of the supreme court on the subject. Also, where a court of appeals affirmed a judgment for plaintiff in a tort action under facts similar to those in another case where the supreme court held that a demurrer to the evidence should have been sustained, the court in *State* ex rel. *Golloday v. Shain*[16] quashed the opinion and record of the court of appeals.

That a reference to the pleadings and instructions in the opinion of the court of appeals, though such opinion neither outlines the petition or answer nor sets out the substance of the instructions, is sufficient to make both the pleadings and instructions, as preserved in the abstract of the record filed in the court of appeals, a part of the opinion for review on *certiorari,* was held in *State* ex rel. *Kinealy v. Hostetter,*[17] which case also held that reference to a written instrument by a court of appeals in its opinion makes such instrument a part of the opinion as though fully set out therein.

II. Habeas Corpus

The only *habeas corpus* proceeding reported in the decisions of the supreme court for 1937 is that of *Ex Parte Bayless,*[18] which was an original proceeding in the supreme court, by which petitioner sought to be released from the penitentiary. There is nothing of consequence in the decision.

15. 341 Mo. 201, 108 S. W. (2d) 122 (1937).
16. 341 Mo. 889, 110 S. W. (2d) 719 (1937).
17. 340 Mo. 965, 104 S. W. (2d) 303 (1937).
18. 341 Mo. 884, 110 S. W. (2d) 724 (1937).

The petitioner sought release on the ground that he had been convicted as an accomplice for murder on perjured testimony on the part of a man who had been convicted of murder, and he had therefore been denied due process. The court held there was no credible evidence tending to show that the testimony of the witness against the petitioner was perjured, and the petitioner was remanded to the custody of the warden of the penitentiary.

III. MANDAMUS

The supreme court decided three *mandamus* cases in 1937, all of which originated in that court and all of which were decided by the court *in banc.* Following the rule that *mandamus* lies to compel a court of appeals to assume jurisdiction of a case where it refuses to take jurisdiction because of a misconstruction of the law governing such jurisdiction, the court in *State* ex rel. *Wabash Ry. v. Shain*[19] declared unconstitutional parts of Sections 5234 and 5237, Missouri Revised Statutes (1929), which authorize appeals in Public Service Commission cases from the circuit court to the supreme court, and ordered a court of appeals, which had refused to take jurisdiction of an appeal in such case, to assume jurisdiction of the case and determine it. The decision is an important one. Upon an application to the Public Service Commission for a certificate of convenience and necessity authorizing a truck operator to extend his route, the commission granted the certificate and the circuit court affirmed the action. The case was then appealed to the supreme court, which transferred the cause to the court of appeals.[20] The court of appeals dismissed the appeal, on the ground it had no jurisdiction. The application for a writ of mandamus followed. The court held that the provisions of Sections 5234 and 5237, Missouri Revised Statutes (1929), which directed that appeals from the circuit court in such cases went directly to the supreme court were in conflict with section 12 of article 6 of the constitution of Missouri, which fixes the jurisdiction of the supreme court, but that after that part of both sections of the statutes which is unconstitutional is discarded, enough remains to provide a right of appeal to an aggrieved litigant in every case.[21]

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19. 341 Mo. 19, 106 S. W. (2d) 898 (1937).
20. State *ex rel.* Pitcairn v. Public Service Comm., 338 Mo. 180, 90 S. W. (2d) 392 (1935).
21. Recognizing the fact, as was reasserted in this case, that jurisdiction of the supreme court and the courts of appeals is vested by the constitution and cannot be controlled or changed by statute, the legislature amended Sections

The writ of *mandamus* was also used against the state auditor, in *State* ex rel. *Consolidated School Dist. No. 3 of Franklin County v. Smith*,[22] to compel him to register bonds voted by relator school district. The judges and clerks of the election at which the bonds were voted on certified the number of votes for and against the bonds, and further certified that six votes were void. If the six votes counted void were considered as votes, the proposition to issue the bonds did not receive the consent of two-thirds of the voters voting, as required by the provisions of the constitution. The court held that, under the provisions of Section 12, article 10, of the constitution, in order for any voter to be considered in determining whether a proposition received the consent of two-thirds of the voters voting on such proposition, he must express a preference either in the affirmative or negative for the proposition voted on, and since the six votes certified as void votes were not expressions of a preference either for or against the proposition, such votes should not be considered and the bonds should be registered.

State ex rel. *Western Union Tel. Co. v. Markway*[23] held that where a county collector improperly demanded from a taxpayer penalties, interest and commissions on taxes, such taxpayer was entitled to have a writ of *mandamus* issued to compel the collector to accept the sum actually due.

IV. Prohibition

During 1937 the supreme court passed on five cases involving the extraordinary writ of prohibition. All of these cases originated in the supreme court, and in each case the original writ was directed against a circuit judge. Two of the cases were determined by division two of the court,[24] and three by the court *in banc*.[25] In one of the cases the relator was a private corporation,[26] and in the other four the relators were public

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5234 and 5237, Mo. Rev. Stat. (1929) (Laws 1937, pp. 432 and 434), so that jurisdiction of appeals from the circuit court in cases originating before the Public Service Commission is the same as in other cases.

22. 341 Mo. 807, 109 S. W. (2d) 857 (1937).

23. 341 Mo. 976, 110 S. W. (2d) 1118 (1937).

24. State *ex rel. and to Use of* Public Service Comm. v. Sevier, 341 Mo. 162, 106 S. W. (2d) 903 (1937); State *ex rel.* W. A. Ross Construction Co. v. Skinker, 341 Mo. 28, 106 S. W. (2d) 409 (1937).

25. State *ex rel.* Igoe v. Joynt, 341 Mo. 788, 110 S. W. (2d) 737 (1937); State *ex rel.* Anderson v. Witthaus, 340 Mo. 1004, 102 S. W. (2d) 99 (1937); State *ex rel.* Madden, Sheriff v. Padberg, 340 Mo. 667, 101 S. W. (2d) 1003 (1937).

26. State *ex rel.* W. A. Ross Construction Co. v. Skinker, 341 Mo. 28, 106 S. W. (2d) 409 (1937).

officials.[27] In the three cases decided by the court *in banc*, the preliminary rule was made absolute, while in the cases decided in division two of the court a peremptory writ was denied as to one,[28] and the provisional rule dissolved and the case dismissed as to the other.[29]

One of the chief functions of the extraordinary writ of prohibition is to keep a court within the limits of its lawful jurisdiction, but the remedy will not be employed to correct judicial errors or where adequate relief may be had by appeal or writ of error.[30] Thus, in *State* ex rel. *W. A. Ross Construction Co. v. Skinker*,[31] where the relator applied for a writ of prohibition against a circuit judge to restrain him from denying the relator the right to interplead in another case before such circuit judge, the court properly held that, since the circuit judge had entered judgment denying relator the right to interplead, and an appeal had been taken by relator in that action, the prohibition remedy was not available to relator, but that he could obtain adequate relief by appeal, the court taking judicial notice of the fact that the appeal in that case was already pending before it.

Neither will the writ be used to determine a moot case. Thus, in *State* ex rel. and to Use of *Public Service Comm. v. Sevier*,[32] the court properly held that where the purpose sought to be accomplished by the writ was obtained before a final hearing, there was nothing to prohibit by order of the court, and the original rule should be dissolved and the case dismissed.[33]

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27. State *ex rel.* Igoe v. Joynt, 341 Mo. 788, 110 S. W. (2d) 737 (1937); State *ex rel. and to Use of* Public Service Comm. v. Sevier, 341 Mo. 162, 106 S. W. (2d) 903 (1937); State *ex rel.* Anderson v. Witthaus, 340 Mo. 1004, 102 S. W. (2d) 99 (1937); State *ex rel.* Madden, Sheriff v. Padberg, 340 Mo. 667, 101 S. W. (2d) 1003 (1937).

28. State *ex rel.* W. A. Ross Construction Co. v. Skinker, 341 Mo. 28, 106 S. W. (2d) 409 (1937).

29. State *ex rel. and to Use of* Public Service Comm. v. Sevier, 341 Mo. 162, 106 S. W. (2d) 903 (1937).

30. For a full discussion of these principles, see McBaine, *The Extraordinary Writ of Prohibition in Missouri* (1924) 30 U. OF MO. BULL. LAW SER. 3, 31 *id.* at 3; (1925) 32 *id.* at 3.

31. 341 Mo. 28, 106 S. W. (2d) 409 (1937).

32. 341 Mo. 162, 106 S. W. (2d) 903 (1937).

33. That case arose after a bus operator had filed with the Public Service Commission an application for a certificate of convenience and necessity to extend the operation of its system. One of the cities on the route of the proposed extension was not served with a copy of the application, as required by Section 5268, Mo. REV. STAT. (1929), as amended by Mo. Laws 1931, p. 307, and Mo. Laws 1935, pp. 323 and 324. Such city sought to have the application dismissed by the commission because it was without jurisdiction. Failing in this, the city applied for a writ of prohibition in the circuit court against the commission to prohibit it from proceeding with the hearing on the application. The commission then applied to the supreme court for a writ of prohibition against the circuit judge. After the provisional writ was issued by the supreme court, respondent filed a return alleging that since the issuance of the provisional writ

But prohibition is an available remedy to prevent a circuit court from proceeding to punish a sheriff for contempt for failing to comply with an order contained in a void writ. Thus, in *State* ex rel. *Madden, Sheriff, v. Padberg,*[34] where a writ designated as a special execution and commanding that it be forthwith returned, was in fact only a general execution, the forthwith return of which is not authorized or sanctioned by statute, the court properly held that the sheriff could not be proceeded against as for contempt in failing to obey the command of the void execution.

Prohibition is also a proper remedy against a circuit judge to prohibit him from issuing a permanent injunction against police officers to restrain them from seizing and summarily destroying slot machines or gambling devices under their general police powers, as was held in *State* ex rel. *Igoe v. Joynt.*[35]

The same principle was applied in *State* ex rel. *Anderson v. Witthaus,*[36] where a truck operator and his employees were arrested for operating his business without a permit or license from the Public Service Commission. The operator applied for a restraining order to prevent the members of the Public Service Commission, the State Highway Commission, and the superintendent and members of the highway patrol from arresting him, his agents, servants and employees for operating without a license, it being the contention of the operator that his business did not come within the purview of the Bus and Truck Act.[37] Relators contended that the operator was a motor carrier and within the statute requiring such carriers to operate under a permit granted by the commission, and that the circuit court had no jurisdiction to grant a permanent restraining order against them to prohibit them from proceeding to comply with the law. The court sustained that contention and made absolute the preliminary rule in prohibition.

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the original application to the Public Service Commission had been abandoned and in lieu thereof applicant had filed a new application seeking the same rights, and had given the complaining city notice according to law.

34. 340 Mo. 667, 101 S. W. (2d) 1003 (1937).

35. 341 Mo. 788, 110 S. W. (2d) 737 (1937). In this case the court discussed gambling devices generally and held that slot machines are gambling devices and unlawful where the chances are unequal in their favor. The court further held that such a device is a public nuisance and police officers have a right to seize and destroy it, and that equity will not interfere with lawful authorities charged with the enforcement of the criminal law, and since the relief sought in the injunction proceeding called for the exercise of jurisdiction by a court of equity which it did not possess, prohibition is the proper remedy.

36. 340 Mo. 1004, 102 S. W. (2d) 99 (1937).

37. Mo. Laws 1931, p. 304.

V. Quo Warranto

Of the three *quo warranto* cases determined by the supreme court in 1937, all originated in that court and all were determined by the court *in banc*. Two arose on information of the attorney general,[38] and one on information of a prosecuting attorney.[39] The writs in two of the cases were directed at private corporations and were in the nature of ouster proceedings for alleged violation of franchise rights,[40] while the other was directed at judges of a county court.[41]

Quo warranto is not the proper remedy to use against judges of a county court for failure to prepare a budget for the county in accordance with the provisions of the budget law.[42] Thus, in a *quo warranto* proceeding of *State* ex inf. *Walsh v. Thatcher*,[43] where the charges were that in preparing the budget for the county business the county officers did not act in accordance with the law, it was properly held that it is not the function of a writ of *quo warranto* to direct any officer what to do, but only to ascertain whether he is constitutionally and legally authorized to perform any act or exercise any function in the office to which he lays claim.

But *quo warranto* will be employed to punish a private corporation for exceeding its corporate or franchise powers, and the remedy was used for that purpose in 1937 in two cases of rather extensive public interest. In *State* ex rel. *McKittrick v. C. S. Dudley & Co.*,[44] forfeiture of the corporate charter of respondent, which was chartered to do a general collection and adjustment business, was sought on the alleged ground that it was wrongfully and illegally engaged in the practice of law and conducting a law business. Applying its recent declaration as to what constitutes the practice of the law and conducting a law business,[45] as well as the statutory definition of what constitutes the practice of the law,[46] the court held that

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38. State *ex rel.* McKittrick v. C. S. Dudley & Co., 340 Mo. 852, 102 S. W. (2d) 895 (1937); State *ex inf.* McKittrick v. Globe Democrat Publishing Co., 110 S. W. (2d) 705 (Mo. 1937).
39. State *ex inf.* Walsh v. Thatcher, 340 Mo. 865, 102 S. W. (2d) 937 (1937).
40. State *ex rel.* McKittrick v. C. S. Dudley & Co., 340 Mo. 852, 102 S. W. (2d) 895 (1937); State *ex inf.* McKittrick v. Globe-Democrat Publishing Co., 341 Mo. 862, 110 S. W. (2d) 705 (1937).
41. State *ex inf.* Walsh v. Thatcher, 340 Mo. 865, 102 S. W. (2d) 937 (1937).
42. Mo. Laws 1933, p. 340.
43. 340 Mo. 865, 102 S. W. (2d) 937 (1937).
44. 340 Mo. 852, 102 S. W. (2d) 895 (1937).
45. Boyle G. Clark v. Austin, Coon and Hull, 340 Mo. 467, 101 S. W. (2d) 977 (1937).
46. Mo. Rev. Stat. (1929) § 11692.

the respondent, in soliciting accounts for collection, sending such accounts to an attorney of its selection and making arrangements with him for his fee, and other similar activities in which it was engaged in its collection business, was practicing law. Since the court found, however, that the respondent had in good faith tried to comply with the law in the conduct of its business, it did not require respondent to surrender its franchise, but fined respondent one dollar and costs and directed that it henceforth cease and desist from illegal practices, on penalty of the forfeiture of its charter and franchise.

In *State* ex inf. *McKittrick v. Globe-Democrat Publishing Co.*,[47] the attorney general filed an information in the nature of *quo warranto,* the purpose of which was to have respondent's charter forfeited, on the ground that it was operating a lottery. The alleged lottery complained of was called the "Famous Names" contest. Respondent admitted it conducted the contest but denied that it was a lottery. The court discussed in detail the plan for the contest and found that in promoting the contest respondent was operating a lottery. Finding that respondent's officers acted in good faith, upon advice of able counsel, and promoted the contest for a legitimate purpose, the court held that it would be unreasonable and unjust to issue a writ of ouster. It required respondent to pay a fine of one dollar and the costs of the proceeding.

THE HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.*

Whether the humanitarian doctrine in Missouri is an exception to the rule of contributory negligence, a rule of proximate cause, an application of the principles of comparative negligence, or a doctrine of liability without fault concealed in words of art, may be a debatable question, but that it was undergoing a period of unrest in 1937 seems clear.

The developments of 1937 indicate that the controversy which flared up in *Perkins v. Terminal Railroad Ass'n*,[1] has not only not been finally

47. 341 Mo. 862, 110 S. W. (2d) 705 (1937).

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1. 340 Mo. 868, 102 S. W. (2d) 915 (1937), noted in (1937) 3 Mo. L. REV. 523.

determined but that important changes in the doctrine either in practice or in principle are liable to occur at any time. 1937 saw the constructive notice feature of the humanitarian doctrine assailed in an attempt to restrict the humanitarian rule to the "discovered peril" situation in accordance with the American Law Institute's *Restatement of the Law of Torts*, Section 480.[2] In this year the supreme court struck down the classic final paragraph of the usual plaintiff's humanitarian instruction advising that the plaintiff was entitled to recovery without regard to his own negligence.[3] At the same time it held that the final clause with reference to plaintiff's own negligence was not prejudicially erroneous where there was no live question of whether plaintiff's negligence was the sole cause of his injuries.[4] In addition, the requirements of a sole cause instruction in a humanitarian case were discussed in both divisions in a manner which indicates that the court *en banc* will be called on again to settle an incipient conflict between its opinions and divisional opinions.

Taken as a whole the supreme court opinions of 1937 involving the humanitarian rule illustrate persistent dissatisfaction of a number of members of the court—perhaps a majority—with certain phases of the doctrine as presently applied. With the close of the decisions for 1937 the future course of the humanitarian rule seemed to depend upon the new members on, or expected on, the supreme bench.

I. In the Court en banc

The most significant case of 1937 involving the humanitarian doctrine is the case of *Schneider v. Terminal Railroad Ass'n.*[5] This case grew out of an automobile-train crossing collision. It involved a fact situation similar to that in the case of *Perkins v. Terminal Railroad Ass'n.*[6] Plaintiff made a submissible humanitarian case upon failure to warn and failure to slacken. These grounds of negligence were submitted in the principal instruction in the disjunctive. As in the *Perkins* case, there was no specific requirement in the instruction to find the element of obliviousness, although the jury was required to find that "the plaintiff came into a position of

2. Crews v. K. C. Public Service Co., 341 Mo. 1090, 111 S. W. (2d) 54 (1937).
3. Smithers v. Barker, 341 Mo. 1017, 111 S. W. (2d) 47 (1937).
4. Crews v. K. C. Public Service Co., 341 Mo. 1090, 111 S. W. (2d) 54 (1937).
5. 107 S. W. (2d) 787 (Mo. 1937).
6. 340 Mo. 868, 102 S. W. (2d) 915 (1937).

imminent peril of being struck by said train." The instruction was sustained following the reasoning of the *Perkins* case for two reasons: (1) obliviousness is an evidentiary as distinguished from an ultimate fact and is comprehended within the term "imminent peril" where the evidence shows the cause of the peril to be obliviousness; (2) as in the *Perkins* case another instruction given at the request of the defendant made it clear that obliviousness must be proved before a duty to warn arose. Only three members of the court concurred fully in the majority opinion. These were Judges Leedy, Tipton and Hays, who, with former Judge Collett, made up the bare majority in the *Perkins* case. Judges Gantt and Frank dissented without qualification, indicating that they adhered to the position taken by them in the *Perkins* case and that they did not consider the issues ruled in that case to be settled. Judge Ellison concurred without opinion in result probably because the instruction under review did not permit recovery for failure to act when the plaintiff was merely "approaching a position of peril." Judge Douglas, the new member of the court, joined Judge Ellison. It appears from this case that Judge Douglas does not endorse the reasoning of the majority opinion in the *Perkins* case and of the majority opinion in this case. If these conclusions are correct the majority opinion in the *Perkins* case was not approved by the court as constituted at the close of 1937. So far as the court *en banc* was concerned a reexamination of the humanitarian theory seemed to be a distinct possibility.[6a]

II. Division One

Division one rendered three interesting opinions upon the humanitarian rule. The first of these was *McGrath v. Meyers.*[7] This case is interesting for its definition of the requirements of a primary negligence sole cause instruction offered by the defense in a case submitted under the humanitarian rule. Under this opinion such an instruction must con-

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6a. These observations are borne out in the very recent case of Buehler v. Festus Mercantile Co., 119 S. W. (2d) 961 (Mo. 1938) (*en banc*). The instructions in this and the Perkins cases were similar. Judge Ellison expressly reasserted the position taken by him in the former case. Judges Douglas, Gantt and Leedy concurred. Judges Tipton and Hays concurred in result only. Judge Lucas did not sit. Thus all the judges in the Perkins case, who are now members of the court, apparently reasserted their positions taken in that case with the exception of Judge Leedy who has joined the minority group in the earlier case. This group has now become the majority on this question, regardless of the position which the newly elected member to the court may take. Query? Is not the Perkins case already overruled on this point?

7. 341 Mo. 412, 107 S. W. (2d) 792 (1937).

tain all the elements required in a humanitarian defense instruction by the case of *Dilallo v. Lynch*.[8] This case seems to require more of the defense in framing such a primary negligence sole cause instruction than is required by the opinion of the court *en banc* in the case of *Borgstede v. Waldbauer*.[9]

In the near past there has been a tendency to grant the defendant in a humanitarian case greater freedom in instructing the jury. This opinion tends to burden the use of the sole cause instruction by requiring explanatory and cautionary matter which, as a matter of practice, lessens its effectiveness for the defense.

In *Crews v. Kansas City Public Service Co.*,[10] the defense sought to induce the court to renounce the Missouri "discoverable peril" doctrine. Specifically it sought to limit the duty to an oblivious plaintiff to a situation where the defendant had actual knowledge of the plaintiff's peril. The case involved an oblivious pedestrian and oblivious street car operator. The court noticed that the humanitarian doctrine has been subjected to a serious strain by rapid automobile traffic, but it refused to give further consideration to the contention of the defendant for the reason that the case at bar involved an ordinary pedestrian and street car situation with a narrow zone of peril. The holding was fortified by the observation that the defendant did not call its theory to the attention of the trial court by an appropriate instruction and thereby waived its right to complain of the theory upon which the case was submitted.

In the *Crews* case the plaintiff's main instruction contained the usual final paragraph that the verdict must be in favor of the plaintiff even though the plaintiff failed to use care for her own safety and was careless in walking in front of the street car. In contrast to the holding of *Smithers v. Barker*,[11] this statement was held not to be reversible error, because there was no live issue as to whether plaintiff's negligence was the sole cause of her injuries, and because the defendant requested no sole cause instruction as in the *Smithers* case.

The case was disappointing because the plaintiff's main instruction contained a clause which might well have provided the basis for an authoritative determination of the questions debated in the *Perkins* case.

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8. 340 Mo. 82, 101 S. W. (2d) 7, 13 (1936).
9. 337 Mo. 1205, 88 S. W. (2d) 373 (1935).
10. 341 Mo. 1090, 111 S. W. (2d) 54 (1937).
11. 341 Mo. 1017, 111 S. W. (2d) 47 (1937).

Plaintiff's instruction submitted in the disjunctive that the plaintiff was in a position of imminent peril "or immediately approaching a position of imminent peril by reason of the approach of said street car and was oblivious of such peril." Defendant had requested instructions using the same language and admitted that the instruction was in accord with the controlling decisions. Because of this there was no occasion to rule on the propriety of that clause of the instruction quoted above.

Except for the ruling upon its peculiar facts, *Smithers v. Barker*[12] involved no fundamental discussion of the humanitarian doctrine. In this opinion, however, an important matter of practice was definitely determined. Plaintiff's main instruction upon the humanitarian doctrine contained a final advice that the verdict should be for the plaintiff "even though you should find and believe from the evidence, that plaintiff did not exercise due care for his own safety, and was, or was not, then and there drunk and negligent in getting himself into the aforesaid position of imminent peril, if any, at said time and place." This final clause was condemned because there was a live issue in the case as to whether the plaintiff's own negligence was the sole cause of his injuries. An instruction on this issue had been requested by the defendant and there was substantial evidence to support such a finding.

The case also holds that one was not oblivious to the danger of a collision within the meaning of the humanitarian rule when he observed an oncoming car a block away and again a half block away and noted its speed although he assumed that he had time to cross with safety and moved into its path without looking again. From this it appears that it is better for the plaintiff not to look at all than to look twice.

III. Division Two

Division two rendered several opinions applying the humanitarian doctrine but, by chance, none of them involved more than routine application of accepted principles.

Kirkham v. Jenkins Music Co.,[13] was an automobile-pedestrian case submitted under the humanitarian doctrine involving a situation where plaintiff's and defendant's testimony conflicted as to whether plaintiff was struck in a safety zone or in the street outside the safety zone. An in-

12. *Ibid.*
13. 340 Mo. 911, 104 S. W. (2d) 234 (1937).

struction assuming that the pedestrian was struck outside the safety zone was held to be prejudicially erroneous on the pedestrian's appeal. The right to a sole cause defense instruction is recognized.

In *Edwards v. Terminal Railroad Ass'n*,[14] a pedestrian standing between two tracks was struck by one of the two trains moving thereon in parallel. The pedestrian was aware of the approach of both trains and there was sufficient room between the trains for him to stand or walk safely. The locomotive of the train which struck him passed safely but he was struck by the tender. The court held that there was no duty to warn because he was not oblivious, and that he was not in a position of peril as the locomotive of the train which struck him passed. Under those circumstances it was held that the humanitarian doctrine had no application.

Mahl v. Terrell[15] involved a collision between a street car and an automobile at an intersection of a public street and a car track. It was held there, in accordance with the uniform line of authority, that where action by the defendant after the peril arose would not have averted the collision, no recovery could be had.

Blunk v. Snider[16] involved an automobile collision at a street intersection. No matter of interest involving the humanitarian doctrine was passed upon.

In *Bates v. Brown Shoe Co.*,[17] plaintiff's intestate riding horseback along a concrete highway at night, claimed that the deceased had been struck by one of defendant's trucks. Plaintiff attempted to prove by circumstantial evidence that the defendant's truck struck deceased, but failed to meet the burden of proof and failed to prove that the deceased was in a position of peril as the defendant's truck approached him. Recovery was denied.

14. 341 Mo. 235, 108 S. W. (2d) 140 (1937).
15. 111 S. W. (2d) 160 (Mo. 1937).
16. 111 S. W. (2d) 163 (Mo. 1937).
17. 116 S. W. (2d) 31 (Mo. 1937).

PROPERTY

McCUNE GILL*

Some interesting new principles of property law have been announced during the past year.

I. GHOST

One of the new principles announced may be stated as follows: "A forged warranty deed is valid." The facts of the case, *Ryan v. Stubblefield,*[1] are briefly these,—a man named Ryan bought a house from one Frentrop who forgot to tell him that there was a second deed of trust of record on the property. Ryan said he did not have his lawyer or title company examine the title. The owner of record was Alvin Schenk which was a mere name or "ghost" used by Frentrop. Ryan sued to set aside the deed of trust which the court did on the ground that the signature was a forgery, decreeing that the title was in Ryan, notwithstanding the fact that his deed from "Alvin Schenk" would also be a forgery under the court's view of the facts.

II. ENDORSEMENT

Another principle which may be considered new is this: "A mortgage note is negotiable without endorsement." This case, *Little v. Remley,*[2] involves a mortgage note made payable to a straw person, as almost all mortgage notes are. The court holds that a straw payee is a "fictitious" payee, even though he or she actually exists, and hence the note is considered to be payable to bearer. In this case the application of this principle resulted in holding a guarantor to his liability even though the validity of the endorsement was not proved. However, another application of the principle might be to allow an assignee of a thief to collect on an unendorsed note.

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The writer has included several decisions by the Missouri Courts of Appeals because of their noteworthy qualities.—*Ed.*

1. 100 S. W. (2d) 444 (Mo. 1936).
2. 101 S. W. (2d) 505 (Mo. App. 1937).

III. Pole Line

Another new principle may be stated thus: "A pole line easement is good even though not paid for." Five cotenants owned a tract of land. One of them for a consideration granted an easement to an electric company for a pole line. The other cotenants executed no agreement and received no payment. The property was sold in a partition sale to one of the nonconsenting cotenants. The court held that the purchaser could not maintain an ejectment suit against the electric company nor collect for the use of the property.[3] In the excitement everybody seems to have forgotten all about due process and just compensation.

IV. Double Payment

Another principle which may be new only as applied to the "great depression" is this: "A mortgage holder can collect his debt twice." Here there was a trustee's sale in foreclosure, where the bid of the mortgagee was less than one-sixth of the value of the property and of the amount of the mortgage. Nevertheless the court permitted a deficiency judgment, which enabled the mortgagee to collect twice as to part of his debt. The decision was based on the cold statutes applicable and the lack of more just statutes, and no heed was given to the idea that "equity" governs mortgage foreclosures.[4]

V. Survivor

Still another new principle is this: "Intention is not considered in construing wills." A testator left two daughters as his only heirs and devised all his property to them "as tenants by the entirety." He also indicated that he intended the survivor to take everything, and it is evident that he (or his lawyer), knowing that tenancies by the entirety go to the survivor, used that phrase to show his intention. But the court said that "rock-ribbed and inflexible" rules of construction nullify even an evident expression of intention.[5]

VI. Insurance

A principal which is new in the current application may be stated thus: "Fire insurance does not insure." Here a land owner paid a

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3. Missouri Power & Light Co. v. Thomas, 340 Mo. 1022, 102 S. W. (2d) 564 (1937).
4. Reed v. Inness, 102 S. W. (2d) 711 (Mo. App. 1937).
5. Peer v. Ashauer, 102 S. W. (2d) 764 (Mo. App. 1937).

premium to a fire insurance company for issuing a policy in favor of a mortgagee and the owner as their interest might appear. The owner executed a contract to a proposed purchaser agreeing to convey the property after certain payments should be made. The house burned, the insurance company bought the mortgage, foreclosed it, and deprived the person who had paid the premium of his ownership, all with the full approval of the court.[6]

VII. Mistake

One of the new principles announced can be expressed in this fashion: "A payment of purchase price to the wrong person is sufficient." The facts in *Hamrick v. Lasky*[7] are these: A tract of land was owned by Pankey and wife as tenants by entirety. Mrs. Pankey was insane but without guardian. Pankey arranged a sale of the property for $4,000.00. To "make title" he defaulted in payments on a deed of trust of $1,300.00 and it was foreclosed and bid in for $1,500.00 by the prospective purchaser. The mortgagee was paid off and the balance of the $4,000.00 was paid to the husband Pankey alone and he spent the money. After his death a guardian was appointed for the wife and sued the purchaser alleging that, as the land was the property of both, the proceeds were also, and the purchaser should pay for his mistake in giving the purchase price to the wrong party. The court, however, denied this plea, confusedly calling the husband and wife "joint obligees" instead of property owners by the entirety.

VIII. Value

Another new principle is this: "Leasehold estates and improvements have no value." The owner of an old and dilapidated store building leased it for 99 years to a lunch room company which spent a large sum in reconstructing it for a lunch room. The entire property was taken as part of a street. The court held that the lessee got none of the resulting payment because the depression had reduced the earnings of the lunch room—and hence the value of the leasehold, but had not, it seems, reduced the value of the fee reversion.[8]

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6. National Fire Ins. Co. v. Munger, 106 S. W. (2d) 10 (Mo. App. 1937).
7. 107 S. W. (2d) 201 (Mo. App. 1937).
8. City of St. Louis v. Senter Comm. Co., 108 S. W. (2d) 1070 (Mo. App. 1937).

IX. Lumber Company

A principle emphatically new is this: "A mortgage can be nullified without due process." In *Uhrig v. Hill-Behan Lumber Co.*,[9] an investor purchased a mortgage on a building just completed where the lumber bill had not been paid. A lien was filed and suit brought to enforce it. The trustee and third party named in the recorded mortgage deed of trust were made parties, but the assignee and holder of the mortgage knew nothing of the suit. The lumber company purchased at the sale for one-tenth of the value of the property. The court said that the mortgage holder not entitled to be served with process either directly or by publication, and refused to set aside the sale.

X. Or

Still another new principle is this: "Words do not mean what they say." A testator devised his farm to his wife for life and at her death "the same may revert to my children or to the lawful heirs of each." One of the children died during the widow's life and her husband claimed an interest on the theory that his wife had a vested estate and that "or" meant "and." The court adopted this view and said that "or to the lawful heirs of each" is the same as "and their heirs" thus creating a vested and not a contingent remainder.[10]

XI. Dismissal

A principle not heretofore announced and hence new may be stated thus: "One of several defendants cannot bring a lawsuit to trial." In this case, *Hodges v. Brooks*,[11] the plaintiff sued several defendants to divest title. All defendants were served with process, but one did not answer. The plaintiff did not bring the case to trial and the court dismissed the petition for failure to prosecute. The higher court held that this could not be done. This left the title of the answering defendants clouded for an indefinite period by the failure of one defendant to answer.

XII. Legacy

Here is another new principle: "A legacy to a doctor is not a legacy." A testatrix left to her doctor a legacy of $1,000 and additional reasonable

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9. 110 S. W. (2d) 412 (Mo. 1937).
10. Garrett v. Damron, 110 S. W. (2d) 1112 (Mo. 1937).
11. 110 S. W. (2d) 1130 (Mo. App. 1937).

sum for medical services rendered and to be rendered her. The court held that this legacy was not a legacy and that the doctor was not entitled to anything because he failed to prove his claim as a debt in the probate court within the time allowed for proof of debts.[12]

XIII. Land and Money

Still another new principle: "An owner can have both land and purchase price." An adult claimed ownership of an interest in land because of a void partition sale while he had been a minor. The owner had received the share of cash allotted to him in the partition sale. It would seem that his present interest in the land should be diminished by the amount of cash he had accepted. But the court held that he has his full interest in the land and the money too.[13]

XIV. Denial

The following principle is new in its continued application: "A denial is an admission." In *Curry v. Crull*[14] there was a continued application of a peculiar doctrine. Plaintiff sued in ejectment and to quiet title. He alleged that he owned the land and that defendant claimed it. Defendant answered with a general denial, obviously intending to deny plaintiff's ownership and to assert his own claim. But the court held that he had unwittingly fallen into one of the procedural pitfalls in such actions, namely, that he had not only denied that plaintiff owned the land but had also denied that he, the defendant, claimed it. Hence he was out of court because he was not injured "much," to use the very words of the court.

XV. Conclusion

The law of property is very ancient. The clay tablets of Babylon and the papyri of Egypt are replete with documents and laws as complete and intricate as those we write and study today. Demosthenes and Cicero amassed fortunes from property litigation and their arguments on questions in the law of wills, trusts, easements, leases and the like, have been preserved *verbatim* for our present perusal. But ancient as it is, the law of property is by no means unchanging. New (not to say novel) principles are continually being announced, as for example by the courts of last resort in Missouri during the past year.

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12. Rowe v. Strother, 111 S. W. (2d) 93 (Mo. 1937).
13. Boone v. Oetting, 114 S. W. (2d) 981 (Mo. 1938).
14. 116 S. W. (2d) 125 (Mo. 1938).

PUBLIC UTILITIES

FRANK E. ATWOOD*

A search of the reports reveals that only a few cases concerning public utilities were decided by the supreme court during the past year. Those herein discussed are the only ones believed to be of sufficient interest to deserve consideration in this section.

I. MOTOR CARRIERS

State ex rel. *Anderson v. Witthaus*,[1] was an original proceeding in prohibition to restrain respondent circuit judge from entertaining further jurisdiction in a suit brought against state officials to enjoin them from arresting or otherwise interfering with the plaintiff therein, his agents, servants or employees, for operating his busses without a permit or license from the Public Service Commission. Suit in the lower court was based on the theory that plaintiff's business of "chartering" busses does not come within the purview of the Missouri Bus and Truck Act.[2] Plaintiff owned and operated three large busses which he chartered to clubs, churches, schools, societies, athletic teams and similar groups who were transported as a collective body to and from various points in the state over the public highways and with no regular destination or route, for which plaintiff was paid a lump sum for each trip, not based upon the number of passengers. On such trips plaintiff did not carry or pick up other passengers. The court held that the definition of "motor carrier," contanied in Section 5264 (b) of the Revised Statutes of Missouri 1929, gives that term a meaning equivalent to that of a common carrier and said:

> "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. 'It follows that the use must be so extensive as to imply an offer to serve all of the public, or that there be other circumstances from which it may be reasonably inferred that the carrier was undertaking to serve all to the limit of his capacity. One,

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1. 340 Mo. 1004, 102 S. W. (2d) 99 (1937).
2. Mo. Laws 1931, pp. 304-316.

however, does not become a public carrier because he is engaged exclusively in transporting persons or property or because the person or persons whom he serves take all his facilities. The test is whether he has invited the trade of the public.' But, 'the public does not mean everybody all the time.' "[3]

Plaintiff was therefore held amenable to the Bus and Truck Act requiring a certificate of convenience and necessity before he could operate over the highways of Missouri.

Ward v. Public Service Comm.[4] was an appeal from the circuit court of the city of St. Louis, wherein that court enjoined the appellant from interfering with respondent's use of the streets and highways in interstate commerce as a motor carrier of property and a contract hauler of property without securing permits and paying certain fees provided by statute, or from instituting any civil action to collect penalties for using said streets and highways as a carrier without such permits and the payment of such fees. In its answer, the appellant contended that the circuit court of the city of St. Louis was without jurisdiction to hear this cause on account of Section 5234 of the Missouri Revised Statutes 1929 which provides:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of the county where the hearing was held or in which the commission has its principal office for a writ of *certiorari* or review. . . . No court of this state, except the circuit courts to the extent herein specified and the supreme court on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties."

In its opinion the court said:

"At the time that the circuit court enjoined the appellant, no application for a permit or any other matter was pending before it for decision. It follows that there was no hearing in the city of St. Louis, and, if the appellant was enjoined from acting in its official capacity, then the circuit court of the city of St. Louis did not have jurisdiction under the above-quoted section. . . .

"In the case of State ex rel. Public Service Commission of Missouri et al. v. Mulloy, 333 Mo. 282, 62 S. W. (2d) 730, 732, we

3. 340 Mo. 1004, 102 S. W. (2d) 99, 102 (1937).
4. 108 S. W. (2d) 136 (Mo. 1937).

ruled that the official duties of the commission were not confined to matters that were or had been pending before it."[5]

Respondent contended that the section was unconstitutional "being an unconstitutional attempt to limit by statute the constitutional jurisdiction of the circuit courts in violation of article 6 of the Constitution of the state of Missouri."

In ruling this contention the court said:

> "We think the Legislature had a right to say in what circuit courts the appellant could be sued when it gave authority for it to be sued. And in so doing it did not violate either section 1 or section 22 of article 6 of our Constitution. . . . This section does not prohibit all circuit courts from enjoining the Public Service Commission from enforcing some illegal order, but does give jurisdiction to the circuit court of Cole county, the domicile of the appellant, and to the circuit court of those counties where a hearing before the appellant was heard.
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> "It follows that the circuit court of the city of St. Louis was without jurisdiction to enjoin the appellant in the case at bar, and the judgment of that court should be reversed."[6]

In *State* ex rel. *Illinois Greyhound Lines, Inc., v. Public Service Comm.*,[7] the appellant operated a bus line from Chicago, Illinois, through the state of Illinois into the City of St. Louis, its operations within this state being solely within the corporate limits of that city. The respondent made an order requiring appellant to cease operations until it had obtained a permit from respondent to operate in Missouri. On *certiorari* the circuit court of Cole county affirmed the order. Appellant contended that it was exempt from the requirements of the Missouri Bus and Truck Act[8] which provides that the act shall not apply to motor carriers operating within municipalities and suburban territories adjacent thereto. Appellant also contended, if it were not exempted by this statutory provision, that the taxes which it would be required to pay were unreasonable and discriminatory and an unconstitutional burden upon interstate commerce.

In deciding the first point the court said:

> "Appellant contends that we cannot look beyond the state line in determining whether its operations are exempt under this proviso, and since all of its operations are within the state, being within the municipality of St. Louis, it is clearly exempt under this proviso of the statute. Appellant's position is not sound. The statute divides bus operations into three classes: First, in-

5. *Id.* at 137.
6. *Id.* at 139.
7. 108 S. W. (2d) 116 (Mo. 1937).
8. Mo. Laws 1931, pp. 304-316, Mo. REV. STAT. (1929) § 5264b.

> trastate; second, intramunicipal or municipal and suburban; and third, interstate. Distinctly different duties are enjoined upon the respondent in the regulation of busses falling within each of the classes. Therefore, the respondent must, of necessity, inquire and determine whether a given carrier's operations extend without the state. If so, that carrier is classified as interstate, even though its operations in this state are solely in a municipality. The appellant's operations of its busses, being interstate, are therefore unlawful unless licensed by the respondent in accordance with the provisions of this act, unless the act is unconstitutional. . . .'[9]

The court then found that the tax was a reasonable compensation for the use of the highways of the state, to the construction and maintenance of which the proceeds therefrom were allocated, was not discriminatory, and was, therefore, constitutional and not a burden on interstate commerce.[10]

II. Rates

May Department Stores Co. v. Union Electric Light & Power Co.[11] was an action in equity for an accounting for the purpose of ascertaining and recovering alleged overcharges for electricity, and an injunction against future excess charges. A referee was appointed and recommended a judgment for plaintiff. Defendants' exceptions to the report were sustained by the trial court and judgment entered dismissing plaintiff's bill from which plaintiff appealed.

In 1912 before the creation of the Public Service Commission the plaintiff entered into a service contract with an electric holding company which provided that said company should furnish electricity and steam to the plaintiff at designated rates. The Cupples Station Light, Heat & Power Company, all of the stock of which was owned by the holding company, supplied plaintiff with electricity and steam under this contract until 1923 when the defendant acquired all of the stock of the Cupples company. Between 1923 and 1929 the defendant continued to furnish plaintiff with electric current and steam under this contract (with certain adjustments). Since 1929 plaintiff had paid this rate under protest and sought to recover the alleged overcharges on the theory that the rates

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9. 108 S. W. (2d) 116, 119 (Mo. 1937).
10. In this case as well as in the Ward case the Federal Motor Carrier Act of 1935 was mentioned but it was not decided what its effect upon the Missouri Bus and Truck Act has been.
11. 107 S. W. (2d) 41 (Mo. 1937). See also Railway Exchange Bldg. v. Light & Development Co., 107 S. W. (2d) 59 (Mo. 1937).

of appellant, filed with and approved by the Public Service Commission should be applicable, rather than the contract rate.

The court first reiterated the well-established rules that rates established by the Public Service Commission supersede all prior contracts or agreements as to rates, without specific adjudication by the commission upon any contract and that rates in effect by agreement or otherwise, before the Public Service Commission Act, must be established within a reasonable time thereafter by receiving the approval of the commission before their continuance is authorized.

The court then said:

> "In order to determine whether there are applicable scheduled rates, it is necessary to decide whether charges are to be figured from Cupples' schedules or Union schedules. If it be Cupples' schedules, plaintiff could recover nothing, because the last Cupples' schedules were filed in 1918 (amended in 1920), and provide higher rates than plaintiff paid. The status of Cupples since Union acquired its stock in 1923 is the decisive question."[12]

After an exhaustive review of the evidence the court then decided that:

> "Cupples' corporate entity was, unquestionably, kept in existence to be used for the purpose of carrying on a part of Union's electric and steam business. We think the decisive questions here are: What part and for what purpose? The answers to these questions plainly are: The part which was covered by contracts which could not be enforced if they were assigned to Union. For the purpose of collecting rates fixed by those contracts, which the commission does not allow Union to charge for the service rendered. We hold that this is a clear case of electricity and steam being produced and sold by Union, but being collected for at rates Union is not authorized to charge, through preserving the corporate entity of Cupples. A finding of such a purpose (none other appearing from any reasonable construction of the evidence) seems to be the correct conclusion. We further hold that this purpose is not proper or lawful, because evasion of the law for uniform regulation of public utility rates will not be permitted by such a device; and that, if Union has in this manner obtained more money from plaintiff than its own authorized rates would be for the service rendered, it must pay back this excess."[13]

The court then held that plaintiff was entitled to recover the overcharges paid by it after the date when it demanded the right to the Union Electric company's scheduled rates and was willing to execute a standard form contract.

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12. *Id.* at 51.
13. *Id.* at 55.

Thus we observe the supreme court applying in the field of utility rate regulation the interesting principle of judicial disregard for the corporate entity where the circumstances seem to require it. But the most important feature of the opinion is not the result that is announced but the reasoning of the writer. It is heartening to note that, instead of "camouflaging" the result by describing the subsidiary company as a "mere instrumentality," "dominated" and "controlled" by the parent company, he has clearly stated that the purpose for which the corporate existence of the subsidiary has been preserved is unlawful, namely, the evasion of rate regulation, and, for that reason, the court will not permit the use of the corporate device.[14]

State ex rel. *City of St. Louis v. Public Service Comm.*[15] was an appeal from a judgment of the circuit court of Cole County affirming an order of the Public Service Commission which fixed for rate-making purposes the fair value of the property of the appellant Laclede Gas Light Company, a large public utility operating in St. Louis, and ordered a 6% reduction in rates to domestic and commercial consumers.[16]

In an opinion affirming the judgment with certain modifications the court announced the following rules for determining the fair value of a gas company's property for rate-making purposes:

1. Land should be valued at the fair market value thereof at the time of the hearing and not on the basis of its special adaptability to the company's particular use.

2. Land which was devoted to generation of electricity or to merchandising, occupied by superseded equipment, or leased or idle, was properly rejected as not used and useful in the gas business.

3. That machinery has become obsolete does not necessarily render the space it occupies also useless so as to require the exclusion of such space in computing the value of property, but a public utility cannot maintain equipment of comparatively small or no useful value on premises, unnecessarily large and valuable, and demand a return upon the whole.

4. In computing the reproduction cost of mains and services running

14. See LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS (1936) 157-158, 220.

15. 110 S. W. (2d) 749 (Mo. 1937).

16. A previous order of the Commission was disapproved by this court in State *ex rel.* City of St. Louis v. Public Service Comm., 329 Mo. 918, 47 S. W. (2d) 102 (1932).

from mains to consumers' premises, the expense of cutting pavement therefor should be calculated upon the present-day reconstruction cost.

5. In valuing property as of the time of the hearing the Commission should consider the anticipated consumption of gas in the reasonably near future.

6. Where it is assumed that two years would be required to reproduce company's property, allowance of general overhead for taxes assessed before expiration of two-year period, but which would not become due until after it expired, should be charged either to construction or to working capital, since taxes would be a capital outlay.

7. Obsolescence, inadequacy, other like factors independent of actual use, and wear and tear should be considered in estimating the accrued depreciation of structural property.

8. In determining accrued depreciation, general overheads should be depreciated along with the property itself.

9. General overheads for preliminary organization and taxes during construction should be exempted from accrued depreciation charges since, while there may have been expenditures for such items when the property was built, they would not occur again on reproduction anew.

10. The amount of accrued depreciation should be deducted from the fair value of the property new, as accertained after a consideration of original cost and present cost of reproduction rather than from original cost only.

11. The Commission is bound to consider prices and wages prevailing at the time of the investigation and to make an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future.

12. Where the physical property has been appraised as an assembled plant doing business and earning money, no additional allowance for going value should be made.

13. Annual depreciation allowance should be based on fair value and not on original cost of property.

14. The accrued depreciation, as it may be observed at a given time, and an appropriate allowance for depreciation need not be the same.

15. The company cannot charge past losses up to consumers in subsequently enacted rates by setting aside an annual depreciation reserve which would include such past losses.

16. The fact that certain machinery has become junk would not necessarily preclude the allowance of depreciation thereon.

17. A public utility is entitled to earn a return reasonably sufficient to keep it abreast of advancements affecting the business it conducts, but sudden changes resulting from new discoveries or new sources of supply are hazards of the industry and loss must be borne by the investor, unless change benefits the consumer by offering him the same service at a lower rate or better service at the same rate.

SALES

LEE-CARL OVERSTREET*

The number of cases decided by the Supreme Court of Missouri involving any phase of the law of Sales during the year of 1937 was quite small. This fact was due, in all probability, to the constitutional and statutory limitation of the appellate jurisdiction of the supreme court to a consideration of those cases in which the amount in dispute exceeds the sum of $7,500.[1] As a result of this limitation, it is fairly certain that, for all practical purposes in Missouri, the vast bulk of the case law having to do with the field of Sales is being written finally by the three courts of appeals of this state, except in those instances where the supreme court happens by chance to be the Missouri court first to decide a case of first impression or where the power of supervisory control of the supreme court may later be exercised. This illustrates one phase of the Chinese puzzle-like set-up of the Missouri appellate court system, to which more extended reference is made in the footnotes.[2] For example, although it could not be

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1. MO. CONST. art. VI; amendment of 1884, § 3; and MO. REV. STAT. (1929) § 1914.

2. Suppose that client A's case is one of first impression and is lost in one of the courts of appeals of this state and that neither the amount involved (see *supra note* 1) nor any other available remedy permits resort to the supreme court. Suppose, further, that client B's case, arising some years later and on all fours with A's case, comes to the supreme court, either by virtue of the accidental fact of the jurisdictional amount involved or because of certification by one of the judges of another court of appeals. In B's case, the Supreme Court of Missouri finds the liability or the law to be exactly contrary to what it was decided to be by the court of appeals in A's case. B's case is now the controlling authority in this state and must be followed by the courts of appeals (MO. CONST. art. VI; amendment of 1884, § 6). How can a lawyer con-

expected to include all cases decided in the broad field of Sales, a count of the Missouri cases digested under the digest heading "Sales" for the years 1935, 1936, and 1937, showed that only three cases found under that heading were decided by the supreme court in that three year period, as compared with twenty-three cases which were decided by the three courts of appeals during the same period of time.[3]

An intensive search of the reported cases which were decided in 1937 has disclosed only six opinions of the Supreme Court of Missouri which touch even remotely upon the subject matter under discussion, and of these six cases, three dealt with the tort liability of sellers or manufacturers rather than with the relationships commonly considered in the so-called law of Sales, and, for that reason, will not be dealt with here.[4]

From an examination of the cases decided in this field by the Supreme Court of Missouri during 1937, it is readily apparent that no startling innovations or cases of great moment were instituted or decided by that court. The cases presented for consideration involved matters concerning either what was, or what was not, a sale in each case, rather than disputes having to do with the legal effects and consequences of sales transactions.[5] Even

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vincingly explain to client A the reasons for the failure of his case, B's success, and the further fact that future litigants in courts of appeals, including A, will be bound by the authority of B's case, rather than A's, from now on? Small comfort, indeed, will it be to A to be told that if B's case had been decided first, A would have won his case in the court of appeals. Mr. Bumble and the Mad Hatter might do a much better job of explaining. Worse than that, what possible justification can there be, either in law or common sense, for a legal system (or lack of system) which permits the accident of jurisdictional amount to determine whether or not a proposition of law is finally, or only temporarily, settled in this state? For an attempt to correct this situation, see the proposed amendment to the constitution of Missouri relating to the judiciary, submitted in 1938 to the bar of Missouri by the Judicial Council of Missouri. See, also, Atkinson, *Work of Missouri Supreme Court for 1937 (Wills and Administration)* (1938) 3 Mo. L. REV. 439, at 449.

3. Missouri cases digested under digest heading "Sales"

Year Reported	Decided by supreme court	Decided by courts of appeals
1935	2	9
1936	1	7
1937	0	7
Total cases 1935-1937	3	23

4. See McCleary, *The Work of the Missouri Supreme Court for 1937 (Torts)* (1938) 3 Mo. L. REV. 420.

5. The case of Cammann v. Edwards, 340 Mo. 1, 100 S. W. (2d) 846 (1936), decided December 14, 1936, barely escaped inclusion in the text of this study by virtue of the date of its decision. Oddly enough, that case also involved a decision of what was not a sale, in that it was there decided that a broker, from whom stock is ordered orally by a customer, is an agent to purchase, and not a seller of, the stock, so that such a stock purchase order is not within the Statute of Frauds (MO. REV. STAT. (1929) § 2968).

so, the cases discussed herein were, in most instances, dragged in by the hair to bring them within the scope of this note.

SALES DISTINGUISHED FROM OTHER TRANSACTIONS

In *Skidmore v. Haggard,*[6] which was an action for personal injuries instituted against one Haggard and the Kansas City Star, it was contended by plaintiff that Haggard was the agent of the Star, so as to make it liable for injuries sustained by plaintiff as a result of a collision in which Haggard's delivery car was involved. Haggard was the distributor of the Kansas City Star in a specified territory and, among other things, bought newspapers from the Star to resell them, at a profit, to rural subscribers in his territory, with whom he dealt directly and took payment in whatever fashion he saw fit, without any control thereof by the Star. In deciding that the plaintiff had not made out a submissible case as against the Star, the court relied, in part, upon the fact that Haggard had bought newspapers from the Star, and so was a purchaser of such newspapers and, as such, was engaged in an independent business, rather than acting as an agent of the Star.

State ex rel. *Igoe v. Joynt*[7] was a proceeding in prohibition in which, ignoring the procedural points involved, one of the questions for decision was whether or not a so-called "rotary merchandiser," which was set in operation by inserting a coin in a slot, was a gambling device or a vending machine. It was held by the court that the device was not a vending or selling machine, but was rather a gambling device, inasmuch as it did not give the same return in market value for the amount paid each and every time that it was operated, but rather offered the chance of winning merchandise worth more in value than the sum ventured, as well as the chance of receiving merchandise worth less in value than the sum inserted in the slot.

City of St. Louis v. Smith[8] was an action for a declaratory judgment to determine whether the City of St. Louis or the contractors had to pay a one per cent sales tax on tangible personal property used by the contractors and incorporated into the completed jobs in the construction of street paving, a sewer and a hospital for the city, all of which were constructed by the contractors under contracts calling for the payments of

6. 341 Mo. 837, 110 S. W. (2d) 726 (1937).
7. 341 Mo. 788, 110 S. W. (2d) 737 (1937).
8. 114 S. W. (2d) 1017 (Mo. 1937).

lump sums, in each case, by the city to the contractors, for the completed works. The one per cent sales tax law[9] imposed a tax upon retail sales[10] of tangible personal property[11] for the use of, or consumption by, the purchaser, and provided that the seller of such property should collect the tax from the purchaser.[12] The court very properly decided that there was a vast difference between a sale and a construction contract and held that the contractors did not sell the materials incorporated into the works to the city, but rather inseparably commingled the materials with labor to produce the finished products called for by the contracts, so that the city was not the purchaser of tangible personal property under the meaning of the law as to the materials incorporated into the works in question.[13]

TAXATION

J. W. McAfee*

I. Municipal Chain Store Tax

In *Kroger Grocery & Baking Co. v. City of St. Louis*,[1] plaintiff and certain intervenors sought an injunction against the enforcement of an ordinance of the City of St. Louis.[2] Defendant city, upon its demurrer being overruled, refused to plead further and appealed from the judgment entered against it. The ordinance in question made it unlawful for any person to operate chain stores in St. Louis without obtaining a license and imposed an annual license fee graduated according to the number of stores operated. It was held that the ordinance was invalid, and the judgment of the lower court was affirmed. The court declared that the

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9. Mo. Laws 1935, p. 411.
10. *Id.* at 413, § 1.
11. *Id.* at 415, § 2.
12. *Id.* at 416, § 5.
13. It might be of interest to note that, even though the so-called one per cent sales tax law referred to above (see *supra* note 9) was repealed and supplanted by the so-called two per cent sales tax law found in Mo. Laws 1937, p. 552, there has been no significant change made in the wording of the sections corresponding to those passed upon by the court in the case of City of St. Louis v. Smith referred to in the text above (see *supra* note 8), so that the same result reached under the one per cent sales tax law in that case would more than likely be reached in a case having similar facts, under the present two per cent sales tax law.

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1. 341 Mo. 62, 106 S. W. (2d) 435 (1937).
2. Ordinance No. 39619.

ordinance, on its face, was a revenue and not a regulatory measure and that the exercise by the city, under its charter, of the taxing power must be in harmony with and subject to the constitution and laws of the state; that the city's power in this connection is limited by statute[3] to taxes graduated in proportion to the annual sales made by a merchant subject to license and that the attempt of the city to base the amount of the tax upon the number of stores operated was in excess of its power. The opinion in the instant case is based upon and is entirely consistent with *Kansas City v. J. I. Case Threshing Machine Co.*[4]

II. Enforcement of Tax Lien

The case of *Schlafly v. Baumann*[5] involved the validity of a proposed sale of real estate for delinquent taxes under the Jones-Munger Act,[6] as amended.[7] Defendant, as collector of revenue for the City of St. Louis, published notice of the sale on April 8, 1935, of the real estate in question for delinquent taxes. The Jones-Munger Act provides that sales for the discharge of the lien for delinquent taxes shall be held on the first Monday of November of each year. At the extra session of the General Assembly in 1933-34, Section 9961, Missouri Revised Statutes 1929, establishing a five-year period of limitation for the institution of actions for the recovery of taxes on real estate, was repealed and reenacted, with the additional provision that ". . . any sale held pursuant to initial proceedings commenced within such period of five years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein. . . ." However, the act of the extra session was held to be unconstitutional because the subject was not included in the message of the governor calling the session,[8] and be-

3. Mo. Rev. Stat. (1929) § 7596 authorizes cities of over 300,000 inhabitants to license, tax and regulate the occupation of merchants and manufacturers; and all such cities "may graduate the amount of annual license imposed upon a merchant or manufacturer in proportion to the sales made by such merchant or manufacturer during the year next preceding any fixed date." The court in the above case construes the word "may" in the clause authorizing a graduated license as equivalent to "must" or "shall."

4. 337 Mo. 913, 87 S. W. (2d) 195 (1935), where it was held that a Kansas City ordinance exacting a license fee graduated according to floor space occupied instead of in proportion to annual sales, of implement dealers, was invalid.

5. 341 Mo. 755, 108 S. W. (2d) 363 (1937).

6. Mo. Laws 1933, pp. 425-449; Mo. Stat. Ann., §§ 9936, *et seq.*, pp. 7980ff.

7. Mo. Laws 1933-34, Ex. Sess., p. 154, § 9961.

8. Mo. Const. art. 4, § 55, Mo. Stat. Ann., § 55, p. 511, limiting the power of extra sessions of the legislature to subjects specially designated in the proclamation by which the session is called or recommended by special message of the

cause the title of the repealed and reenacted section of the special session contained no reference to any provision effecting a change in the sale date prescribed by the Jones-Munger Act.[9] The court pointed out here that the proposed exercise of power by defendant collector is in derogation of private rights and that the provision for sale on the first Monday in November is for the protection of landowners and is mandatory upon the official; that since the notice in question is not in conformity with said provision, it is void.

The sale under the notice referred to above having been restrained by the lower court, the cause was continued *nisi*, and the collector again published notice for the sale of said lot on November 4, 1935. The circuit court restrained the collector from selling the lot free and clear of certain restrictions which had been imposed upon it by deed. In affirming the action of the circuit court, it was held that since the delinquent taxes were computed on an assessed value, including the increment of value accruing by reason of the restrictions, the collector was bound to sell the property subject to them. The opinion here is consistent with the earlier ruling in *State* ex rel. *Koeln v. West Cabanne Improvement Co.*[10]

In the case of *State* ex rel. and to the use of *Bair v. Producers Gravel Co.*,[11] the question involved arose upon a motion to quash execution and stay a sale upon the contention that the tax judgment involved was void for the reasons that it was obtained under a proviso of the Jones-Munger Act, and that such proviso is unconstitutional.[12] The judgment, which movent sought to quash, was obtained after the effective date of the act, but upon suit instituted prior thereto, and was valid only if the provision

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Governor after it has convened. See also MO. CONST. art. V, § 9, MO. STAT. ANN., § 9, p. 528.

9. MO. CONST. art. IV, § 28, MO. STAT. ANN., § 28, p. 437: "No bill . . . shall contain more than one subject, which shall be clearly expressed in its title."

10. 278 Mo. 310, 213 S. W. 25 (1919), where it was held that payment of tax assessed and charged on a lot was payment of a tax chargeable on the appurtenant easement on the court on which the lot abutted, and that any attempt to charge further tax on such easement was unenforcible.

11. 341 Mo. 1106, 111 S. W. (2d) 521 (1937).

12. The proviso in question is contained in Mo. Laws 1933, § 9962b, p. 444, of the Jones-Munger Law (MO. STAT. ANN. 8006). That section provides for the foreclosing of tax liens by sale instead of suit, with the proviso that nothing therein contained shall affect the right of the collector to proceed to final judgment in foreclosure for taxes upon which suit had been instituted prior to the effective date of the Jones-Munger Act, and gives the collector power, with reference to suits which had been instituted but on which no judgment had been obtained on the effective date of said act, to either proceed to final judgment in such suit or, in his discretion, to dismiss the suit and proceed to foreclosure by sale under the provisions of the act.

of the Jones-Munger Act, authorizing the collector to either proceed with the suit or to foreclose the lien by sale, at his election, was constitutional.

It was contended by movent that the provision under which judgment was taken was unconstitutional on five grounds: (1) that it delegates legislative power to collectors,[13] (2) that the portion of it permitting collectors to proceed either with a suit or by dismissing the suit and foreclosing the lien was in effect a revival or re-enactment of the old law for the enforcement of tax liens;[14] that such alternative procedure would permit lack of uniformity in the various counties in the enforcement of tax liens;[15] that it violates the equal protection clause of the Federal Constitution;[16] and that it is contrary to the purview of the whole act and is inconsistent with the first sentence of the Section of which it is a part.

The point raised by the first contention to the effect that the alternate methods of procedure afforded the collector was a delegation of legislative power, was not properly before the court in this proceeding because, under existing statutory provisions[17] the collector was authorized to continue the prosecution of the suit even though there was no proviso in the Jones-Munger Act authorizing him to do so. For the same reason, there was, as the court held, no merit to the second contention. Even if the statutory provisions here referred to did not authorize the continuation of the suit, the proviso involved was self-sufficient and did not amount to re-enactment of provisions of the old law. Since the procedure outlined was made generally applicable, movent's third contention was denied without discussion.

The court says that there was no violation of the equal protection clause since the alternative procedure authorized did not effect substantive rights and involved merely the method of enforcing the existing lien and

13. Mo. CONST. art. III; art. IV, § 1.
14. Mo. CONST. art. IV, § 33, prohibiting the revival or re-enactment of an act by mere reference to the title thereof.
15. Mo. CONST. art. X, § 3.
16. U. S. CONST. Fourteenth Amendment, § 1.
17. Mo. REV. STAT. (1929) § 658 provides: ". . . nor shall any law repealing any former law, clause or provision be construed to abate, annul or in anywise affect any proceedings had or commenced under or by virtue of the law so repealed, but the same shall be as effectual and be proceeded on to final judgment and termination as if the repealing law had not passed, unless it be otherwise expressly provided." § 660 provides: "The repeal of any statutory provision shall not affect any act done or right accrued or established in any proceedings, suit or prosecution, had or commenced in any civil case previous to the time when such appeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provisions so repealed had remained in force."

was similar to laws giving a choice of forums in which a right may be enforced.[18]

There was no merit, said the court, in appellant's fifth contention, since the established use of a proviso is to restrict the general language preceding it.

III. Questions of Assessment

In the case of *Washington University v. Baumann*,[19] the university was granted an injunction restraining the collector of the city of St. Louis from seizing certain parcels of real estate for delinquent taxes assessed in 1931 and from attempting to collect the taxes in question on the ground that the university's charter exempted its property from taxation. In affirming the judgment, the court reviewed the case of *Washington University v. Rouse*,[20] in which the United States Supreme Court, in an opinion by Mr. Justice Davis, in 1869, reversed the Missouri Supreme Court and held that the property owned by Washington University was exempt from taxation. Defendant contended that a court of equity had no jurisdiction, even if the property in question was entitled to exemption, because the University had not exhausted its legal remedies by appeal to the local board of equalization or the state tax commission.

The opinion takes notice of the holding in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*[21] to the effect that one who claims that his property has been fraudulently assessed must exhaust all available statutory remedies

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18. In Cincinnati Street Ry. v. Snell, 193 U. S. (1904) where it was held that where two persons of the same class are afforded separate forums in which their rights are administered under the same or equal laws, the fact that one may not resort to the forum open to the other is not a violation of the Constitution, because it is fundamental rights and not the mere place of enforcement which are safe-guarded by the Fourteenth Amendment.

19. 341 Mo. 708, 108 S. W. (2d) 403 (1937).

20. 75 U. S. 439 (1869).

21. 323 Mo. 180, 19 S. W. (2d) 746 (1929). Plaintiff sought an injunction upon the ground that its shares of stock had been fraudulently assessed at 100% of their value, whereas other property in the township had been assessed at not exceeding 75% of its value, and some property had not been assessed at all. The court held that Section 9854, giving the state tax commission the power to receive and act upon complaints concerning the assessment of property, afforded a full and complete legal remedy. That case was reversed on other grounds in 281 U. S. 673 (1930), but was followed in this state on the principal point in First Trust Co. v. Wells, 324 Mo. 306, 23 S. W. (2d) 108 (1929); State *ex rel.* Thompson v. Collier, 328 Mo. 246, 41 S. W. (2d) 400 (1931); State *ex rel.* Thompson v. Jones, 328 Mo. 267, 41 S. W. (2d) 393 (1931); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 328 Mo. 836, 42 S. W. (2d) 23 (1931); State *ex rel.* Davis v. Walden, 332 Mo. 680, 60 S. W. (2d) 24 (1933); State *ex rel.* St. Louis v. Caulfield, 333 Mo. 270, 62 S. W. (2d) 818 (1933); Wiget v. St. Louis, 337 Mo. 799, 85 S. W. (2d) 1038 (1935), 100 A. L. R. 1284 (1936).

before he may obtain relief by injunction. However, the opinion points out that the holding in the *Brinkerhoff-Faris* case does not mean that revisory proceedings before a local board of equalization or state tax commission always are the taxpayer's only initial remedy against a void assessment and that, under the facts here involved, the statutory remedies are neither adequate nor complete. Thus, it was held that the rule in question was not applicable.

Although the grant of immunity from taxation is a personal or corporate privilege which does not pass upon a transfer of the franchise of the corporation, except with express statutory sanction,[22] nevertheless, despite the fact that the exemption here claimed was originally granted to the Eliot Seminary, the name of which was changed to Washington University by legislative act,[23] the corporation remained the same and the latter is entitled to all of the immunities and privileges conferred upon and belonging to the Eliot Seminary. The judgment of the circuit court, granting the injunction prayed for, was affirmed.

The result reached by this opinion appears to be entirely sound. However, the writer is not entirely clear as to the grounds upon which the court distinguished the *Brinkerhoff-Faris* case. It is difficult to see why the local board of equalization or the state tax commission could not have granted full and complete relief from the imposition of the tax in question. There is language in the opinion which justifies the conclusion that it is the court's opinion that the assessor had no power to make the assessment, and that his action was a nullity and, therefore, subject to collateral attack. If the levying of the tax here involved was wholly void, there is a clear distinction from the rule of the *Brinkerhoff-Faris* case, where it would seem that the tax levied was merely voidable.

IV. Penalties

In *State* ex rel. *Western Union Telegraph Co. v. Markway, Collector*,[24] the company had in each year, prior to certification by the state tax commission of plaintiff's assessment for the years 1933, 1934 and 1935, obtained a temporary injunction in the United States District Court against such certification of any amount in excess of the amount which the com-

22. Morgan v. Louisiana, 93 U. S. 217 (1876); Rochester Ry. v. Rochester, 205 U. S. 236 (1907); Wright v. Ga. R. R. & Banking Co., 216 U. S. 420 (1910).
23. Mo. Laws 1857, p. 610.
24. 341 Mo. 976, 110 S. W. (2d) 1118 (1937).

pany claimed the assessment should be. The company's bill was ultimately dismissed and the dismissal affirmed by the circuit court of appeals. In October, 1936, the commission certified to the various counties those portions of the assessment which had been in dispute. On December 9, 1936, plaintiff tendered the amount of the taxes to the collector of Cole County with the assertion that they did not become delinquent until January, 1937, and that, therefore, no penalties, interest or collector's commissions were due. Taxes on the property of telegraph companies are, by statute,[25] levied and collected in the manner provided by law for taxation of railroad property.[26] The opinion points out that taxes against railroad companies become delinquent if not paid "on or before the first day of January next after the same shall have been assessed and levied."[27] It was held that there was no levy of the disputed portion of the taxes until after they were certified by the commission in October, 1936, and that they could not become delinquent until January 1, 1937. Since it is a fundamental rule that a tax cannot be a debt, the company could not be required to pay interest on the amounts in dispute.

V. Franchise Tax

State v. Bank of Southeast Missouri,[28] is an action by the attorney-general to enforce franchise tax for the year 1930 charged against the Bank of Southeast Missouri, which had subsequently turned its assets over to the Sturdivant bank, which latter bank had its assets taken over by the Commissioner of Finance. The supreme court confirmed the judgment of the lower court to the effect that the lien of the franchise tax did not attach to the assets of the transferee bank in the absence of a showing of such facts as would create an equitable lien.

VI. Miscellaneous

In *Grand River Drainage District v. Reid, Collector*,[29] the plaintiff drainage district had acquired and held several tracts of land to protect its lien thereon, under the provisions of the Revised Statutes of Missouri 1929, Sections 10766 and 11020. It leased the land until a fair price could be

25. Mo. Rev. Stat. (1929) § 10066.
26. *Id.* at §§ 10024-28-30-32.
27. *Id.* at § 10035.
28. 107 S. W. (2d) 1 (Mo. 1937).
29. 341 Mo. 1246, 111 S. W. (2d) 151 (1937).

obtained therefor and applied the rentals to the expenses and indebtedness of the district. The lower court held that the land so held is not exempt from taxes accruing after its acquisition. In reversing the judgment, the supreme court ruled that since the land was held in good faith for the protection of the district's lien for drainage taxes, the leasing thereof was merely a husbanding of its resources for the promotion of its governmental functions and the land was exempt under the constitution.[30]

Calling attention to earlier rulings that drainage districts are "municipal corporations" within the meaning of the constitution, the court distinguished *St. Louis v. Wenneker*,[31] on the ground that in that case the property was held by the city for the benefit of a particular class and was not, therefore, exempt. In the instant case, the land was held for the benefit of the drainage district as well as for the bondholders.

Other cases digested under the heading "taxation" do not really involve any question of taxation.[32]

TORTS

GLENN MCCLEARY*

One cannot read the decisions of the Missouri Supreme Court for any recent period without noticing the amount of work presented to the court from the very active field of Torts. The table showing the topical analysis of the decisions for 1937 does not reflect the full extent of the work presented in Torts, since many of the cases arising out of personal injuries have been listed under Evidence, Master and Servant, and other subjects. Approximately one-fourth of all the cases decided in this period had to do with some phase of tort law. This tremendous growth of tort law, particularly in the field of negligence, doubtlessly will go on unabated. It is

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30. MO. CONST. art. X, § 6.
31. 145 Mo. 230, 47 S. W. 105 (1898), where property was given by law to the city of St. Louis in trust to furnish relief to poor immigrants.
32. Pruitt v. St. Johns Levee & Drainage Dist., 341 Mo. 120, 106 S. W. (2d) 467 (1937), holding that corrected tax deeds made by an ex-sheriff, who, when in office, had made the original deeds, could be introduced in evidence. Stubblefield v. Husband, 341 Mo. 38, 106 S. W. (2d) 419 (1937), holding that one who, as owner, accepts the surplus remaining from the proceeds of a tax sale, was estopped to attack the validity of the proceedings which had resulted in the sale.

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conceivable that, for various reasons, certain types of personal injuries may, in the future, be taken from the courts and placed under administrative tribunals, as was done when the master-servant cases were turned over to the Workmen's Compensation Commission. This volume of cases brings new rules and precedents which will tend to increase the law's uncertainty and lack of clarity. It is also conceivable that this may force the abandonment of our common-law system and the adoption in its place of rigid legislative codes, unless a new factor can be found to guide.

There is increasing evidence that this new factor may be asserting its strength already. The court each year is making more use of the Restatements. This new factor in the decisions should be observed by the profession since the Restatements are likely to become a very persuasive source of law, if they have not assumed that role already.[1]

With few exceptions, the tort cases fall in the field of negligence and apply previously well settled doctrines to factual situations which vary slightly from situations previously dealt with. For this reason many of the decisions will be passed over with little or no mention. Only the more significant variations or advances in the application of negligence principles will be stressed.

Since the humanitarian doctrine governs so many Missouri decisions, and due to the diverse attitudes among the members of the bar on the soundness of such a doctrine, it has been thought desirable to give special treatment to the cases in which this rule of liability has been applied.[2] In so doing, the doctrine may be examined more critically.

I. NEGLIGENCE

A. *Duties of Persons in Certain Relations*

1. Possessors of Land

The case of *Ilgenfritz v. Missouri Power & Light Co.*[3] involves the question whether a waxed linoleum on the floor of an office was such a

1. For examples, see Skidmore v. Haggard, 341 Mo. 837, 110 S. W. (2d) 726 (1937); Ilgenfritz v. Missouri Power & Light Co., 340 Mo. 648, 101 S. W. (2d) 723 (1937); Shroder v. Barron-Dady Motor Co., 111 S. W. (2d) 66 (Mo. 1937); and see discussion by the writer, *The Restatement of the Law of Torts and the Missouri Annotations* (1937) 2 Mo. L. REV. 28.

2. See the section entitled Humanitarian Doctrine by Mr. Becker at p. 392.

3. 340 Mo. 648, 101 S. W. (2d) 723 (1937), noted in (1937) 2 Mo. L. REV. 374.

dangerous condition that the possessor owed a duty either to warn a business guest of the danger or make the condition safe. The linoleum, because of the wax, had a glossy and slick appearance. The court held "that it is not negligence to merely wax an office floor when it is obvious to all who use it that it is waxed; when no unusual amount or kind of wax is used so as to make it slicker than waxed floors of like character are usually kept. . . ." The court, however, recognized that the danger might not be so obvious if floor wax were put on certain places "where people would step on it unexpectedly, as, for example, where they would step off of an elevator or a moving stairway or in a dimly lighted room or corridor; or it might be negligence to put wax on a substantial incline." The case was distinguished from other cases where the condition of a certain part of the floor was different from the rest, and this difference was not likely to be noticed by persons walking thereon, or where substances were improperly left there at all. The holding, together with the *dictum* as to under what circumstances waxed floors might not be obvious, furnish quite a complete guide to possessors in determining their responsibility for liability from this sort of harm.

On the basis of this decision, the court in *State* ex rel. *Golloday v. Shain*[4] quashed an opinion by the Kansas City Court of Appeals, in the case of *Myers v. Golloday*,[5] affirming a judgment which had been recovered for personal injuries alleged to have been caused by a fall on a waxed floor in the lobby of defendant's theatre. The condition and appearance of the floors, as well as their visibility to anyone entering the building, were practically identical in both cases.[6]

Where the possessor of land was a railroad it was held, in *Karr v. Chicago, Rock Island & Pacific Ry.*,[7] that no duty was owed to a railroad crossing watchman at a crossing by the employees operating a train to look out for him or take measures for his protection unless and until they discovered him in a position of peril in time, by the exercise of due care, to avert injury to him. No cause of action was available to the plaintiff on the

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4. 341 Mo. 889, 110 S. W. (2d) 719 (1937).
5. 104 S. W. (2d) 1007 (Mo. App. 1936).
6. To be considered with this line of cases is Boyd v. Logan Jones Dry Goods Co., 340 Mo. 1100, 104 S. W. (2d) 348 (1937), where in an action for wrongful death, the evidence was held insufficient to take the question of negligence in the construction and lighting of a landing in a store to the jury. There the deceased shopper fell on a landing in a store brightly illuminated, while stepping up from a diagonal step that varied in width from five to eight feet, and that condition of step was obvious.
7. 341 Mo. 536, 108 S. W. (2d) 44 (1937).

theory that, had the trainmen performed some duty which they owed to travelers on the street at and near the crossing, or to passengers on the train, he would not have been injured. There the train struck an automobile at the crossing where the plaintiff was employed as flagman or watchman, throwing it and striking the plaintiff. In order to constitute actionable negligence, the duty must be owed to the plaintiff. But, in *Clark v. Terminal R. R. Ass'n of St. Louis*,[8] it was held that if there exists a well-established custom for train operatives to keep a lookout for and to warn trackmen, known to and relied upon by such trackmen, or a rule of the railroad company to that effect, then there is a duty to keep such lookout.

The principle of the *Karr* case, that a duty must be owed to the particular plaintiff before there can be actionable negligence, was also applied in *English v. Wabash Ry.*[9] There the plaintiff, a pedestrian, was struck by defendant's train while walking along the track near a private farm crossing. While a statute provided for necessary farm crossings for the use of proprietors or owners of land adjoining railroads, there was no duty to keep a lookout for the general public in the absence of known frequent public use. The court pointed out that the plaintiff made no claim of a duty to him on the ground that he had any intention to visit the farm or that he was using it for any purposes of a farm crossing.

In *Sale v. Kurn*,[10] a railroad was held not liable in negligence for the death of a boy who fell from a load of hay drawn by a team which became frightened and ran across the highway into a ditch when a gas electric train, passing on tracks parallel to the highway, emitted a whistle. The train had passed the team within a second or two after the first whistle, and the team did not become frightened until the second or third blast, when the train has gone past the team. There was no duty owed the plaintiff to be on the lookout; therefore, to maintain the action, it must be shown that the engineer had discovered the boy's peril in time to save him by acts not inconsistent with his obligation to operate his train in a proper manner.

The status of one was raised from that of a trespasser to a passenger, so as to allow a recovery for injuries caused by a derailment of a train in

8. 111 S. W. (2d) 168 (Mo. 1937).
9. 341 Mo. 550, 108 S. W. (2d) 51 (1937).
10. 341 Mo. 1157, 111 S. W. (2d) 98 (1937).

Graves v. Missouri Pacific R. R.[11] The plaintiff, thinking his passage was paid, had boarded defendant's train in good faith, to assist in caring for his employer's horses being shipped in a car wherein he was known by the railroad company to be with other caretakers. While the relation of passenger and carrier can be created only by contract, this may be implied where the carrier does something indicating the latter's acceptance of a person as a passenger.

In *Ford v. Rock Hill Quarries Co.*,[12] the court continued to apply the Missouri rule that a possessor of land owes no duty to warn or make safe dangerous conditions on the premises as to licensees who go upon premises for their own purpose. There the owner of a crusher building knew that his tenant's son and other children frequently played on the premises, and failed to object thereto or to eject them from the building in which there were dangerous conditions. But this did not amount to an invitation to enter the building and play therein, so as to raise a duty on the part of the possessor. At most, such facts, it was held, gave the boy tacit permission which amounted to mere license, so that the only duty owed was not wilfully to injure him. As pointed out elsewhere,[13] the Missouri classification of licensees is too broad and includes actual trespassers. A genuine licensee is one who comes on the premises for his own purpose but with the consent of the possessor. This consent is one in fact. Failure to prosecute persons who intrude, or failure to go to the expense of putting up intruder-proof fences, or to station a guard to patrol points of entry, or to take other steps to exclude trespassers, cannot constitute proof of a genuine consent. They are undesired intruders at best, to whom no duties are owed as to existing dangerous conditions. This would leave a genuine gratuitous licensee to be dealt with separately and, as to them, since the possessor's consent had actually been obtained, the tendency in the law is to impose an affirmative obligation to make the premises safe or to warn of dangers if the possessor knows of the condition, realizes that it involves an unreasonable risk, and has reason to believe that the licensee will not discover the condition or realize the risk.[14] This is not an undue burden on the possessor since he voluntarily yielded to the visit by the licensee, and he should, therefore, assume a certain responsibility to prevent in-

11. 118 S. W. (2d) 787 (Mo. 1937).
12. 341 Mo. 1064, 111 S. W. (2d) 173 (1937).
13. See discussion by the writer, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land* (1936) 1 Mo L. Rev. 45.
14. Restatement, Torts (1934) § 329.

juries. However, the result of the instant case would be the same because the boy was a trespasser; the criticism is directed to the classification because it places gratuitous licensees and trespassers in the same group in so far as their protection is concerned.

2. Municipal Corporations

In *Carruthers v. City of St. Louis*,[15] it was alleged that, in following a black line in the street which led up to a parkway in the center of the street, the driver of an automobile was caused to drive his car over the parkway and to strike a steam shovel, resulting in injuries to his guest, the plaintiff. It was held that, even if there was a negligent direction of traffic, there could be no recovery against the city since it was engaged in a governmental function. On the other hand, in *Mengel v. City of St. Louis*,[16] an automobile guest's action against the city was upheld where injuries were sustained when the automobile collided in the nighttime with a concrete slab located in an intersection and formerly the support for a traffic sign. The concrete block itself, and alone, was not serving or operating to regulate traffic. It then became a mere obstruction in the street which, if unguarded or unlighted or not properly lighted, would likely be, especially in the nighttime, a physical hazard to vehicles on the street at this point.

In *Taylor v. Kansas City*,[17] a submissible case was made out by the plaintiff in an action against the city for injuries sustained from an alleged defect in the sidewalk, located in the business section of the city, where her evidence showed a sudden, abrupt, and rounded downward slant or slope in the surface of the sidewalk of 1½ inches in 8 inches to the level of the manhole cover located in the sidewalk.

3. Supplier of a Chattel

The liability of the supplier of chattels is constantly receiving more attention from the courts and is being so rapidly extended that this phase of the field of negligence is most important to the profession. Historically, the liability of suppliers of chattels did not develop uniformly. While negligence principles were applied to bailors, certain additional requirements were needed before manufacturers and vendors could be held responsible for injuries arising from their negligence in supplying chattels

15. 341 Mo. 1073, 111 S. W. (2d) 32 (1937).
16. 341 Mo. 994, 111 S. W. (2d) 5 (1937).
17. Taylor v. Kansas City, 112 S. W. (2d) 562 (Mo. 1937).

to others, in the absence of privity of contract. That is, the law developed around types of suppliers without recognition of common principles applicable to all. The new development is to recognize the common basis for liability on principles of negligence where an unreasonable risk of injury may be anticipated if due precautions are not taken. As this is not the place to discuss fully this development, reference is made to such treatment.[18]

In *Tayer v. York Ice Machinery Corp.*,[19] an action for wrongful death was brought against the manufacturer for alleged negligence in manufacturing an ammonia compressor, resulting in death to one employed to be in the vicinity of its intended use. While the court denied liability on a theory of contributory negligence in assuming a known danger for the preservation of the property of another, it was necessary first to find a duty owed by the manufacturer to the employee of a purchaser of its product. The development in liability in such cases has been from one of two different approaches. The older one was that no duty was owed to others than the person immediately supplied by the manufacturer on the ground that there was no privity of contract. To this certain exceptions were engrafted where the thing was inherently dangerous. The other approach was grounded on straight principles of negligence where a risk of injury could be foreseen to persons who might come into contact with the thing. Thus a manufacturer is liable who fails to use reasonable care in the manufacture of a chattel which, unless carefully made, involves an unreasonable risk of causing substantial bodily harm to those who lawfully use it for the purpose for which it is made and to those whom the supplier should expect to be in the vicinity of its probable use. As pointed out elsewhere, the results of the two approaches have not differed greatly, yet the legal reasoning is quite dissimilar. The court, in the instant case, seemed to put Missouri in line with the better considered line of authority which follows the latter approach. It cited the Restatement and leading cases which have taken this position. However, it also cited a previous Missouri decision, *McLeod v. Linde Air Products Co.*,[20] as authority supporting the same position. It seems to the writer that the *McLeod* case was merely an extension of the older approach, because it still used the language of the

18. See Note (1937) 2 Mo. L. REV. 73; *id.* at 247; and reference to the subject by the writer, *supra* note 1, at 37.
19. 119 S. W. (2d) 240 (Mo. 1937).
20. 318 Mo. 397, 1 S. W. (2d) 122 (1927).

exceptions to the old requirement of privity of contract as found in the earlier Missouri decisions.[21] Since the same result would be reached in most cases regardless of the approach used, it seems that the court might very well distinctly state which technique is to govern future decisions.

In *State* ex rel. *Govro v. Hostetter*,[22] the St. Louis Court of Appeals had ruled that an instruction, authorizing a recovery by a smokestack painter against the owner of the smokestack for injuries sustained in a fall caused by the breaking of a defective rope, if the rope, which had been furnished, was defective in the stated manner when furnished and the owner was negligent in furnishing a rope in such condition, was reversible error, as not requiring the jury to find, as a condition of liability, that the owner knew of, or by the exercise of ordinary care could have discovered, the defect in the rope. This ruling was held not to conflict with previous supreme court decisions and states the principle of liability of a bailor who supplies a chattel for a business purpose.

The liability of a dealer, who loaned an automobile to a prospective purchaser for demonstration purposes, for defective brakes allegedly caused by improper greasing of the wheels by the manufacturer at the factory, resulting in injuries to the prospective purchaser's wife as a result of a collision which was proximately caused by such defect, was presented in *Shroder v. Barron-Dady Motor Co.*[23] The court found no breach of duty on the part of the dealer, as it was under no duty to make such unusual inspection as to take off the wheels to determine the kind of grease used. Its duty was to observe such automobile to see if it operated properly, to investigate the cause of any unusual condition apparent to him, and to investigate the condition and check the operation of parts which might reasonably be expected, as a result of knowledge and experience with such automobiles, to need attention before delivery to a purchaser. The case is an important one in this field of liability. The opinion is particularly well reasoned and draws heavily on the Restatement of Torts.

The case of *Brady v. Terminal R. R. Ass'n of St. Louis*[24] is novel both as to the facts and as to the basis for decision. There the plaintiff, an in-

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21. For a more extended analysis of the Missouri position, see references in note 18, *supra*.
22. 341 Mo. 262, 107 S. W. (2d) 22 (1937).
23. 111 S. W. (2d) 66 (Mo. 1937).
24. 340 Mo. 841, 102 S. W. (2d) 903 (1937). The plaintiff was allowed a recovery under the Safety Appliance Act by the United States Supreme Court, in Brady v. Terminal R. R. Ass'n of St. Louis, 303 U. S. 10 (1938).

spector for the Wabash, was injured while inspecting a boxcar which the defendant had placed on the track of the plaintiff's employer for inspection. The court held that the terminal railroad and the railway company accepting the boxcar tendered to it by the former for inspection were only licensees of each other, so that the former owed the latter and hence the latter's employee, injured while inspecting the car, no common-law duty to make an inspection which would have disclosed a defective grabiron. An understandable position for denying responsibility was also employed by the court in that the plaintiff voluntarily exposed himself to a known and appreciated danger incident to the work in which he was engaged. As to the principal ground for the decision, it seems that the court, in classifying the plaintiff as a licensee, was employing a technique applicable to the liability of a possessor of land for dangerous conditions, but in a situation where the defendant was not a possessor of land. The track where the car was placed for this inspection belonged to the Wabash. Instead, this would seem to be a case involving the liability of a supplier of a chattel, but the court denied the applicability of that line of cases. The court declined the analogy found in the cases where a carrier furnishes a defective car to a shipper or consignee whose employee is injured in loading or unloading such defective cars, on the ground that in the instant case "the cars were merely tendered and for the distinctly different purpose alone of inspection, and the Terminal stood in no contractual relation or privity with the Wabash in respect of its subsequent use of the cars."

B. *Breach of Duty Established Through Violation of Statute or Ordinance*

The duty and breach of duty, which constitute negligence, may be shown through violation of a statute which was intended to protect persons of the class to which plaintiff belongs against the kind of injury which he has received. In *Berry v. Kansas City Public Service Co.*,[25] the violation of statutes pertaining to a carrier's duty to ring a bell as its train approached a crossing, to slacken speed, and to have headlights were presented in the same instruction as constituting negligence. Since the accident occurred at a private crossing of the street car company and the railroad track, the first two statutes did not apply; the railroad did not cross a street, road or highway at this point. However, the omission to

25. 341 Mo. 658, 108 S. W. (2d) 98 (1937).

have a headlight lighted as the locomotive approached the crossing was a violation of a statutory duty constituting negligence *per se*.

C. *Res Ipsa Loquitur*

Where a thing which has produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such that in the ordinary course of events does not happen if due care has been exercised, the fact of injury under these circumstances is sufficient to support a recovery in the absence of any explanation by the defendant tending to show that he was free from negligence. This doctrine was held not applicable in *Tayer v. York Ice Machinery Corp.*,[26] where the purchaser of an ammonia compressor manifold had exclusive possession thereof for eight months and had subjected the manifold to the flow and pressure of ammonia, to rapid temperature changes, and to knocking and pounding from liquid ammonia. The doctrine was held applicable in *Evans v. Missouri Pacific R. R.*,[27] where the evidence showed a pedestrian, standing three or four feet from a freight train at an intersection, was struck by a rod or bar projecting from a box car after the engine and several cars had passed.

D. *Imputed Negligence*

The question of imputed negligence was presented in *Barnes v. Real Silk Hosiery Mills*,[28] where plaintiff was struck by a car driven by a salesman for the defendant company. The salesman was at the time of the injury driving his own car on his way to the territory in Kansas City that had been assigned to him. The evidence showed that the defendant had no control or right of control over the salesman as to the manner by which he went to and from his territory or while working in the territory, or as to his physical conduct in soliciting orders. Therefore, the legal basis for imputing the negligence of the salesman to the defendant was absent.

In *Skidmore v. Haggard*,[29] evidence that the purchaser of a newspaper route sold newspapers purchased by him from the publisher, solicited new subscribers, was furnished blank form subscriber receipts and account sheets by the publisher, sent the latter maps of route and lists of subscribers, carried mail sacks containing newspapers to post offices on his

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26. 119 S. W. (2d) 240 (Mo. 1937).
27. 116 S. W. (2d) 8 (Mo. 1937).
28. 341 Mo. 563, 108 S. W. (2d) 58 (1937).
29. 341 Mo. 837, 110 S. W. (2d) 726 (1937).

route without compensation, and made his route in the automobile of one having another route for two days after injuring a third person in an automobile collision, was held insufficient to constitute such assumption of control of his physical activities by the publisher as to change his status from that of an independent contractor to that of a servant or employee.

In *Riggs v. Higgins*,[30] evidence disclosing that insurer's agent was required to collect premiums and solicit insurance in certain territory, that agent was required to attend meetings held almost weekly for all agents in the district, that meetings were held outside agent's territory, that insurer's officers knew their agent owned an automobile and frequently used it in going to such meetings, but that insurer neither directed the use of the automobile by the agent nor reserved the right to control the manner in which the agent should travel in going to these meetings, was held insufficient to justify a judgment against the insurer for death caused by the agent's negligent operation of his automobile while going to a meeting. There is vigorous dissent on rehearing by Judge Gantt in which Judges Frank and Douglas concur.

The familiar rule that the negligence of a driver of an automobile cannot be imputed to the guest was applied in *Schmitt v. Missouri Pacific R. R.*[31] There it was held error to instruct the jury, under evidence showing that the motorist invited his cousin to go for a drive about the city, that the couple visited mutual friends, and that the automobile collided with a train when the motorist was taking the cousin home, that if the automobile was on a mission for the cousin the motorist's negligence was imputable to the cousin, since the cousin was the motorist's guest. The evidence showed that plaintiff had no interest or ownership in the car nor any actual or legal right of control over its operation.

E. *Causation*

Assuming negligence to have been made out, there was still the question of causation or responsibility in law to be determined in a few decisions. In *Connole v. East St. Louis & Suburban Ry.*,[32] causation was not established by showing violation of a statute requiring vehicles to be brought to a full stop at a "stop" sign at railroad crossings, where there was no showing that due observance would effectually accomplish its pur-

30. 341 Mo. 1, 106 S. W. (2d) 1 (1937).
31. 102 S. W. (2d) 658 (Mo. 1937).
32. 340 Mo. 690, 102 S. W. (2d) 581 (1937).

pose, so that plaintiff's contributory negligence would bar a recovery. Where no sufficient or substantial evidence was adduced tending to establish the causal connection between conditions making necessary an operation and the collision, the defendant was entitled to an instruction and the refusal thereof constituted error in *Berry v. Kansas City Public Service Co.*[33] Where the evidence merely established that the injury might have resulted from several causes, for some but not all of which the defendants were liable, the necessary causal connection remained in the realm of speculation. So in *Pedigo v. Roseberry*,[34] in an action for malpractice, the evidence, showing that the crippled condition of patient's leg might have been caused by patient's premature use of the leg, was held to sustain a verdict denying a recovery. But where the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw, nor should have foreseen the extent of the harm, or the manner in which it occurred, does not prevent the conduct from being the legal cause of the injury. Thus, in *Mrazek v. Terminal R. R. Ass'n of St. Louis*,[35] in an action for injuries sustained by a freight check clerk, when a freight truck, being pulled by a tractor through a tunnel connecting the freight station and freight room, collided with parked freight trucks between which the clerk was standing, the evidence warranted the inference that the presence of employees near the parked trucks could reasonably have been anticipated, so as to render the employer liable, though the operator of the truck did not actually see the clerk.

The principle of causation which holds one liable for his negligent conduct, where it is one of several causes concurring to produce the injury, was applied in *Fawkes v. National Refining Co.*[36] There it was held error to instruct that the occupant of a truck could not recover for injuries sustained in a collision with an unlighted truck being pushed along the highway, if the negligence of the driver of the truck containing the occupant was the proximate cause of the collision, regardless of any concurring negligence of the defendant in pushing the truck on the highway. Likewise, it was held in *Morris v. E. I. DuPont de Nemours & Co.*,[37] in an action against a dynamite manufacturer for injuries sustained by a miner from premature explosion of a stick of dynamite used in mining

33. 341 Mo. 658, 108 S. W. (2d) 98 (1937).
34. 340 Mo. 724, 102 S. W. (2d) 600 (1937).
35. 341 Mo. 1054, 111 S. W. (2d) 26 (1937).
36. 341 Mo. 630, 108 S. W. (2d) 7 (1937).
37. 341 Mo. 821, 109 S. W. (2d) 1222 (1937).

clay, that even if the act of the mining company in distributing defective dynamite to miners was a contributing or intervening cause, it would not relieve the manufacturer of liability, since the injury was the natural and probable consequence of the original negligence and was such as might reasonably have been foreseen as probable.

F. *Defenses in Negligence Cases*

In *Bedsaul v. Feeback*,[38] it was reversible error to instruct that a truck driver who collided with a preceding truck, negligently parked in the nighttime without lights, could not recover if the truck driver continued to drive the truck forward when he could not see as a result of lights of approaching automobile. While recognizing that there are cases supporting the theory of the instruction, the court considered such a rule impracticable that would require as a matter of law the operator of an automobile traveling at night to stop his car or have it under such control that he can stop within the range of his vision, upon being blinded by the headlights of an approaching car. The court distinguished between cases where the driver's vision was continuously obstructed and where his vision was only momentarily impaired.

In *State* ex rel. *Kansas City Southern Ry. v. Shain*,[39] where plaintiff stated that he could not see a railroad freight car across the highway when he was within ten or twelve feet of the railroad track because of swirling snow and dust, although it was not snowing at the time, the court held that he was contributorily negligent as a matter of law in dashing forward as he did, when he could not see, with such force and violence that he crashed into the freight car for half the length of the engine.[40]

It was not considered negligence as a matter of law on the part of an employee to preclude a recovery against his employer, in *Phares v. Century Electric Co.*,[41] where he obeyed his foreman's order to put an electrode in one furnace while an adjacent furnace was in operation, knowing of the danger of receiving an electric shock, unless the danger was so threatening and imminent that a prudent person would not have obeyed the order.

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38. 341 Mo. 50, 106 S. W. (2d) 431 (1937).
39. 340 Mo. 1195, 105 S. W. (2d) 915 (1937).
40. In Crews v. Kansas City Public Service Co., 341 Mo. 1090, 111 S. W. (2d) 54 (1937), it was held that the plaintiff was entitled to inform the jury in a humanitarian case that the contributory negligence of the plaintiff which only contributed to or concurred in his injury would not defeat his recovery. See this case noted in (1938) 3 Mo. L. REV. 324.
41. 341 Mo. 990, 111 S. W. (2d) 11 (1937).

G. *Humanitarian Doctrine*

Due to the significance of this doctrine in the Missouri decisions, it has been thought desirable to give special emphasis to this phase of Torts by creating a special field for discussion which will be found elsewhere in this issue of the Review.

H. *Burden of Proof*

Lawyers and trial courts are still having difficulty in framing instructions on the burden of proof which will stand up under the scrutiny of the supreme court. In *Morris v. E. I. DuPont de Nemours & Co.*,[42] an instruction was reversibly erroneous as imposing a greater burden of proof than is required: "If . . . you find that the evidence touching the charge of negligence against defendant to be evenly balanced, or the truth as to the charge of negligence against defendant remains in doubt in your minds, . . . your verdict must be for the defendant. . . . " In *Blunk v. Snider*,[43] an instruction that negligence is a positive wrong and hence not presumed, and that recovery may be had only when such charge is sustained by the preponderance, that is, the greater weight of the credible evidence to the reasonable satisfaction of the jury that the charge is true as laid, was erroneous as casting too great a burden on plaintiff. The court called attention to the proper statement of such an instruction in *Mengel v. City of St. Louis*,[44] quoting from recent Missouri decisions: " 'A short, simple instruction, telling the jury that the burden is on plaintiff to prove his case by a preponderance or greater weight of the credible evidence, and that unless he has done so the jury must find for defendant, ought to be sufficient to inform the jury what plaintiff is required to do. A plain declaration to that effect will be easily understood by a jury. The more the instruction is elaborated upon, the more complex it becomes and the more it is likely to be misunderstood.' . . . Certainly all that ought to be required, in addition to such a statement . . . should be a clear definition of preponderance of evidence. . . . "

The Missouri rule as to the effect of the doctrine of *res ipsa loquitur* on the burden of proof and the effect of rebutting evidence by the defendant on the presumption or inference raised by the doctrine was restated in

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42. 341 Mo. 821, 109 S. W. (2d) 1222 (1937).
43. 111 S. W. (2d) 163 (Mo. 1937).
44. 341 Mo. 994, 111 S. W. (2d) 5 (1937).

Evans v. Missouri Pacific R. R.:[45] "'Our court has held that the burden of proof never shifts and that the presumption raised by the doctrine *res ipsa loquitur,* relating as it does to the burden of proof, remains in the case to the end and will take the case to the jury, notwithstanding the evidence, however probative, given in rebuttal on behalf of the defendant.'"

II. Assault and Battery

An instruction in *O'Shea v. Opp,*[46] in an action for battery, that if the defendant provoked the difficulty with the plaintiff for the purpose of taking advantage of him and doing him "great" bodily harm, then if the plaintiff did attack the defendant, the defendant was guilty of assault if he struck the plaintiff, was erroneous for the insertion of the word "great."

III. Fraud and Deceit

The case of *Jeck v. O'Meara*[47] raises the question of whether or not promissory statements, made by the defendants as of their own knowledge, when in fact they did not know whether the statements were true or not, and related to matters peculiarly within the knowledge of the defendants, misrepresented an existing state of mind on which an action for deceit may be predicated. There the plaintiff alleged that the defendant, for the purpose of inducing the plaintiff to invest in the capital stock of Lindell Chevrolet Company, fraudulently represented, *inter alia,* that the plaintiff could not lose because the General Motors Holding Company existed for the purpose of taking over failing dealers and would come to the rescue of any retail dealer in financial trouble. The court held that the grounds of fraud submitted, even when coupled with the allegation that such matters were peculiarly within the knowledge of the defendants and of which plaintiff was ignorant, were not sufficient to state a cause of action. The court said there was no distinction in principle between this situation and cases where promissory statements are accompanied by a present intention not to perform and were made for the purpose of deceiving the representee. On the latter question the Missouri courts have distinguished between predicating fraud on an unfulfilled promise, even though at the time it was made there was an intention not to perform it, and misrepresentations of

45. 116 S. W. (2d) 8 (Mo. 1937).
46. 341 Mo. 1042, 111 S. W. (2d) 40 (1937).
47. 341 Mo. 419, 107 S. W. (2d) 782 (1937).

intention or purpose which the court has regarded as a statement of fact. As this is not the place to discuss the case, other than to point out the nature of the problem involved, reference is made to a treatment of the case elsewhere.[48]

IV. Libel and Slander

In *Perdue v. Montgomery Ward & Co.*,[49] plaintiff was accused in the immediate presence and within the hearing of other persons of stealing a coat from the defendant's store. The question was whether the defense of qualified privilege was in the case, since the statements were made by the store's detective in the performance of his duties. Since the defendant's employee unequivocally admitted that he had no thought in his mind that plaintiff stole the coat, there could be no good faith on his part in so charging, and in the absence of good faith there could be no question of privilege. Usually lack of good faith is used to rebut the defense of privilege and must be shown by the plaintiff. Here, the employee, having admitted his lack of good faith, is quite properly denied his defense of privilege and the plaintiff need not show the existence of actual malice.

V. Malicious Prosecution

In *Polk v. Missouri-Kansas-Texas R. R.*,[50] it was held that the dismissal of a criminal prosecution did not conclusively establish the want of probable cause so as to authorize a recovery for malicious prosecution. After the plaintiff had been bound over to the district court on the preliminary hearing before a justice of the peace of the criminal proceeding upon which the instant malicious prosecution action was based, the prosecuting attorney subsequently failed and refused to file an information against him, whereupon the justice of the peace before whom the preliminary hearing had been held, with the concurrence and approval of the prosecuting attorney, entered an order of record dismissing the cause and discharging the accused. The court also held that it was prejudicial error to admit the statement of the prosecuting attorney as to his reasons for not filing an information aganist the accused, as such statement tended to discredit the testimony of witnesses showing probable cause for criminal prosecution and was based on matters *de hors* the record.

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48. See note on this case and other relevant Missouri decisions in (1938) 3 Mo. L. Rev. 69.
49. 341 Mo. 252, 107 S. W. (2d) 12 (1937).
50. 341 Mo. 1213, 111 S. W. (2d) 138 (1937).

TRUSTS

W. L. NELSON, JR.*

Only well established principles of the law of Trusts were applied by the Missouri Supreme Court last year in its decisions involving this field of the law, and for that reason no lengthy discussion of them is undertaken in this summary.

I. CREATION

Tootle-Lacy National Bank v. Rollier[1] was a suit in equity to secure directions in the administration of an estate. The testator provided in his will for a specific bequest of $6000 and then directed that the residuary estate be put in trust with the plaintiff bank for the use of testator's wife for life, and after her death to be paid to their son. The testator also carried several life insurance policies, and the endorsements on these provided, in effect, that if his wife survived him and if there was a trust operating under his will, the proceeds of the policies should be paid to the bank as trustee. The named legatee took the position that the endorsements on the policies failed to create an enforcible trust inasmuch as no object or beneficiary was named therein, and that the proceeds of the policies became assets of the estate and should be applied to the payment of her bequest.

The lower court held that a valid trust was created. This was upheld by the supreme court, that court saying that the only reasonable inference, when the endorsements and the will were construed together, was that the testator intended to create a trust in the proceeds of the policies for the support of his wife. The court emphasized that although the subject matter of the trust created by the endorsements was different from that created by the will, the trustee was the same and its duties and responsibilities as such were fixed by the will. In commenting on the requirements for the creation of a trust the court said that "No particular, formal, or technical words are required in the creation or declaration of an express trust and the declaration of such trust need 'not be contained in or endorsed on the instrument which transfers the legal title. It may be set out in one or several instruments executed at other times than that of the trans-

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1. 111 S. W. (2d) 12 (Mo. 1937).

fer of title, provided, when construed together,' they show the existence of the trust."[2]

II. Resulting Trusts

Milligan v. Bing[3] was an action to declare a resulting trust in certain real estate. The title to the property was in the name of the mother and father of the plaintiffs as tenants by the entirety. The mother died and the children argued, in this suit, that a joint tenancy was not created but that a resulting trust arose in favor of the wife and in favor of her heirs after her death. The basis for their contention was that the husband had purchased the land in the joint names of himself and his wife in violation of the latter's directions to take title in her name alone, and that the major portion of the purchase price was made up of the wife's separate money.

The court applied the well settled rule that a resulting trust will not be established "except upon evidence so clear and convincing as to leave no reasonable doubt in the mind of the chancellor as to the existence of the alleged trust." It examined the evidence and held that the lower court was justified in its finding that the husband and wife had intended to create an estate by the entirety in the land and that, therefore, no resulting trust arose.

In *Liflander v. Bobbitt*,[4] plaintiff claimed title to certain real estate by virtue of a sheriff's deed under execution on a judgment against one Bobbitt, while Bobbitt's son claimed title under a warranty deed from the former record owner. The evidence indicated that the property was purchased by the father in the son's name and that money which belonged to the son made up a portion of the purchase price. The court held that this money was a trust fund in the father's hands, that the property should be charged with a lien for that amount, and that the father's creditors could not reach that interest. In explaining this holding the court said that "since a minor son's money is a trust fund in the hands of his father, he could not get title to property by using such trust in its acquisition, and his creditors' rights can be no greater than his."[5]

III. Constructive Trusts

Long v. Von Erdmannsdorff[6] was a suit to declare and enforce a trust

2. *Id.* at 16.
3. 108 S. W. (2d) 108 (Mo. 1937).
4. 111 S. W. (2d) 72 (Mo. 1937).
5. *Id.* at 75.
6. 111 S. W. (2d) 37 (Mo. 1937).

in plaintiff's favor in land held in the name of defendants. It appeared that the plaintiff had loaned money to the defendants, taking as security a deed of trust on certain lots on which there was a prior deed of trust in favor of a building and loan association. Later a settlement was effected wherein the note given plaintiff was released and the deed of trust securing it cancelled, the defendants executing another note and conveying part of the land to the plaintiff. In this deed the defendants agreed to pay the balance remaining unpaid on the building and loan note and "to hold the second party harmless." Thereafter the building and loan note became delinquent and the property was foreclosed. The defendants purchased at this sale. The plaintiff contended in the present suit that, because of the provisions in the deed that the defendants would pay the building and loan obligation, a trust arose in her favor when the defendants purchased at the foreclosure sale. There was some dispute as to why the defendants executed the new note, but they testified that it was to take care of the building and loan note. The supreme court denied the plaintiff's contention and held that the new note was given by the defendants to meet the building and loan note and that the obligation to pay the balance on that note was thereby discharged.[7]

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7. An interesting case decided by the St. Louis Court of Appeals, Brown v. Maguire's Real Estate Agency, 101 S. W. (2d) 41 (1937), has been certified to the supreme court. This case involved the title to rent money deposited by the agency. After a judgment had been rendered against it, an execution was issued and the bank was summoned as garnishee. A day later, before it had received notice of the garnishment, the agency deposited rent money with the bank, it being the custom of the agency to collect rent and then distribute it to the property owners. The garnishee bank contended that it was entitled to apply this deposit to an individual debt of the agency to the bank, but the lower court ordered the bank to turn this money into court. On its failure to comply with this order judgment was entered against the bank. The intervening claimants, who were the owners of the property on which the rents were collected, appealed. The court held that the rent money constituted a trust fund held by the agency for the claimants, and that although a debtor creditor relation existed between the bank and the agency, the agency was a depositor in the capacity of trustee, and not as an individual. Consequently, the bank could not use the fund to discharge the individual debt of the trustee when it had knowledge of the trust character of the fund, or had knowledge of facts sufficient to put it on inquiry with respect to the character of the fund. The court held that there were sufficient facts here, such as knowledge by the bank president of the nature of the agency's business, and its previous collections and disbursements, to put the bank on inquiry.

WILLS AND ADMINISTRATION

THOMAS E. ATKINSON*

I. CONTEST OF WILLS

To the writer, the most interesting case of the year in the field of decedent's estates is *Baxter v. Bank of Belle.*[1] The will was contested upon the ground, *inter alia,* of improper execution. The instrument was prepared by a notary who also supervised the execution. Testatrix expressed the desire that the notary's wife and one Travis act as witnesses. It is clear that the former properly performed the functions of an attester and it is just as certain that Travis did not, as he signed the will several hours after the other parties and outside the presence of the testatrix. The notary attached his certificate that "in witness thereof I have hereunto set my hand and affixed my official seal" immediately below the attestation clause and signed his name in the presence of testatrix. Proponent contended that the notary could be regarded as an attesting witness. The trial court left the matter to the jury as to whether he signed as a witness. Nothing further appears as to the court's instruction in this regard.

The supreme court held that the verdict against the will was supported by substantial evidence. The opinion discusses the questions of whether the notary had *animus attestandi* and whether testatrix intended and requested him to act as a witness. Evidently these are regarded as questions for the jury. It does not appear how much guidance the court should give the jury in submitting these issues. There are many holdings cited in the opinion to the effect that one who signs to give approbation to the will has sufficient *animus attestandi* though he subscribes as notary, justice of the peace, or executor. It would also seem that as a matter of law the knowledge by testatrix that the scrivener was signing the will, coupled with her failure to object, make out sufficient request that he should act as an attesting witness.[2] It is not clear whether the supreme court believed: (1) that the person signing the will must be thought of by himself and testator

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1. 340 Mo. 952, 104 S. W. (2d) 265 (1937), noted (1937) 2 MO. L. REV. 532.

2. See Schierbaum v. Schemme, 157 Mo. 1, 57 S. W. 526 (1900); Bingaman v. Hannah, 270 Mo. 611, 194 S. W. 276 (1917). Our statute does not expressly require a request by testator. MO. REV. STAT. (1929) § 519.

as a "witness"—an extremely narrow view—or (2) that the matter is properly left to the jury upon general instructions as to the subjective intent of the parties—a position which would facilitate the invalidating of wills by juries sympathetic to disinherited heirs and might in some cases permit fraud to be practiced upon testators by persons apparently acting as attesters. However, there are other contributing factors to the decision, for the will contained evidences of being forged in part, and the verdict against the will could also be sustained upon the ground of mental incapacity.[3]

The opinions of the year as a whole indicate an inclination to sustain wills which are contested upon the ground of mental incapacity and undue influence. In four cases,[4] the court reviewed the testimony upon one or both of these issues and held that the showing was insufficient to submit the matter to the jury and accordingly ordered the will upheld. However, in *Baxter v. Bank of Belle*,[5] where proponents did not ask specifically that the question of mental incapacity be withdrawn from the jury and themselves proferred instructions upon this issue, it was held not erroneous to submit the matter to the jury. In the same case it was also held not to be improper for contestant to ask of medical witnesses hypothetical questions fairly embodying the testimony, apparently regardless of whether the court regarded the facts related as sufficient to uphold a finding of incompetency. However, it was held in *Frank v. Greenhall*[6] that, where the court deems the evidence insufficient to leave the issue to the jury and the trial court directed a verdict in favor of the will, it was not error to refuse to submit to physicians hypothetical questions concerning the testator's sanity. Moreover in *Nute v. Fry*,[7] reversing a verdict setting aside the will, it was held that the decision of the court below could not be sustained by the answers to hypothetical questions based upon facts which were not inconsistent with mental capacity to make a will.

The last two cases perhaps involved a problem concerning the function of expert opinion in such cases. Clearly it is improper for the witness to

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3. Baxter v. Bank of Belle, 340 Mo. 952, 104 S. W. (2d) 265 (1937), cited notes 1, *supra*, and 5, *infra*.
4. Gaume v. Gaume, 340 Mo. 758, 102 S. W. (2d) 636 (1937); Frank v. Greenhall, 340 Mo. 1228, 105 S. W. (2d) 929 (1937); Rex v. Masonic Home of Missouri, 341 Mo. 589, 108 S. W. (2d) 72 (1937); Nute v. Fry, 341 Mo. 1138, 111 S. W. (2d) 84 (1937).
5. 340 Mo. 952, 104 S. W. (2d) 265 (1937), cited note 1, *supra*.
6. 340 Mo. 1228, 105 S. W. (2d) 929 (1937), cited note 4, *supra*.
7. 341 Mo. 1138, 111 S. W. (2d) 84 (1937), cited note 4, *supra*.

fix for himself the degree of mentality necessary to make a will. Perhaps the witness' opinion on the general question of sanity or soundness of mind might be said to be immaterial, as it is not restricted to the kind of incompetence which is relevant in a will contest. But when the evidence is fairly reviewed in the hypothetical question and the expert witness is asked his opinion of the testator's mental capacity to make a will according to the proper legal standard, is the court prepared to say that the opinion is of no consequence merely because the court does not believe that the facts related in the question show incapacity to make a will? The question is by no means easy to answer. The fundamental problem seems to be whether the courts should control experts' opinions much as they control the verdicts of juries.[8]

Weaver v. Allison[9] holds that the burden of proof upon the issue of mental capacity is upon proponent; that there must be some evidence of sanity; that the presumption of sanity from proof of execution does not aid the proponent in sustaining this burden; that a judgment sustaining the will in a jury waived case when there is no evidence of sanity must be reversed. This case deals with the question of general capacity or sufficiency of mind. When the issue is merely one of insane delusions, it was held in *Gaume v. Gaume,*[10] following a prior decision, that the burden of proof is upon contestant. While not discussing burden of proof upon the issue of mental capacity, three cases[11] by their result indicate that the verdict can be directed in favor of the party who has the risk of non-persuasion. On the issue of undue influence it was held in *Rex v. Masonic Home of Missouri*[12] that the burden of proof was on contestants and that, even if fiduciary relations are shown, there must be facts and circumstances from

8. Gaume v. Gaume, 340 Mo. 758, 102 S. W. (2d) 636 (1937); Frank v. Greenhall, 340 Mo. 1228, 105 S. W. (2d) 929 (1937); Rex v. Masonic Home of Missouri, 341 Mo. 589, 108 S. W. (2d) 72 (1937); Nute v. Fry, 341 Mo. 1138, 111 S. W. (2d) 84 (1937), cited note 4, *supra.*

9. 340 Mo. 815, 102 S. W. (2d) 884 (1937), cited note 13, *infra.*

10. 340 Mo. 758, 102 S. W. (2d) 636 (1937), cited note 4, *supra.* It is interesting to note that the sole evidence introduced upon the issue of delusions were testator's declarations that he regarded children as detrimental to his interest and that he frequently called his son, the contestant, a son-of-a-bitch—hyphens sic in the opinion. The latter fact was minimized as an evidence of insane delusion by testimony that the testator referred to other persons in like manner and that this practice could be regarded as a family trait, the testator's brothers and father being addicted to like profanity.

11. Frank v. Greenhall, 340 Mo. 1228, 105 S. W. (2d) 929 (1937); Rex v. Masonic Home of Missouri, 341 Mo. 589, 108 S. W. (2d) 72 (1937); Nute v. Fry, 341 Mo. 1138, 111 S. W. (2d) 84 (1937), cited notes, 4, 6, 7, *supra,* and note 12, *infra.*

12. 341 Mo. 589, 108 S. W. (2d) 72 (1937), cited note 4, *supra.*

which undue influence can be fairly and reasonably inferred in order to sustain a verdict against the will.

The legal nature of an action brought to set aside a probated will was discussed in *Weaver v. Allison.*[13] Initiation of the suit to contest was held to wipe out the previous probate and to require proponent to make a *prima facie* case for the will. The same case holds that a will should not be denied probate nor contested upon the ground of internal invalidity and that ordinarily validity, construction, or effect of the instrument will not be determined in these proceedings.

Liggett v. Liggett[14] is a case deciding what is contest of a will within the meaning of a clause forfeiting the devisee's interest on account of his contest. The son of testatrix brought suit in her lifetime claiming (erroneously) that testatrix had merely a life interest in certain land and that one-sixth of the remainder belonged to plaintiff under terms of an ancestor's will. Later, testatrix made a will devising a specific eighty acres of the land to plaintiff. Upon the death of testatrix, plaintiff revived his action against the executor and amended his petition so as to claim only the property specifically devised to him. Subsequently he obtained possession, or attempted to obtain possession, of the eighty acres. The executor contended in his answer that the conduct of the plaintiff constituted a contest of the will so as to work a forfeiture. It was held that neither the original action, nor the amended claim, nor the acts *in pais* constitute a contest of the will.

II. Construction of Wills

Five cases during the year deal with construction of wills. In *Painter v. Herschberger,*[15] the will was held to be unambiguous and accordingly the instructions to the draftsman and other extrinsic evidence were held inadmissible. The will here provided that the residue should be left in trust to pay the income to three grandchildren, and, if any of the latter died leaving no descendants, the share of said deceased should be divided among the survivors or their heirs, with the exception that in the event of the death of the grandson J. W. leaving no issue, his share was to go to plaintiff, a great grandchild. J. W. died after the testator's death. It was held that plaintiff was not entitled to take under the will, which was construed to refer to the death of J. W. prior to testator's death as J. W. was the pri-

13. 340 Mo. 815, 102 S. W. (2d) 884 (1937).
14. 341 Mo. 213, 108 S. W. (2d) 129 (1937).
15. 340 Mo. 347, 100 S. W. (2d) 532 (1937).

mary beneficiary.[16] The interest of J. W. was held to vest in him upon his surviving the testator, regardless of the fact that the will gave power of sale to the trustees.

In *Garrett v. Damron*,[17] testator's will left a life interest in his farm to his widow and then provided that upon the latter's death the land should revert to his children "or" to the lawful heirs of each, naming the children. One of these children, the wife of plaintiff, died childless after testator's death. Subsequently testator's widow died. In a partition sale plaintiff claimed half of his wife's share as her widower. It was held that the interest of the testator's daughter was vested and not contingent upon her surviving the life tenant. The presumption of vesting was applied and the word "or" was construed to mean "and" and the following words to be expressions of limitation and not words of purchase.

McMurry v. McMurry[18] was a case in which the testator left all his property to his wife "making her absolute owner thereof, her lifetime, she to be her own executor and no bond to be required." In the next paragraph it was provided that upon the widow's death $200 was to be paid one son and the remainder divided equally among four other children. The widow did not dispose of the property during her lifetime but attempted to dispose of it by will. It was held that the husband's will created a life estate in his wife with remainder to the children but with power of disposal in the wife, which would create a fee simple in her if she exercised it. As she did not alienate the property in her lifetime the remainder to the children was deemed unaffected by her will.

In *Humphreys v. Welling*,[19] the testatrix devised the residue of her estate, consisting principally of land, to her grandson in trust until he should reach the age of thirty; provided that, if he should, upon attaining the age of twenty-five, obtain an order of the probate judge to the effect that the latter was convinced of his industry and frugality, the property should be turned over to him then. The will then provided that the grandson should have no power to alienate his interest until he attained the age of thirty or obtained the property under the order of the probate court, as above set forth. It was further provided that if the grandson died without children the property should go to the heirs of the testatrix and not to

16. See note 19, *infra*.
17. 110 S. W. (2d) 1112 (Mo. 1937), cited note 22, *infra*.
18. 340 Mo. 1094, 104 S. W. (2d) 345 (1937).
19. 341 Mo. 1198, 111 S. W. (2d) 123 (1937).

the grandson's heirs. After the grandson had become twenty-five, he applied to the probate judge for an order turning over the property but no action was taken upon this request. He then deeded the property to his mother and afterward died intestate, unmarried, childless and under thirty. The heirs of the testatrix brought suit to quiet title to the land and cancel the deed by the grandson to his mother. It was held, affirming judgment for plaintiffs, that the reference to the grandson's death without children did not refer merely to his death before that of the testatrix;[20] that the plaintiffs obtained an executory devise which might follow a fee; that the grandson did not obtain the power of alienation until he received the property upon attaining the age of thirty or through order of the probate court, and that hence his deed to his mother passed no interest in the land.

The interesting problem of whether a testamentary reference to a debt owed by the testator may be regarded as a legacy of the debt was decided in *Rowe v. Strother*.[21] Here testatrix left $1,000 to the plaintiff stating that this was done for the reason that the latter had been her physician for years and testatrix had not paid him what his services were worth. The will further provided that in addition to said $1000 the testatrix desired her executor to pay plaintiff a reasonable sum for his services. Plaintiff filed no claim for his unpaid account but sued the executor upon the theory that this provision of the will constituted a legacy of the reasonable value of the services. It was held that this language was too indefinite to constitute a legacy and that the intention was merely to make clear that the $1000 was not given in lieu of the amount owing for services. As the plaintiff's claim was barred by the nonclaim statute, he was entitled to no more than $1000.

III. Election by the Surviving Spouse

There are four cases dealing with matters of election by the surviving spouse as to interests to be taken in the estate of the deceased husband and wife. In the already mentioned case of *Garrett v. Damron*,[22] the decedent childless wife owned a remainder subject to the life estate of her mother. Upon the death of the latter after the wife's death it was held that it was

20. Painter v. Herschberger, 340 Mo. 347, 100 S. W. (2d) 532 (1937), cited note 15, *supra*.
21. 341 Mo. 1149, 111 S. W. (2d) 93 (1937).
22. 110 S. W. (2d) 1112 (Mo. 1937), cited note 17, *supra*.

unnecessary for the surviving husband to elect between common law dower and the statutory half subject to debts, as the husband had no dower rights in the wife's remainder.

Two cases deal with the formalities required for an election between common law dower and the statutory share. The statute[23] requires a filing of a declaration to take the statutory share in both the probate and recorder's offices within one year, or the surviving spouse will be deemed to take common law dower. In both of these cases the written declaration was properly filed in the probate office. In *Schuster v. Schuster*,[24] a copy of the declaration filed in the probate office was certified by the clerk of the probate court and the certified copy filed in the probate office. This was held sufficient, the court also apparently approving the practice of filing duplicate originals in the two offices, or a filing and recording in one office followed by a withdrawal therefrom and a refiling of the same in the other office. *Ferguson v. Long*[25] involves primarily a question of fact as to whether the declaration had been filed in the recorder's office. The widow claims to have left the declaration on the table of the recorder's office, calling it to the attention of the person in charge when the latter was engaged in other business. Upon review of the testimony in a partition action, it was held by the supreme court that the evidence did not sustain the widow's claim.

State v. Hostetter[26] is a case refusing to quash upon *certiorari* the opinion of the St. Louis Court of Appeals in In re *Flynn's Estate*.[27] Relator claimed that the *Flynn* case was in conflict with the decisions of the supreme court. In the *Flynn* case it appeared that the will of testatrix was complicated, the widower ignorant of his rights, and the executor-trustee interested in the estate adversely to the widower. Under these circumstances it was held that there was no election to take under the will, by reason of the widower's acceptance of small amounts of income from the executor-trustee when the widower renounced the will within ten months after the wife's death and before anyone could be injured by the acceptance. In refusing to quash the opinion in the *Flynn* case the supreme court found that it was not inconsistent with its own decisions.

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23. Mo. Rev. Stat. (1929) § 329.
24. 340 Mo. 1110, 104 S. W. (2d) 353 (1937).
25. 341 Mo. 182, 107 S. W. (2d) 7 (1937).
26. 340 Mo. 965, 104 S. W. (2d) 303 (1937).
27. 95 S. W. (2d) 1208 (Mo. App. 1936).

IV. Contracts to Devise

Three opinions involved so-called actions for specific performance of decedent's promise to will property to plaintiff. In all of these cases the supreme court's decision was in favor of the plaintiff. In *Finn v. Barnes*[28] the plaintiff deeded land to the decedent upon oral agreement that plaintiff was to perform household services for the deceased and that the parties were to execute reciprocal wills. These wills were executed but later decedent made another will which was probated. The plaintiff brought an action for specific performance of the promise and to impress a trust against the beneficiaries under the later will. The trial court's decision in favor of the plaintiff was affirmed by the supreme court, which declared that the Statute of Frauds would not prevent the enforcement of a fair and equitable contract, when to hold otherwise would work a fraud, and compensation could not be estimated in money.

There is a similar holding in *Roth v. Roth,*[29] wherein consideration for decedent's promise was found in plaintiffs' forbearance to sue to set aside deeds given by their predeceased father to his second wife, the decedent. It was also held that the Statute of Limitations did not run until decedent's death as it could not be determined before whether she had breached her agreement by a devise to others. In this case, however, the property was held subject to a lien in favor of decedent's heirs and devisees in the amount that mortgages upon the land in question were discharged from funds furnished by the decedent in her lifetime.

In *Schweitzer v. Patton,*[30] plaintiff was a married woman separated from her husband. She inserted an advertisement in a German newspaper published in Chicago where she then resided, announcing that she sought someone who would share a home and the expense thereof with the intent of marriage. Decedent, a resident of Missouri, was a cripple and badly in need of someone to care for his household. He answered plaintiff's notice, writing that if she would come and make her home with him she would take a half interest in every respect. He also stated incorrectly that he was three feet three inches tall. This latter information did not deter the plaintiff, however, and she came and kept house for decedent until his death. There was testimony that she faithfully performed the household

28. 340 Mo. 445, 101 S. W. (2d) 718 (1937).
29. 340 Mo. 1043, 104 S. W. (2d) 314 (1937).
30. 116 S. W. (2d) 39 (Mo. 1937).

duties and that decedent had told others that she would receive all, or half, of his property. Apparently he did not live more than a year or so after she came to Missouri. The trial court denied relief in plaintiff's specific performance suit but the supreme court held that she was entitled to half the estate, regarding the decedent's letter as embodying the contract. The court pointed out that decedent might have lived many years and that it was not inequitable that the plaintiff, after full performance, should have the advantage of her bargain.

V. Administration of Estates

There is a dearth of cases dealing with the details of administration of decedent's estates. Only one opinion can be claimed to fall within this field. In *Smith v. St. Louis Union Trust Co.*,[31] the plaintiff residuary legatee sued the executor for waste in failing to sell securities in the estate. The action was brought in circuit court, there being no prior determination by the probate court of the fact or amount of the alleged waste. The supreme court affirmed the decision of the court below in holding that the probate court had exclusive jurisdiction of this matter, where, as here, the probate court had the power and machinery to make the necessary decisions. Appellant contended that this was analogous to an action upon the personal representative's bond and that such actions could be brought in circuit court by the residuary legatee before settlement of the estate in probate court if all debts were paid. The court refused to accept the analogy and pointed out that the trust company under the law gave no bond and that its deposit of securities with the state was not the equivalent of a bond for the purpose in hand.

VI. Devices to Avoid Administration

There are various devices to avoid the necessity of administration of the property owners' estates. One of these is the joint estate or tenancy by the entireties. Upon the death of one tenant the property passes to the surviving tenant by the terms of the grant without necessity for judicial administration to perfect the transfer. Convenient as the estate may be in the ordinary case, its use may give rise to litigation wherein fraud is claimed. Thus in *Milligan v. Bing*,[32] the wife's individual money was

31. 340 Mo. 979, 104 S. W. (2d) 341 (1937).
32. 341 Mo. 648, 108 S. W. (2d) 108 (1937).

used with her consent for the purchase of land, title to which was taken in the name of the husband and wife as tenants by the entireties. Upon the death of the wife, the children sued the husband as administrator of the wife and individually to impress a trust. The supreme court held that the evidence showed that the arrangement was what the wife desired and that the statute[33] which declared that the husband should not take his wife's personalty without her written assent does not apply where investment was really by the wife and the husband's activities were merely mechanical to carry out her desires.

That the estate by the entireties is used at times in an attempt to defraud creditors is illustrated in *Farmers & Traders Bank v. Kendrick.*[34] There the decedent, being indebted to plaintiff and others, had his realty transferred to himself and wife as tenants by the entireties. After his death, the wife obtained an order of the probate court refusing letters of administration upon the representation that decedent had left only $550. Plaintiff commenced suit against the wife to set aside the transfers which created the tenancy by the entireties. The defendant got judgment below claiming that the transfer was in satisfaction of a debt owing by the decedent to her. In reversing the case, the supreme court found that no *bona fide* debt existed in defendant's favor and that under the dead man's statute[35] she could not testify as to the creation of the obligation. Furthermore, it was held that there was no necessity for the plaintiff to obtain a judgment against decedent or his estate before bringing the present action, as the debt to plaintiff was admitted by defendant's answer. In addition, it was declared to be unnecessary for plaintiff to move to set aside the order refusing letters as the decedent had no other assets and his estate was admittedly insolvent.

The use of life insurance to pass property in the form of money without administration thereon is illustrated in *Tootle-Lacy National Bank v. Rollier.*[36] There certain policies were, by their terms, made payable to the trustees under testator's will, unless certain circumstances occurred, in which case they were payable to deceased's estate. The contingencies did not occur so that, of course, the amount of the policy passed directly to the

33. Mo. Rev. Stat. (1929) § 3003.
34. 341 Mo. 571, 108 S. W. (2d) 62 (1937).
35. Mo. Rev. Stat. (1929) § 1723.
36. 341 Mo. 1029, 111 S. W. (2d) 12 (1937).

trustees and was not regarded as part of the estate to be administered in probate court.

VII. Survival and Revival of Actions

Phillips v. Cope[37] held that, where one executes a deed including therein through mutual mistake certain premises not intended to be conveyed, his heirs upon his death may maintain suit for reformation of the deed in the absence of intervening equities of third parties. *De Hatre v. Ruenpohl*[38] was a suit to enforce a constructive trust upon land, wherein the decision below was for the defendant. After appeal by the plaintiff the action was revived in the name of plaintiff's administrator with defendant's consent.[39] The supreme court held that it had no jurisdiction over the appeal as it was not revived in the name of the heirs. It being too late to do so under the statute,[40] the case was transferred to the court of appeals. Up to this writing no disposition has been reported of the latter court's determination.

The cases discussed above—numbering slightly more than a score—constitute all the 1937 supreme court cases dealing with any substantial phase of decedents' estates which could be found by diligent search. Most of them were doubtless important to the parties but few are of much jurisprudential value. Indeed, most of the new and interesting points decided—particularly in the field of administration—were contained in the opinions of the courts of appeals.[41] It seems unfortunate that, due to

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37. 111 S. W. (2d) 81 (Mo. 1937).
38. 341 Mo. 749, 108 S. W. (2d) 357 (1937).
39. Two decedents' estates cases involve the jurisdictional amount of the supreme court, both being decided adverse to the court's jurisdiction. In Grant v. Bremen Bank & Trust Co., 108 S. W. (2d) 347 (Mo. 1937), there was a dispute as to whether the will gave the legatee an annuity of $50 or $150 per month. In the absence of a showing as to the legatee's age it was held that it did not appear that more than $7500 was in controversy. In Nies v. Stone, 108 S. W. (2d) 349 (Mo. 1937), plaintiff sued for half the net estate as decedent's widow. The gross estate was appraised at $25,836.97 and the semi-annual account showed claims and expenses in the amount of $6,783.33 had been allowed. While half of the balance exceeded $7,500 by more than $2,000 the court declined jurisdiction because of uncertainty of the factors of the appraisal and further claims and expenses left the amount in dispute in the realm of conjecture.
40. Mo. Rev. Stat. (1929) § 896.
41. For example see O'Connell v. Dockery, 102 S. W. (2d) 748 (Mo. App. 1937); Briscoe v. Merchants and Miners Bank, 102 S. W. (2d) 751 (Mo. App. 1937); Schaefer v. Magel's Estate, 108 S. W. (2d) 608 (Mo. App. 1937), noted (1938) 3 Mo. L. Rev. 66; McCrary v. Michael, 109 S. W. (2d) 50 (Mo. App. 1937), noted (1938) 3 Mo. L. Rev. 330; Studer v. Harlan, 109 S. W. (2d)

jurisdictional limitations, so many important questions are finally determined by tribunals of less authority and prestige than the supreme court. Is this not an argument for the unification of our appellate tribunals according to the constitutional amendment recently proposed by the Judicial Council of Missouri, or some similar plan?

WORKMEN'S COMPENSATION

JAMES A. POTTER*

I. JURISDICTION[1]

The Missouri Supreme Court, being a court of limited and defined jurisdiction, will refuse to hear a case unless its jurisdiction is clearly apparent. Furthermore, it will consider the question of its own jurisdiction *sua sponte,* even when it is not raised by counsel.

In the two cases of *Hardt v. City Ice and Fuel Co.*[2] and *Evans v. Chevrolet Motor Co.*,[3] the court had under consideration appeals from awards of compensation for permanent disability. In each case the award provided for a definite number of weeks compensation at a certain rate, which in neither case equalled $7500.00, and a smaller sum of compensation per week for life. The court denied jurisdiction in each case on the ground that the jurisdictional amount was not involved:

> ". . . jurisdiction of this court . . . attaches when, and only when, the record of the trial court affirmatively shows that there is involved in the controversy, independent of all contingencies, an amount exceeding $7,500, exclusive of costs."[4]

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687 (Mo. App. 1937); Kemp v. Hutchinson, 110 S. W. (2d) 1126 (Mo. App. 1937), noted (1938) 3 Mo. L. REV. 328; Rohde v. Metropolitan Life Insurance Co., 111 S. W. (2d) 1006 (Mo. App. 1937).

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1. Of the eleven cases decided in which questions concerning the Workmen's Compensation Law were involved, the grounds for jurisdiction were as follows:
   Over $7500.00 involved——6
   Certiorari to quash opinion of Court of Appeals——2
   Certified to Supreme Court by Court of Appeals——1
   Jurisdiction denied by Supreme Court——2
2. 340 Mo. 721, 102 S. W. (2d) 592 (1937).
3. 102 S. W. (2d) 594 (Mo. 1937).
4. Citing Platies v. Theodorow Bakery Co., 334 Mo. 508, 66 S. W. (2d) 147 (1933), where a distinction is made between this type of award and a death benefit award. The court in the instant case points out that its jurisdiction must appear at the time the appeal is taken, and nothing that occurs subsequently may be invoked to confer jurisdiction.

The court refused to consider the commuted value of the award as a basis for jurisdiction on the ground that the compensation commission is the only body that can allow a settlement on commuted value, and inasmuch as it was not done in either case, the court could not consider such value in determining its jurisdiction.[5]

II. Particular Cases

In the main those cases involving questions of workmen's compensation law were decided by applying established rules and principles thereto.[6] There were, however, a number of cases which deserve more than passing attention.

Hanson v. Norton[7] was a malpractice suit brought by an employee against the physician who had treated him for injuries received in his employment, and at the request of plaintiff's employer. It appeared that plaintiff had made claim for compensation and was awarded compensation for the full extent of his disability, the final award being made after the defendant physician had completed his treatment. Plaintiff in this suit took the position that he was not compensated in the proceeding before the compensation commission for pain and suffering and mental anguish resulting directly from defendant's negligent treatment. Defendant contended that the injuries for which plaintiff was seeking damages were the same ones for which he had received compensation, and that by receiving the compensation, plaintiff had received full and complete satisfaction for said injuries.

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5. The court does not consider the question of the value of the award based on the life expectancy of the disabled employee. This might be a basis for determining the jurisdictional amount, as it is used in death cases to determine damages.

6. (a) Award of compensation commission has force and effect of verdict of jury and if supported by substantial competent evidence is conclusive on questions of fact. Edwards v. Ethyl Gasoline Corp., 112 S. W. (2d) 555 (Mo. 1937); Edwards v. Al Fresco Adv. Co., 340 Mo. 342, 100 S. W. (2d) 513 (1937); Jenneman v. Consolidated Underwriters, 340 Mo. 273, 100 S. W. (2d) 458 (1937).

(b) Motion for new trial is not necessary to an appeal from judgment of a circuit court affirming or reversing award of Workmen's Compensation Comsion. Jenneman v. Consolidated Underwriters, 340 Mo. 273, 100 S. W. (2d) 458 (1937).

(c) Burden is on claimant to prove that the accident complained of arose out of and in the course of the employment. Miller v. Ralston Purina Co., 109 S. W. (2d) 866 (Mo. 1937).

(d) A court reviewing an award of the compensation commission is not authorized under the law to make its own finding and peremptorily direct an award. State *ex rel.* Randall v. Shain, 108 S. W. (2d) 122 (Mo. 1937).

7. 340 Mo. 1012, 103 S. W. (2d) 1 (1937).

The court, following *Hughes v. Maryland Casualty Co.*,[8] held that the malpractice of the treating physician is a proximate result of the primary injury, and if the injury is aggravated by negligence of the physician, compensation for such aggravation must be procured in the proceedings provided by the act.[9] The court excludes the physician from the class of third parties against whom the employee may have an action under Section 3309;[10] the court said that a third party under this section against whom an action may be maintained is the "*person* who *committed,* or who was responsible for the commission of the *original* act, resulting in the injury for which compensation has been awarded. . . ."[11]

Goldschmidt v. Pevely Dairy Co.[12] was an action by the widow, minor children, employer and insurer against third parties to recover for the death of an employee. The widow had failed to file suit within six months, and the minor children had failed to file within one year after the death of the employee. The employer took the position that it had five years from the date of the award of the compensation commission, at which time a cause of action accrued to it. In overruling this contention the court held that Section 3309[13] creates no new cause of action in the employer, but merely subrogates to the employer the rights, if any, which the dependents may have against a third party.

In *Miller v. Ralston Purina Co.*,[14] the court evaded the real question involved, namely, whether parrot fever is excluded by Section 3305,[15] and decided the case on a question of failure of proof.

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8. 229 Mo. App. 472, 76 S. W. (2d) 1101, 1102 (1934).

9. Hughes v. Maryland Casualty Co. may be distinguished. This was a suit against the employer's insurer for the damage resulting from the malpractice of physician selected by insurer. After citing cases holding that employee must recover in the compensation proceeding for aggravation resulting from said malpractice, the court said, "Many of the cases just cited hold that suit cannot be maintained against the physician, even, but we are not concerned with a suit of that kind, the case now before us being against the insurance company, alone." In the instant case the court intimates that if compensation is not awarded for aggravation, then such a suit might be maintained.

10. "Where a third person is liable to the employe or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employe or to the dependents against such third person. . . ."

11. The common law rule referred to by the court offers a logical basis for the court's decision. "When an injured party has received full satisfaction for his injury, from one wrongdoer, whether the injury was caused by one or more, each of whom may be severally liable, he is barred from further recovery from the other tort feasors."

12. 111 S. W. (2d) 1 (Mo. 1937).

13. See note 10, *supra.*

14. 109 S. W. (2d) 866 (Mo. 1937).

15. "The said terms ('injury' and 'personal injuries') shall in no case be construed to include occupational disease in any form, nor shall they be

In *State* ex rel. *Randall v. Shain,*[16] an award was made by one commissioner after hearing. An application for review was filed, as provided, and another hearing was held before the same one commissioner, at which time additional evidence was introduced by employer. The full commission then made its final award denying compensation. The circuit court sustained this final award, but on appeal the Kansas City Court of Appeals reversed the judgment of the circuit court and directed it to enter judgment affirming the original award of the one commissioner.

Upon review the supreme court reversed the Kansas City Court of Appeals on the ground its decision conflicted with a previous ruling in the case of *Waterman v. Chicago Bridge & Iron Works.*[17] The basis of the decision of the Kansas City Court of Appeals was that the evidence submitted on rehearing was not competent because available at the original hearing, and the full commission could not consider it. On this point the supreme court said:

> "Even if the evidence was available for the hearing held on January 6, the commission on review, if they deemed it advisable, had the right to hear the evidence."[18]

The appellant raised the further objection that on the hearing on review only one commissioner was present, and thereafter the final award was made by the full commission. The court held appellant had waived his right to have the evidence heard by all the commissioners by not requesting all to be present at the hearing. The court then goes on to say:

> "Let it be understood, however, that we are not holding that it is mandatory upon the compensation commission for all members thereof to be personally present at hearings on review even when requested. We are not ruling upon that point because it is not before us for decision."[19]

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construed to include any contagious or infectious disease contracted during the course of the employment. . . ."

16. 108 S. W. (2d) 122 (Mo. 1937).

17. 328 Mo. 688, 41 S. W. (2d) 575 (1931).

18. The court also said that under Section 3341 it was discretionary with the commission whether they would review only the evidence adduced at the original hearing and make their final award from that, or hear further evidence.

19. It should not be necessary for the full commission to be present at hearings held upon an application for review. In those cases in which the full commission reviews an award without further hearing, it makes its award from the record prepared before a referee or one commissioner. It would not be illogical to say that, if further evidence were presented after an application for review were filed, one commissioner could hear the evidence and the full commission make its award from the record. Such practice should fall within the discretion allowed to the commission under Section 3341.

Knaup v. Western Coal & Mining Co.[20] was a personal injury action brought in Missouri for injuries sustained in Kansas. The answer set up the Kansas Compensation Law as a defense. The defense turned upon whether the injuries sustained were the result of an accident within the meaning of the Kansas act. The supreme court decided the question by applying the interpretation of the Kansas act as laid down in the decisions of the Kansas courts. Those decisions held that the inhalation of poisonous gas from day to day finally resulting in injury is not an injury by "accident" within the meaning of the act. A sudden escape of poisonous gas causing injury is necessary to bring the case within the meaning of the term.[21]

In *State* ex rel. *O'Dell Construction Co. v. Hostetter*,[22] the court holds that the defense of an act of God may apply to a compensation case, approving the holding of the St. Louis Court of Appeals, as follows:

> ". . . if the death of the deceased was attributable solely to the injurious effects of the forces of nature unmixed with any peculiar risk to which the employment gave rise, then there could be no liability to the dependent for compensation, but that if the employment of the deceased did subject him to a risk and hazard from such forces of nature over and above that to which the general public was exposed, or, to put it another way, if the act of God concurred and collaborated with conditions peculiarly attendant upon the employment to bring about the death, then the dependent is clearly entitled to recover the death benefit as against the defense here interposed."[23]

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20. 114 S. W. (2d) 969 (Mo. 1937).

21. This ruling seems to be contrary to the view held in Missouri. In Lovell v. Williams Bros., 50 S. W. (2d) 710 (Mo. App. 1932), an employee, digging a ditch, contracted a blister on his hand after several days. It was held to be an accident within the act. In Downey v. Kansas City Gas Co., 338 Mo. 803, 92 S. W. (2d) 580 (1936), an injury to employee's eye caused by soot rubbed therein over a period of several weeks by employee's hand covered with soot from chimneys where employee was working, was held to be an injury resulting from an accident within the meaning of the act. In Rinehart v. F. M. Stamper Co., 227 Mo. App. 653, 55 S. W. (2d) 729 (1932), employee was compelled, as a part of his duties, to go into a refrigerator while perspiring from heavy exertions, as a result of which he contracted pneumonia the same day or the next day. The court said that it would have been competent for the compensation commission to have found employee had sustained an accidental injury within the meaning of the act.

In the instant case the supreme court said that in none of the above three cases was the usual meaning of the term "accident" involved, but its meaning as defined in Section 3305 of the Missouri act. The Kansas act does not include a definition of the term "accident", as in the Missouri act.

22. 340 Mo. 1155, 104 S. W. (2d) 671 (1937).

23. In this case death was caused by lightning striking a barn in which deceased, with others, had taken shelter temporarily during a storm. The barn was isolated and in such a location that expert opinion was to the effect that it would tend to attract lightning. There can be no dispute with the view that seeking shelter from a storm does not break the continuity of the employ-

III. Occupational Disease

The case of *Soukop v. Employers' Liability Assurance Corp.*[24] deserves mention. Plaintiff, employee, obtained judgment by default against his employer for lead poisoning by reason of the negligence of the employer in failing to comply with the requirements of Sections 13234 and 13252 to 13255, Missouri Revised Statutes 1929, pertaining to the health and safety of employees. This case was a proceeding in garnishment against the employer's insurer. At the time there was no occupational disease act in Missouri. The question was whether employee's condition was caused by "accident" within the meaning of the term as used in two policies of insurance covering employer.[25] The question to be determined by the court was whether these definitions of terms applied to the coverage of clause 1(b) of the policy which provided:

> "To indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada. . . ."

The court held that the repeated use of the term "(personal) injuries" in the policies presents an ambiguity which requires a construction of the policies. The court points out that the term is used in a very broad sense in the preliminary paragraph of the policy, in the limited sense of the compensation law in paragraph 1(a) and in paragraph 1(b) in a broader sense than in 1(a). The court proceeds to consider some definitions of personal injuries and then concludes that "accident," as applied to respondent's injuries, should be construed in the broader sense, as correlative to "personal injuries" in the broad sense of bodily injuries.[26]

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ment. But the court's holding that deceased's employment did expose him excessively to lightning seems a bit strained.

24. 108 S. W. (2d) 86 (Mo. 1937), 112 A. L. R. 149 (1938).

25. Insurer's position was that "accident" as used in its policies meant accident as defined in the Workmen's Compensation Act, [Mo. Rev. Stat. (1929) § 3305], namely, "an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury," and that this statutory definition is identical to the common law meaning of the term. But in its opinion the court quotes further from that section of the law with reference to the meaning of "injury," to-wit: "The term 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom."

26. Compare result in Blanke-Baer Extract and Preserving Co. v. Ocean Accident and Guarantee Corp., 96 S. W. (2d) 648 (Mo. App. 1936), 108 S. W. (2d) 17 (Mo. 1937), *cert. quashed*, where it was held that tuberculosis resulting from lowering of employee's resistance due to frequent colds contracted through

The insurer contended that clause seven of the policies imposed limitations on clause 1(b). In clause seven the word "accident" occurs for the first time:

> "Seven. This agreement shall apply only to such injuries so sustained by reason of accidents occurring during the policy period limited and defined as such in item 2 of said declarations."

In overruling this contention the court held that this clause is applicable to and restrictive of 1(b) in so far only as it fixes the limits of the policy period.

A dissent was entered on the ground that clause seven clearly limited the liability of the insurer to injuries caused by accident, and that it did not cover occupational diseases. The dissent takes the view that there is no ambiguity between clause seven and 1(a) or 1(b), but that giving two meanings to "accident" by the majority creates the ambiguity.[27]

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wearing wet clothing in the course of her employment, was held to be a "personal injury" within the coverage clause of a similar liability policy. The court there held that clause 1(b) did not exclude diseases, and that clause 7, indifferently and obscurely introduced, was intended to limit and define the injuries insured with respect to the policy period rather than to characterize the injuries insured. See also Columbia Paper Stock Co. v. Fidelity & Casualty Co., 104 Mo. App. 157, 78 S. W. 320 (1904). See annotation in (1938) 112 A. L. R. 158, for cases holding to the contrary view.

27. The dissent agrees that if an ambiguity exists, the court must construe the policy most favorably to the insured. But the dissent contends that the term "accident" is used only once, and hence can have only one meaning, which must have been the statutory meaning when usd in connection with 1(a). The result reached by the majority seems proper and more in accord with the intent of the parties to the contract. For if the reasoning of the dissent is followed, clause 1(b) is merely surplusage and adds nothing to the coverage afforded by 1(a). Such was not the intent of the parties. It seems clear that clause 1(a) was intended to take care of the liability of the employer under the Compensation Act, and clause 1(b) was intended to cover all other liability imposed upon the employer for injuries to employees.