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Missouri Law Review

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THE WORK OF THE MISSOURI SUPREME COURT FOR THE YEAR 1936

This issue of the *Missouti Law Review* is devoted to a study of the work of the Missouri Supreme Court for the year 1936. This study is designed to follow the progress of the law in Missouri as found in the decisions by the highest appellate tribunal. It is true, however, that the full development of the law during any period cannot be shown without including the work of the Missouri Courts of Appeals. Various members of the legal profession have collaborated in this study. It is hoped that this effort will prove to be of sufficient value so that this type of study will become an annual part of this publication. In this manner the progress of the law may be pointed out to the members of the legal profession of Missouri in a way that the reading of isolated cases during the year cannot do. It is quite obvious that there are limitations to a survey of this nature. It is, of course, impossible to cover every topic in the law, hence certain fields have been selected.

I

STATISTICAL SURVEY

The following statistical tables convey their own significance. Table I shows the volume of work which has been presented to the court during 1935 and 1936. It shows also the disposition of the cases. It is to be noticed that there was a considerable reduction in the number of cases filed in 1936, as compared to 1935. However, the number of cases disposed of by opinions was greater in 1936 than in 1935.[1]

1. There is a variance between the total number of cases disposed of by opinions in Table I and the number in Table II. This may be explained in that the former was taken from the docket, while the latter was taken from the reports. Certain opinions have disposed of more than one docketed case. In some instances a case was decided in 1935 and rehearing denied in 1936. In Table II, the date of the decision was taken.

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TABLE I[2]

SUPREME COURT DOCKET

January 1, 1935, to December 31, 1936

Number of cases on docket January 1, 1937

Civil	*Writs*	*Criminal*	*Total*
270	10	8	288

Number of cases filed 1935-1936

	Civil	*Writs*	*Criminal*	*Total*
1935	473	216	98	787
1936	342	185	96	623
	815	401	194	1410

Number of cases disposed of by opinions

	Civil	*Criminal*	*Total*
1935	256	75	331
1936	296	73	369
	552	148	700

Number of cases disposed of by motions, etc.

	Civil	*Writs*	*Criminal*	*Total*
1935	302	147	35	484
1936	276	132	20	428
	578	279	55	912

Number of cases under submission

Civil	*Criminal*	*Total*
69	8	77

Number of cases on docket January 1, 1935	490	
Number of cases filed 1935-1936	1410	1900
Number of cases disposed of 1935-1936	1612	1612
		288

2. Table I was prepared by the clerk of the court. Tables II and III were prepared by Mr. Theodore Beezley, a third year student in the School of Law.

Table II shows the disposition of the litigation. A comparison of affirmances with reversals carries interesting implications. The number of reversals clearly indicates the need for and value of an appellate tribunal for the protection of litigants.

TABLE II[3]

DISPOSITION OF LITIGATION

Judgment affirmed	140
Affirmed on condition (enter remittitur)	7
Awarding of new trial by trial court affirmed	2
Affirmed and remanded	4
Reversed and remanded	87
Judgment reversed	14
Modified or corrected and as modified or corrected affirmed	4
Affirmed in part and reversed in part	5
Affirmed in part and in part reversed and remanded	5
Writ granted	5
Writ denied	19
Rule absolute	8
Rule discharged	2
Case transferred to court of appeals	18
Record quashed	4
Appeal dismissed	7

Table III gives a topical analysis of the decisions for the year 1936. It is impossible that such a table will more then reflect the opinion of the individual who has attempted to classify the cases under one topic. Seldom do cases fall only in one field of the law. In preparing this table each case has been listed under the principal issue with which it dealt. In many instances this necessarily had to be arbitrary. However, in spite of the shortcomings of such an attempted analysis, the table does show the fields of the law to which the litigation during this period pertained.

TABLE III[4]

TOPICAL ANALYSIS OF DECISIONS

Administrative Law	6
Agency	1

3. *Ibid.*
4. *Ibid.*

Appeal and Error	19
Bills and Notes	2
Constitutional Law	16
Contracts	7
Corporations	2
Criminal Law	58
Creditors Rights	2
Damages	6
Equity	18
Evidence	11
Habes Corpus Proceedings	1
Insurance	7
Mandamus Proceedings	8
Master and Servant	15
Mortgages	6
Municipal Corporations	2
Negligence (Automobiles)	17
Other Negligence	24
Partnership	1
Pleading	5
Practice and Procedure	14
Quo Warranto Proceedings	2
Real Property	15
Receivership	5
Statutory Construction	5
Suretyship and Guaranty	1
Taxation	5
Torts (other than negligence)	7
Trusts	9
Wills	27
Prohibition Proceedings	5

The average number of opinions written by members of the Missouri Supreme Court during this period is eighteen. The average number of opinions written by the Supreme Court Commissioners is thirty-one. The scarcity of dissents is quite remarkable. During the year under review there were only four dissents and only two dissenting opinions written.

II

ADMINISTRATIVE LAW

H. L. LISLE*

In view of the comparatively recent development of this field of law and the resulting lack of formal organization of the topics involved, the writer will briefly state the method of dealing with the cases.

Since there is no digest heading which includes all the cases on the subject, it has been necessary to search all the reported cases to ascertain when law relating to this new development in the Anglo-American law system appeared. Because of the specialized nature and diversity of function of the administrative agencies it seems desirable to organize the cases in respect to agencies with which they deal, rather than to lump together decisions dealing with a similar function or power being exercised by several agencies. Finally since this does not purport to be an exhaustive study of administrative law as applied in Missouri, but rather a review of the court's work in the field for the year, not all of the Missouri commissions and administrative agencies will be referred to.

Submitting in advance of consideration of the cases a suggested improvement in the field, it would seem that clarity and understanding might be facilitated by the adoption of a uniform reporter system for the rules and orders of all such agencies and the frequent reference to such reports by the courts in their opinions dealing with the functions of the agencies.

I. PUBLIC SERVICE COMMISSION OF MISSOURI

(A) *Jurisdiction of the Supreme Court on Appeal From Orders of the Public Service Commission*

The following two cases have to do with the jurisdiction of the supreme court on appeal from the circuit courts. In both cases the court denied jurisdiction to hear such appeals but on different grounds. The cases have to do with the procedural aspect rather than the substantive law and demonstrate that the court requires adherence to the statutory and constitutional procedural requirements.

In *State* ex rel. *to Use of Alton R. R. v. Public Service Commission*,[1] there was an appeal from a judgment of the circuit court of Cole county

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1. 100 S. W. (2d) 474 (Mo. 1936).

affirming an order of the Public Service Commission fixing maximum rates for transportation of coal in car load lots between points in Missouri where the distance is 95 miles or less. The appellants contend there is a constitutional question properly lodged in the case and thus that this court has jurisdiction. Section 5233 of Missouri Revised Statutes 1929 provides that the defeated party before the commission must file with the commission a motion for rehearing as a prerequisite to the removal of the cause from the commission to the circuit court by certiorari. This same section provides that the application for rehearing filed with the commission "shall set forth specifically the ground or grounds on which the appellant considers said order or decision to be unlawful, unjust or unreasonable. No corporation or person or public utility shall in any court urge or rely on any ground not so set forth in said application." The cause was transferred to the Kansas City Court of Appeals. Unless there is a constitutional question involved the supreme court has no jurisdiction to hear this appeal,[2] and since the alleged constitutional question was not preserved in the application for rehearing but first appears in the application for certiorari to remove the case to the circuit court, the appellant has not complied with the statutory requirements and it cannot be considered by the court.[3]

State ex rel. *Pitcairn v. Public Service Commission*[4] was an appeal by the relators from a judgment of the circuit court of Cole county affirming an order of the Public Service Commission granting a certificate of convenience and necessity to the operator of a bus line. The relator assigned an error that the order of the commission was unreasonable, unjust, and unlawful and that the circuit court erred in affirming it because (1) the applicant was not required to comply with Section 5268 (as amended by Laws of Missouri 1931, p. 307, Laws of Missouri 1935, p. 323); (2) there was no proof of convenience and necessity; (3) the order enlarged and expanded the scope and application of the 1931 bus and truck law[5] contrary to the intention of the legislature. This appeal was sent to the supreme court because Section

2. State *ex rel.* Gehrs v. Public Service Commission, 338 Mo. 177, 90 S. W. (2d) 390 (1935); State *ex rel.* Pitcairn v. Public Service Commission, 338 Mo. 180, 90 S. W. (2d) 392 (1935); State *ex rel.* Gehrs v. Public Service Commission, 90 S. W. (2d) 394 (Mo. 1935); State *ex rel.* Orscheln Bros. Truck Lines, Inc. v. Public Service Commission, 338 Mo. 572, 92 S. W. (2d) 882 (1935).

3. State *ex rel.* Buffum Tel. Co. v. Public Service Commission, 272 Mo. 627, 199 S. W. 962 (1917); State *ex rel.* v. Atkinson, 269 Mo. 634, 192 S. W. 86 (1917).

4. 92 S. W. (2d) 881 (Mo. 1936).

5. Laws of Missouri 1931, p. 304.

5237 of Missouri Revised Statutes 1929 undertakes to confer jurisdiction upon this court in all cases originating before the Public Service Commission. The cause was ordered transferred to the Kansas City Court of Appeals. Here the court denied having jurisdiction on the ground that all appeals within its jurisdiction are designated by the constitution of Missouri,[6] and that in all other cases jurisdiction of appeals from circuit courts of the state resides in the several courts of appeals. The legislature cannot by enactment invade the jurisdiction of the courts of appeals as defined and vested by the constitution or that of the supreme court to either enlarge or subtract therefrom.[7] The alleged error number three presents no constitutional issue since the relator was only contending that the commission's order is unlawful in that it went beyond its statutory authorization, and not that the statutory authorization was unconstitutional.[8]

(B) *Rate Fixing in Relation To Prior Existing Contracts*

In *Kansas City Light and Power Co. v. Midland Realty Co.*,[9] the plaintiff contracted to supply the defendant with steam heating service for a certain period at specified rates. This contract was entered into before the Public Service Commission Law was enacted. Under the contract the defendant had an option of renewal which was exercised shortly after the Public Service Law was enacted and became effective. The plaintiff filed with the Public Service Commission a schedule of rates effective August 1, 1917. This schedule was higher than the defendant's contract rate. The commission never ruled upon the reasonableness of such schedule. In September, 1917, other of the plaintiff's users of steam filed a complaint against such schedule and the commission determined that such schedule was unreasonably high and ordered it lowered, such order to be effective March 1, 1918. This new schedule was still higher than the defendant's rate. On June 11, 1918, the plaintiff entered a complaint before the commission charging that the rates were confiscatory. The commission found for the plaintiff that the rates on steam were confiscatory and had been placing the burden of operating the business upon the electrical division of the plaintiff company and ordered such rates raised, such order to become effective

6. Mo. CONST. art. 6, § 12, and Section 5 of Amendment of 1884 to article 6.
7. State *ex rel.* Pitcairn v. Public Service Commission, 338 Mo. 180, 90 S. W. (2d) 392 (1935); State *ex rel.* Gehrs v. Public Service Commission, 338 Mo. 177, 90 S. W. (2d) 390 (1935).
8. See Moyer v. Orek Coal Co., 78 S. W. (2d) 107 (Mo. 1934).
9. 338 Mo. 1141, 93 S. W. (2d) 954 (1936).

December, 1919. After August 1, 1917, the plaintiff billed the defendant for its steam heating service under the schedule effective on that date until March, 1918, and thereafter under the schedule of the latter date until August 31, 1918, which was the date that the defendant claimed its contract expired. The defendant refused to pay as billed and made payments in accordance with the contract rate claiming that rate to be still effective. The plaintiff claims that the contract rate was void and seeks to recover the difference between the amount already paid by the defendant and the scheduled rates. The circuit court held for the defendant as to the difference between the rates for the period August 31, 1917, to March 1, 1918; and for the plaintiff as to the difference in rates between March 1, 1918, and August 31, 1918. The court reversed the finding for the defendant, and affirmed the finding for the plaintiff.

The defendant contended that the schedule filed and effective August 1, 1917, was not a lawful rate as to contract customers until ruled upon as being just and reasonable by the commission, in other words that filing with the commission did not make the rate so filed prima facie legal as to contract customers. However, approving the construction placed upon the rating statutes[10] by a prior case,[11] the court held that the rates filed by the plaintiff effective August 1, 1917, primarily fixed by the plaintiff's schedule, were under the circumstances the effective rates pro tempore, though their reasonableness was not thereby finally determined and that maintenance of a lower rate (the contract rate) than the August 1, 1917 rate was against public welfare.[12]

The defendant next contended that paragraph 4 of Section 5208 of Missouri Revised Statutes 1929 expressly preserves heating contracts existing at the time the act was passed. However, the court points out that it has been settled by the Missouri decisions that the commission has the power to fix by order reasonable telephone, light, power, and heating charges at rates exceeding the maximum prescribed by ordinance, franchise, or individual

10. Mo. Rev. Stat. (1929) § 5228. The statute gives Commission power to fix heating rates. Mo. Rev. Stat. (1929) § 5247. The statute places burden upon party adverse to commission to show that commission's order was unreasonable or unlawful.

11. Marty v. Kansas City Light & Power Co., 303 Mo. 233, 259 S. W. 793 (1923).

12. Mo. Rev. Stat. (1929) § 5189, expressly prohibits discrimination by a utility as to rates charged between localities or persons.

contracts; that such order does not in the constitutional sense impair the obligations of such contracts; and that such rates automatically supersede all rates coming into conflict therewith.[13] The former decisions referred to in footnote thirteen are based upon the theory that, since the constitution of Missouri[14] declares that "the exercise of police power of the State shall never be abridged," it cannot be contracted away. The Public Service Commission is not a court and cannot enforce contracts, but instead deals with public utilities upon the theory of public service without regard to any contracts. It is a fact finding body whose findings and orders are prima facie reasonable and lawful, and are subject to judicial review in that respect only. Therefore, the court in the principal case holds that the statute does not operate to exempt the contracts from the scope of exercise of police power.

Finally the defendant contends that it is a violation of the contracts clause[15] and of the due process clause[16] of the United States Constitution to abrogate their contract rate unless in due course of its procedure the commission finds the contract rate to be reasonable. The court held that the construction the Missouri courts have placed upon the statute[17] authorizing substituted rates for existing rates[18] does not require any finding of facts or making of any order as a condition precedent to validity of the schedule filed in 1917 and effective August 31, 1917. Therefore, since the defendant did not afford himself of the usual remedy of protesting the reasonableness of the rates, and adding the fact that the federal courts follow the construction placed on state statutes by state courts,[19] no question of due process under the Fourteenth Amendment of the Constitution could arise.

(C) *Public Service Commission Orders in Relation to Interstate Commerce*

The following two cases involve orders of the commission coming in conflict with federal power over interstate commerce resulting in a setting aside of the commission's order by the court. In *State* ex rel. *to Use of Pan-*

13. Kansas City Bolt and Nut Co. v. Kansas City Light and Power Co., 275 Mo. 529, 204 S. W. 1074 (1918), *aff'd* 252 U. S. 571 (1920), upon authority of Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. 372 (1919); State *ex rel.* Washington Univ. v. Public Service Commission, 308 Mo. 328, 272 S. W. 971 (1925).
14. Art 12, § 5.
15. U. S. CONST., ART. 1, § 10.
16. U. S. CONST., AMEND. XIV.
17. Marty v. Kansas City Light & Power Co., 303 Mo. 233, 259 S. W. 793 (1923).
18. MO. REV. STAT. (1929) § 5228.
19. Georgia Ry. & Power Co. v. Decatur, 262 U. S. 432 (1923).

handle Eastern Pipe Line Co. v. Public Service Commission,[20] the relator prosecuted this review before the court of an order of the Public Service Commission requiring the relator "to furnish natural gas to the city of Fulton at reasonable rates." The relator was an interstate pipe line company engaged in transporting natural gas from Texas and Kansas through the states of Oklahoma, Missouri, and Illinois for the purpose of sale in large quantities to local gas distributing utilities at wholesale and industrial plants. Among the distributing utilities purchasing gas from the relator in Missouri is the Central States Gas Utilities Company, a subsidiary corporation owning and operating several local distribution systems in cities in Missouri. The delivery of natural gas by the relator to local distributing systems is accomplished by means of laterals off the main line which connect with pressure measuring stations where the local utility takes delivery and reduces the pressure. Service from the relator's main line is rendered under contract and the relator owned none of the facilities beyond the outlet of the reduction and measuring stations. A Fulton industrial plant had contracted to buy gas from the relator and in consequence of such transaction the relator built a lateral and delivered gas to the plant outside the city limits. The relator refused to sell gas to the city's municipal utility and as a result the city applied to the commission for the order here complained of. The commission's opinion stated that such order was not an interference with the relator's interstate commerce because the relator and its subsidiary in Missouri constituted in reality one common enterprise engaging in intrastate business in Missouri. The circuit court upheld the order. The cause was reversed and remanded with directions to annul the order of the commission.

The court states that the case of *State* ex rel. *Cities Service Gas Co. v. Public Service Commission*[21] is controlling. In that case it was held that where the interstate pipe line company had contracted with subsidiary companies to furnish gas to the subsidiary for distribution to consumers in municipalities it did not subject the main line company to regulation by this commission, since the company was not engaged in intrastate commerce and such regulation would constitute a direct burden upon the interstate commerce of the main line company. The work of the main line company in preparing for delivery to local distributors was an incident of its interstate

20. 93 S. W. (2d) 675 (Mo. 1936).
21. 337 Mo. 809, 85 S. W. (2d) 890, 891 (1935).

business in contrast to the pressure reduction and distribution by the subsidiary. This view expressed by the court is in line with decisions of the Supreme Court of the United States on this point.[22]

State ex rel. *and to Use of Baldwin v. Public Service Commission*[23] was an appeal from the judgment of the circuit court approving an order of the commission. The order of the Public Service Commission requiring the Missouri Pacific Railway to restore certain inequalities between the interstate and the intrastate coal rates to Jefferson City, either by the elimination of a forty-five cent per ton allowance to consignees of interstate shipments, or by establishing a similar allowance with respect to intrastate shipments was held to be beyond the proper power of the commission as an interference with rates in interstate commerce.

Since the intrastate rate was not an issue in the case the court assumes that it was a reasonable one as fixed by the commission. The effect then of the commission's order was to say to the Missouri Pacific that if it did not raise its interstate rate, at the expense of losing business to other competing lines, it would have to haul coal for less than the reasonable rate fixed by the commission for interstate shipping. Such effect seems to be a direct burden upon interstate commerce and to fall within the prohibition placed upon such direct burdens by the Supreme Court of the United States.[24]

The commission contended that since Congress had never attempted to regulate a situation causing undue prejudice against intrastate commerce and an undue preference to interstate commerce, until Congress occupies that field, the states are free to regulate as in this case. However, the court points out that the Supreme Court of the United States has held that the commerce clause prevents states imposing direct burdens upon interstate commerce whether Congress has acted or not.[25]

(D) *Public Service Commission Orders in Relation To Railroad Building and Improvement*

The following two cases deal with orders of the commission which required railroads to expend money on building and improvements where

22. State Tax Commission v. Interstate Natural Gas Co. Inc., 284 U. S. 41 (1931); Pennsylvania v. West Virginia, 262 U. S. 553 (1923); People's Natural Gas Co. v. Public Service Commission, 270 U. S. 550 (1926).
23. 339 Mo. 814, 99 S. W. (2d) 90 (1936).
24. Louisville and Nashville Ry. v. Eubank, 184 U. S. 27 (1902).
25. Minnesota Rate Cases, 230 U. S. 352, 396 (1913); Missouri *ex rel.* Barrett v. Kansas Natural Gas Co., 265 U. S. 298, 307, 308 (1924).

public safety was to be benefited thereby. The findings of the commission in both cases required the presentation of much expert evidence and a great amount of technical detail which, in absence of such commissions, would place a great burden upon the courts of law.

State ex rel. *Wabash Ry. v. Public Service Commission, State* ex rel. *Franklin v. Public Service Commission* and *State* ex rel. *City of St. Louis v. Public Service Commission*[26] were three separate appeals (but because they presented but one case were treated as one by the court) from the judgment of the circuit court of Cole county upholding the order of the Public Service Commission, which allocated the cost of abolishing grade crossings of the Wabash and certain streets of St. Louis at 60% of the cost against the city and 40% against the Wabash. Both the city and the Wabash contend that the other should bear the total expense, but the court pointing out the careful consideration of the commission in making its determination of all the facts and circumstances involved, upheld the commission's finding as to allocation.

In answering the railroads contention that it had been denied due process of law under the Fourteenth Amendment to the Constitution of the United States, the court points out that the commission permitted all parties to be heard and an opportunity to present their evidence after which, the commission giving due consideration to all the evidence, based its conclusion upon the facts found. The case demonstrates the usefulness of administrative agencies and is in accord with prior Missouri decisions.[27]

In *State* ex rel. *St. Paul and Kansas City Short Line R. R. v. Public Service Commission,*[28] the railroad had, in violation of the regulations of the Public Service Commission, erected a bridge with a fourteen foot horizontal clearance instead of a sixteen foot clearance, without first applying to the commission for permission to do the same,[29] but later applied to the commission to approve the same due to alleged financial inconvenience of repair-

26. 100 S. W. (2d) 522 (Mo. 1936).
27. State *ex rel.* Wabash Ry. v. Public Service Commission, 306 Mo. 149, 267 S. W. 102 (1924); State *ex rel.* Alton Ry. v. Public Service Commission, 334 Mo. 985, 70 S. W. (2d) 52 (1934); State *ex rel.* Alton Ry. v. Public Service Commission, 334 Mo. 995, 70 S. W. (2d) 57 (1934).
28. 339 Mo. 641, 98 S. W. (2d) 699 (1936).
29. Mo. REV. STAT. (1929) § 4657 empowers the Public Service Commission to promulgate rules concerning track clearances and make it necessary for railroads wishing to erect structures with clearances less than those provided by commission's rules to apply to commission for permission to erect the same.

ing the bridge. The court held it was not error for the commission to refuse such application since, had the railroad previous to erection of the bridge made application showing mere financial inconvenience, it would not have authorized the commission granting permission to erect a bridge not complying with requirements; therefore, the applicant could not place itself in a better position by erecting the bridge without permission and asking for permission to maintain it later. Economy alone, as a ground for authorizing the commission to permit construction of a bridge not meeting the statutory and commission requirements, is not within the term "impracticable" as contemplated by Section 4657 of Missouri Revised Statutes 1929.

(E) *Public Service Commission Orders Exceeding Statutory Authority of the Commission*

In *State* ex rel. *Empire District Electric Co. v. Public Service Commission,*[30] in reversing the judgment of the circuit court of Cole county which affirmed an order of the Public Service Commission, the court held that Section 5200 of Missouri Revised Statutes 1929 did not authorize the commission to order that the electric company replace in its depreciation reserve fund amounts which had been charged to such fund and subsequently transferred to the surplus account and thereafter used for paying dividends to stockholders.

The court bases its decision primarily upon its interpretation of the statute in question. The statute gives the commission power, after hearing, to require the company to carry an account for depreciation reserve, subject to control by the commission. This is construed by the court to mean that if the commission by order, after hearing, requires that the company set up such account, then the commission can control the amounts charged to said account. In the principal case the company had voluntarily set up such an account and charged amounts to it, which had been shown in its reports to the commission since 1915. Thus the court arrives at the conclusion that the commission, not having by its order required the company to set up the account, had no power over it. The retroactive nature of an order purporting to affect amounts accumulated in years prior to the commission's order was also pointed out by the court.

Aside from the strictness of such construction and the fact that it requires the commission to order a thing done which the company has already

30. 339 Mo. 1188, 100 S. W. (2d) 509 (1936).

done to acquire jurisdiction over the fund, the construction seems sound.

It appears, however, that profitable inquiry may be made into the purpose of the commission's hearing in the first instance. The commission had been attempting to ascertain the fair value of the company's property and in so doing found some enlightening information as to the rapid accumulation of what might well be considered, in view of the advanced state of engineering science in computation of the life of physical property, excessive accruals in the depreciation reserve account. From 1915 to 1923 the account grew to approximately $1,000,000, at which time the directors of the company set aside $400,000 to be charged to the "surplus" account, in 1926 another $400,000 was set aside in the same fashion, and again in 1929 $800,000 was transferred to an account called "Special Surplus Reserve," and this fund was disbursed by paying dividends to stockholders before this proceeding was brought. These transfers were shown on the company's annual report to the commission.

Realizing the position of the court in face of the statement by the commission that it could not ascertain whether such accruals were excessive or not, yet it seems that the statement of the court to the effect that the only interest of the public in such a reserve is that the company's property be kept in repair, is hardly justified. If the company had been charging excessive amounts to the depreciation reserve account, such procedure might well result in higher rates to the consumer, since this amount would be deducted from earnings on the books of the company but by their accounting methods eventually paid to stockholders as profits. Surely the public has an interest in the rates it pays for service.

As to the purpose of the commission's order concerning the last $800,000 transferred to "surplus," little can be ascertained since the court does not cite the report of the commission nor are portions bearing on this point quoted.

II. Workmen's Compensation Commission

(A) *Procedure and Evidence*

Wills v. Berberich's Delivery Co.[31] demonstrates the principle that while procedure and admission of evidence before administrative tribunals is not as formal and strict as in courts of law, reasonable assurance of finding based upon evidence is requisite.

31. 339 Mo. 856, 98 S. W. (2d) 569 (1936).

The appellants filed a claim with the Workmen's Compensation Commission seeking compensation for the death of Arthur N. Wills. The deceased, employed as a chauffeur for the respondent company, fell while repairing the roof of one of the respondent's trucks and sustained severe and painful injuries to his left elbow and shoulder. At the time of the accident the deceased had a small boil on the left side of his face. The infection which had been confined in the boil, began to spread, finally resulting in septicemia from which he died a week after his fall. The appellant claimed that the injuries resulting from the fall caused the infection to spread. The respondent contended that the injuries sustained did not have any connection with the spreading of the infection. To sustain their contention the respondents offered to introduce in evidence a written statement, made and signed by the deceased, wherein he stated he had not sustained any injuries to his face by the fall, and also the testimony of a physician that the deceased had made statements to the physician to the same effect. This evidence was excluded on the theory that the deceased was not there to refute such evidence. On appeal to the circuit court the evidence was held material, and the commission's order reversed. The circuit court was upheld on the ground that the evidence was properly admissable as part of the res gestae.

The appellant, citing the case of *Jackson v. Curtiss-Wright Airplane Co.*[32] quotes the following from that case:

> "The proceedings before the compensation commission are prescribed by statute, section 3349, R. S. Mo. 1929 . . . to be informal and without regard to the technical rules of evidence. While incompetent evidence will not support an award[33] . . . its admission is substantial, competent evidence to support it."

The court answers this contention by pointing out that the admission of incompetent evidence, where there is sufficient competent evidence to justify the award, and excluding competent evidence are two entirely different things; therefore, the commission erred in so excluding the respondent's evidence.

(B) *Finality of Findings of Workmen's Compensation Commission*

The following two cases are in accord with prior Missouri decisions in holding that the findings of the commission have the force and effect of a

32. 334 Mo. 805, 68 S. W. (2d) 715 (1934).
33. Woods v. American Coal and Ice Co., 25 S. W. (2d) 144, 146 (Mo. App. 1930).

jury verdict[34] and will not be disturbed if supported by sufficient evidence.[35] Section 3349 Missouri Revised Statutes 1929 does not mean that that finding can be based upon testimony that falls short of proof of fact.[36]

In *Adams v. Continental Life Ins. Co.*,[37] the deceased, an employee of the defendant life insurance company, was killed while working in South Dakota. There was conflicting evidence as to whether the deceased was still working under a contract made in South Dakota or whether a new contract had been entered into when the deceased had been transferred to Missouri to work in the home office for some time before he returned to South Dakota where he was killed. The commission upon application made to it by the widow for compensation found that there was insufficient evidence to sustain a finding that there was a new contract entered into in Missouri and hence the commission did not have jurisdiction. The circuit court reversed the finding of the commission and remanded the cause to the commission with directions to find that the claimant was entitled to compensation. The supreme court reversed the ruling of the circuit court. Findings of fact by the commission, if sustained by sufficient competent evidence, are, absent fraud, conclusive on appeal, and, in determining the sufficienecy of the evidence upon which the commission based its finding, the court considers the evidence in the light most favorable to the finding and disregards evidence which might support a different finding than made.[38]

The court held that as a matter of law upon the record it could not say that a new contract was made when the deceased was called to Missouri, or in other words there was substantial evidence to support the finding of the commission that a new contract was not made in Missouri.

On the other hand, the findings of fact by the commission are not conclusive on appeal if not supported by sufficient competent evidence.[39]

In *Maddux v. Kansas City Public Service Co.*,[40] the claimant employee was injured in the course of his employment and after hearing the evidence as

34. Haeger v. Pulitzer, 17 S. W. (2d) 578 (Mo. 1929).
35. Smith v. Levis-Zukoski Mercantile Co., 14 S. W. (2d) 470 (Mo. 1929).
36. Woods v. American Coal and Ice Co., 25 S. W. (2d) 144 (Mo. App. 1930).
37. 101 S. W. (2d) 75 (Mo. 1936).
38. Mo. Rev. Stat. (1929) § 3342; Wadley v. Employer's Liability Assurance Corp., 225 Mo. App. 631, 37 S. W. (2d) 665 (1931); Lerlich v. Chevrolet Motor Co., 328 Mo. 112, 40 S. W. (2d) 601 (1931).
39. Mo. Rev. Stat. (1929) § 3342; Doughton v. Marland Refining Co., 331 Mo. 280, 53 S. W. (2d) 236 (1932).
40. 100 S. W. (2d) 535 (Mo. 1936).

to the permanency of the claimant's injury, the commission awarded him compensation on the basis of "permanent total disability," as set forth in Section 3316 of Missouri Revised Statutes 1929, instead of on the basis of "partial permanent disability" as set forth in Section 3315 of Missouri Revised Statutes 1929. The circuit court affirmed the award, and the affirmance was upheld by the supreme court. The finding of the commission on questions of fact, if supported by substantial, competent evidence, has the force and effect of the verdict of a jury and is conclusive upon the courts on appeal.[41] The commission's finding here is supported in the court's estimation by sufficient evidence.

(C) *Jurisdiction of the Workmen's Compensation Commission*

In determining that the Workmen's Compensation Commission could not deny jurisdiction in the following case the court found it necessary to decide a very troublesome conflict of laws problem. Under the facts of the case either the law of Illinois or the law of Missouri was applicable; therefore, it became necessary for the court to decide which should apply in determining whether or not the commission could refuse to entertain jurisdiction. The court in the case adopted the view of the United States Supreme Court as expressed by the case of *Alaska Packer's Association v. Industrial Accident Commission of California,*[41a] and rejected the unsatisfactory "contract theory" sometimes applied to such cases.[42] Since it is not the purpose of this article to deal with the conflict problem, it will suffice to say that Missouri is in accord with the latest United States Supreme Court decision.

In *State* ex rel. *Weaver v. Missouri Workmen's Compensation Commission,*[43] James Weaver, a resident of Missouri, was employed by a New York company under a contract of employment executed in Illinois. Weaver was killed while in the course of his employment while in the state of Missouri. He left surviving him his widow and two minor children who were residents of Missouri. At the time of Weaver's employment and thereafter, there was in full force and effect in Illinois a workmen's compensation law, which provided that the Illinois law should apply to any injury received outside the state of Illinois under contract of employment made within the state of

41. Doughton v. Marland Refining Co., 331 Mo. 280, 53 S. W. (2d) 236 (1932).
41a. 294 U. S. 532 (1935).
42. See 11 MINN. L. REV. 329 (1927).
43. 339 Mo. 150, 95 S. W. (2d) 641 (1936).

Illinois. The widow of Weaver applied to the Missouri Workmen's Compensation Commission for compensation under the Missouri law, which provides that it shall apply "to all injuries received in this state, regardless of where the contract of employment was made, and also to all injuries received outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide."[44] The Missouri Workmen's Compensation Commission declined to take jurisdiction of the application upon the grounds that (1) since the contract of employment was made in Illinois, the Missouri statute did not apply, and (2) that even if the Missouri statute did apply the commission should decline jurisdiction because the Illinois law also applies and must, under the full faith and credit clause of the Federal Constitution, be given effect in Missouri. The court held that the Missouri workmen's compensation law applied,[45] therefore the commission could not deny jurisdiction.

III. Missouri State Highway Commission

(A) *Powers of the Commission*

The following two cases demonstrate the broad scope of administrative power vested in the Highway Commission by the constitution of Missouri and by statute. In *State* ex rel. *State Highway Commission v. Sevier*,[46] under the constitutional provision that money in the state road fund should be administered for construction and maintenance of such highways and free interstate bridges as the state highway commission might deem proper,[47] the commission entered into a joint undertaking with the Kansas state highway department to construct a free bridge across the Missouri river. A company owning a bridge across the river sought to enjoin the commission from going on with the work on the ground that the Kansas highway department may not perform their part of the undertaking and that it will be a waste of public funds. The commission brought prohibition. The court held that the commission has sole jurisdiction to determine whether expenditures for building free interstate bridges and connecting highways would be a waste of public funds because of inability or unwillingness of other states to perform their part of such undertaking. The determination of the question by the com-

44. Mo. Rev. Stat. (1929) § 3310.
45. Mo. Rev. Stat. (1929) §§ 3299 *et seq.*
46. 339 Mo. 479, 97 S. W. (2d) 427 (1936).
47. Mo. Const. art 4, § 44a.

mission is final. The courts cannot interfere with the ordinary functions of executive departments.[48] Therefore, prohibition will lie.

In *State* ex rel. *Missouri Power Co. v. Allen*,[49] a statute forbade the moving of buildings along highways unless application had been made to the county court and a permit issued authorizing the same. While moving a tool shed belonging to the commission, a highway commission employee was killed by a highline of the defendant power company. No permit had been obtained to move the building. The court held that such failure to obtain the permit would not bar recovery by the administrator of the deceased, since the deceased stood in the same relation to the power company as the commission did. The court points out that since the commission is essentially an agency of the state and as such exercises broad administrative powers in the interest of the public[50] and has jurisdiction and control to maintain highways, it would be anomalous to require that such commission apply to the county court to move its tool house, an act which was incident to highway maintenance.

IV. St. Louis Board of Police Commissioners

State ex rel. *Kennedy v. Remmer's v. Board of Police Commission*[51] involves an instance of an administrative agency formulating an order and acting under it in excess of power conferred on the commission and in an arbitrary fashion. The constitution of Missouri[52] provides that the general assembly may enact laws for the removal from office of all public officers, for cause. Under this constitutional provision the general assembly enacted statutes[53] creating the Boards of Police Commissioners as administrative agencies and endowing them with power to appoint the members of metropolitan police forces and with power to discharge members for cause. Section 7547 of Missouri Revised Statutes 1929 delegated additional authority to make rules and regulations consistent with the section which shall be necessary for discipline, trial, and government of the police. The section further provides that violations of all such lawful rules shall be punishable by dis-

48. Selecman v. Matthews, 321 Mo. 1047, 15 S. W. (2d) 788 (1929).
49. 100 S. W. (2d) 868 (Mo. 1936).
50. For powers of Highway Commission, see Mo. Rev. Stat. (1929) §§ 8115, 8134, 8109.
51. 101 S. W. (2d) 70 (Mo. 1936).
52. Art. 14, § 7.
53. Mo. Rev. Stat. (1929) §§ 7540 to 7548.

missal or such lighter punishment as the boards may direct. Rule 10, Section 178 of the St. Louis Police Manual reads:

> "He (referring to every member and employee of the force) shall not file, nor retain counsel for the defense of, an action at law without first obtaining permission to do so from the chief of police with approval of the board."

The charge under which Kennedy, a patrolman, was discharged stated that, without making application to the board, he had filed an action in court and retained counsel in a suit to enjoin the board from asking him to give ten per cent of his salary toward unemployment relief. He brought certiorari in the circuit court to review the action of the board. The writ was quashed and Kennedy appeals. The proceedings were reversed and remanded with direction to quash the record as made by the board. While there is no doubt but that the board has jurisdiction to entertain and decide upon the infraction of valid rules adopted by the board,[54] yet such a rule as the one used as the basis for the dismissal is unreasonable upon its face, arbitrary in its character, is a denial of reasonable liberty of action, and transcends the due bounds of legislative power, irrespective of constitutional power, state or national.[55]

Also the rule contravenes article 2, Section 10 of the constitution of Missouri, which provides that the courts of justice should be open to every person and a certain remedy afforded for every injury to every person, property, or character; and that right and justice shall be administered without sale, denial, or delay.

V. Missouri Dental Board

State ex rel. *Inscho v. Missouri Dental Board*[56] is another case in which an administrative agency exceeded its statutory authorization. Here the Dental Board made an order revoking a dentist's certificate of registration, charging that the dentist had published misleading statements as to his skill and method of practice of dentistry, and that, through advertising in newspapers and statements to patients, he tended to deceive and defraud the public. The statute[57] among other things authorizes the board to revoke a certificate of registration if the dentist advertises in any

54. State *ex inf.* Barrett *ex rel.* Bradshaw v. Hedrick, 294 Mo. 21, 241 S. W. 402 (1922).
55. Hannibal v. Missouri and Kansas Tel. Co., 31 Mo. App. 23, 33 (1888).
56. 339 Mo. 547, 98 S. W. (2d) 606 (1936).
57. Mo. Rev. Stat. (1929) § 13566.

manner with a view of deceiving or defrauding the public. The evidence presented proved that the dentist had advertised, but there was no showing that the statements in the advertisements had been false nor that anyone had relied upon them to their substantial damage. The dentist petitioned the circuit court for an alternative writ of mandamus directing the Dental Board to rescind its order. The circuit court issued the writ upon the ground that the complaint did not charge nor the evidence show any offense under the statute. This was affirmed. The Dental Board is vested, by statute, with administrative and ministerial powers and duties, and so long as its actions are within the scope of its powers and it exercises a reasonable discretion, the courts will not interfere therewith; but if, perchance, through some misunderstanding or misconstruction of the statute, the board exceeds its power or acts beyond the scope of its authority, or in the exercise of the powers given, it acts arbitrarily and against the great weight of the evidence before it upon a given question, the aggrieved party may resort to an action of this kind.[58]

The charge went to fraudulent misleading and deceptive advertising, but no attempt was made to show that any false statements were made in the advertisements. Mere advertising, while it may be disapproved by the profession, does not constitute a ground under the statute for revocation of licenses.

III
APPELLATE PRACTICE

THOMAS E. ATKINSON*

Considerably more than one half of the opinions decided by the Supreme Court of Missouri in 1936 have one, or more, digest paragraphs upon matters concerning appellate practice. Furthermore, as the cases have been digested in the unofficial reporter, fully twenty per cent of all syllabus paragraphs deal with matters of the jurisdiction of the supreme court, the procedural side of extraordinary legal actions commenced there, and the field known as appeal and error. While it is true that many of these paragraphs refer merely to points casually mentioned by the court and do not represent difficult or time-

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58. State *ex rel.* McCleary v. Adcock, 206 Mo. 550, 105 S. W. 270 (1907).

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consuming deliberations, the same can be said of many of the points of substantive law or trial procedure. It would not seem unreasonable to assume that somewhere in the vicinity of one fifth of the court's time and energy is consumed in passing upon questions of its own jurisdiction and procedure.

Most thinking people will share the writer's regret of this conclusion. Even the most friendly and sympathetic critic must feel that an undue amount of energy is being expended on the machinery of presenting cases before our highest tribunal. Obviously the blame must be shared, in some fashion, by the courts, the bar and the legislature. Very likely a broad-minded person engaged in any one of these three fields would be willing—though perhaps reluctant—to admit that some of the responsibility should be assumed by his particular branch. Possibly the court's derelictions may be due in part to lack of clarity and consistency of its prior pronouncements, and in part to the subconscious professional attitude which runs through all professions of placing undue emphasis upon form and technique at the expense of the larger functions which the particular profession is designed to fulfill. On the part of the bar there is undoubtedly considerable carelessness, and occasionally, unforgiveable ignorance. More serious is counsel's frequent insistence upon unmeritorious technical points. Finally the legislature's fault may be its neglect to pass amendments to procedural statutes in keeping with modern demands, or its failure to turn the entire matter over to the court or some other body better qualified to make the necessary revisions.

It seems apparent that if the situation is to be materially bettered, this is not likely to come as the result of isolated movements among the three responsible bodies. Probably the best solution would be a new set of rules promulgated by the court and framed with the assistance of the Judicial Council and the bar.[1] Of course new rules alone can only make improvements

1. In the interest of harmony, legislative sanction should be obtained, if possible, for the judicial pronouncement of procedural rules. Current history of rule-making for actions at law in the Federal courts is a case in point. If such sanction is not forth-coming, may the court, in the exercise of its judicial powers, proceed to set up a set of rules of appellate and trial procedure displacing existing statutes? In a scholarly and lawyer-like article, Professor Tyrrell Williams concludes that, while the legislature may delegate to the courts the power to displace statutory procedure by rules of court, without such authority, judicial rules are subject to the statute laws. Williams, *The Source of Authority for Rules of Court Affecting Procedure* (1937) 22 Wash. U. L. Q. 459. Of course this conclusion is inevitable under the English parliamentary system. American authorities have also refused to supersede statutory procedural provisions by court rules. In this connection, see the opinion of Ellison, C. J., in Clark v. Austin, 101 S. W. (2d) 977, 985-996 (Mo. 1937). Still it may be asked whether under American constitutional system, the judicial nullification of procedural rules would not be a much milder

possible. The immediate propelling force must be a change of attitude in the judiciary and in the profession generally. In this, the bench must lead the way, for only through its firm determination can the sloth, the carelessness and unwarranted contentiousness, of the stragglers at the bar be dispelled. In this connection there is room for optimism concerning some of the decisions mentioned below. Some of them clarify doubtful points. Others insure future observation of rules designed to promote procedural efficiency by the very rigor with which breaches of those rules are met. Still, in the main, the cumbersome appellate machinery continues as before. It cannot do otherwise until the present statutory structure is overhauled by some group or body which is given *carte blanche.*

It would be impossible within reasonable compass, as well as generally unprofitable, to set forth herein all propositions of appellate procedure decided by the court in 1936. On the other hand no attempt will be made to restrict treatment to cases deciding new points. Rather an endeavor will be made to steer a middle course and mention all cases which may be regarded important as precedents. Possibly the presentation of a fair picture of the year's work in the field may be one method of raising the general inquiry of the need for reform.

JURISDICTION OF THE SUPREME COURT

The supreme court has jurisdiction to entertain appeals from circuit courts by Section 12 of article VI of the constitution (as amended) in causes where the amount in dispute exceeds the sum of $7,500[2] and "in cases involv-

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assertion of authority than the established power to declare unconstitutional a law dealing with substantive provisions. It is true that if the judicial power to displace procedural statutes exists, it has long been dormant. This is not remarkable in view of the fact that until comparatively recently the legislatures rather than the courts led the way in freeing us from archaic procedural shackles. As a purely practical matter, it was reasonable that the courts should have recognized the legislatures' forward steps of an earlier day. The question now is: should the courts be hampered by present legislative inactivity, due perhaps more to pressure of time than to absence of interest on the part of the latter? A constitutional amendment permitting court rules to supersede procedural statutes would of course be a happy solution of the whole matter.

See also Howard, *Control of Unauthorized Practice Before Administrative Tribunals in Missouri* (1937) 2 MO. L. REV. 313. Hudson, *The Proposed Regulation of Missouri Procedure by Rules of Court* (1916) 13 U. OF MO. BULL. LAW SER. 3; Hyde, *From Common Law Rules to Rules of Court* (1937) 22 WASH. U. L. Q. 187; Hyde, *Origin and Development of Missouri Appellate Procedure* (1937) 2 MO. L. REV. 281; Wheaton, *Courts and the Rule-Making Powers* (1936) 1 MO. L. REV. 261.

2. See Section 3 of amendment of 1884 to article VI of the constitution and MO. REV. STAT. (1929) § 1914.

ing the construction of the Constitution of the United States or of this state; in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question; in cases involving the construction of the revenue laws of the state, or the title to any office under this state; in cases involving title to real estate; in cases where a county or other political subdivision of the state or any state officer is a party, and in all cases of felony."

That these are the only cases in which an appeal from the circuit court court may be entertained by the supreme court was reaffirmed in *State* ex rel. *Gehrs v. Public Service Commission of Missouri*,[3] holding that a statute authorizing appeals generally from judgments of the circuit court affirming orders of the commission was invalid.

In *Bolin v. Sovereign Camp, W. O. W.*,[4] it was claimed by the appellant that the insurance agreement in question was a Nebraska contract and that under the laws of that state was ultra vires and that "full faith and credit" was involved. The appellee claimed that the agreement was a Missouri contract and the trial court so found. The supreme court held that the only question involved in the appeal was whether the trial court was right in so finding and that this question could be decided without passing upon the constitutional question and accordingly transferred the appeal to the appropriate court of appeals.

In an appeal from the circuit court from a judgment upholding an order of the Public Service Commission, it was held in *State* ex rel. *to the Use of Alton R. R. v. Public Service Commission*[5] that the court would not take cognizance of the proceeding upon the basis of constitutionality of the order unless that question was preserved in the application for rehearing filed with the commission. Furthermore, in *State* ex rel. *Missouri Electric Power Co. v. Allen*,[6] it was held that the supreme court had no jurisdiction of an appeal upon the basis of a constitutional question when the latter was not the sole issue in the court below and the appellant did not in any manner insist upon constitutional protection on the trial.

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3. 338 Mo. 177, 90 S. W. (2d) 394 (1936), noted in (1936) 21 ST. LOUIS L. REV. 332. This case relies on several cases decided late in 1935. See also State *ex rel.* Orscheln Bros. Truck Lines, Inc. v. Public Service Commission, 92 S. W. (2d) 882 (Mo. 1935); State *ex rel.* to the Use of Alton R. R. v. Public Service Commission, 100 S. W. (2d) 474 (Mo. 1936).
4. 339 Mo. 618, 98 S. W. (2d) 681 (1936).
5. 100 S. W. (2d) 474 (Mo. 1936).
6. 100 S. W. (2d) 868 (Mo. 1936).

A number of cases involved the question as to whether the amount in dispute exceeded the sum of $7,500 so as to allow appeal from the circuit to the supreme court. In a collision accident case where plaintiff's petition alleged personal injuries to the extent of $10,000 and also property damages, and the verdict was for $500, it was held in *Ashbrook v. Willis*[7] that the court had no jurisdiction to entertain plaintiff's appeal though his motion for new trial claimed inadequacy of the amount of the verdict. The court asserted its power to pierce the record to see whether jurisdiction was being foisted on the court. As the point of inadequacy of the verdict was neither briefed nor argued, the claim of damages in excess of $7,500 was deemed colorable. In *Johnston v. Ramming*,[8] it was held that where the petition alleged $15,000 damages and the verdict was for the defendant and plaintiff obtained an order for a new trial from which defendant appealed, the supreme court had jurisdiction of the appeal. Where weekly payments for life were claimed under the workmen's compensation law, it was held proper for the court to make use of mortality tables in order to determine whether the amount in dispute exceeded the jurisdictional figure.[9] A fair measure existed for the measurement of the amount in dispute in this case.[10]

In a suit in the nature of a creditors' bill, the amount in dispute is the total of claims represented and not the value of property of which the receiver would go into possession, according to *Matz v. Miami Club Restaurant*.[11] Where a permanent injunction was granted by the court below but the question of $10,000 damages was reserved, it was held in *Godefroy Mfg. Co. v. Lady Lennox Co.*[12] that the supreme court had no jurisdiction on account of the amount. The finality of this judgment for purposes of appeal was left to the court of appeals. In *Stine v. Southwest Bank of St. Louis*,[13] suit was brought to enjoin the foreclosure of a trust deed for $20,000 on the ground of an agreement to extend. Plaintiff lost below and costs in the sum of $2,653.60 were assessed

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7. 338 Mo. 226, 89 S. W. (2d) 659 (1936).
8. 100 S. W. (2d) 466 (Mo. 1936).
9. Maddux v. Kansas City Public Service Co., 100 S. W. (2d) 535 (Mo. 1936).
10. *Cf.* State *ex rel.* Pitcairn v. Public Service Commission, 338 Mo. 180, 90 S. W. (2d) 392 (1935), where appellant sought merely the privilege to operate a motor carrier for hire. As no money judgment was sought the privilege was deemed to involve no measureable pecuniary right so as to give the court jurisdiction on appeal.
11. 339 Mo. 1133, 100 S. W. (2d) 476 (1936). See *infra* note 14.
12. 339 Mo. 1107, 100 S. W. (2d) 271 (1936).
13. 98 S. W. (2d) 539 (Mo. 1936).

against him and his surety upon motion of defendant. Plaintiff's appeal from this order was held not to be within the jurisdiction of the supreme court because: (1) there was nothing to show the amount involved on the injunction issue, and (2) even if an appeal were made upon the injunction matter, the present appeal was separate, being neither a cross-appeal nor an appeal upon the matter of fixing costs in the action.

Several cases reiterate the rule that controversies concerning a claimant's interest in a decedent's estate is determined by the net value of the claimant's interest after payment of debts and not by the gross estate, nor the claimant's proportionate share thereof.[14]

A number of cases pass upon the question as to whether title to real estate is involved. This seems to be a never ending problem in Missouri. That issues concerning the priority of certain liens on land do not give the court jurisdiction on appeal was held in *Breit v. Bowland*.[15] According to *State* ex rel. *Ross v. Martin*,[16] an appeal from an order granting a motion to set aside a sale of lands under execution for delinquent drainage taxes was held not to involve title to realty, as the validity of the sale and not title was in issue. In *City of St. Louis v. Franklin Bank*,[17] it was decided that the supreme court had no jurisdiction of an appeal by the condemnor from an award of damages to owners when the right to condemn was conceded, as no title to realty was involved. A suit to cancel a trust deed and to enjoin sale thereunder was deemed to involve title to real estate for purposes of appellate jurisdiction in *Meredith v. Pound*.[18]

Ballenger v. Windes[19] is an important decision. It was held that an action of ejectment in which defendant claimed title and in which judgment was given in favor of plaintiff for possession and one dollar per month rents and profits until possession was given, did not involve title to real estate as title was not specificially adjudged in the action though it might have been if prayed. Justice Hays dissented reviewing the historical nature of ejectment and the

14. Peer v. Ashauer, 92 S. W. (2d) 154 (Mo. 1936); Fleischaker v. Fleischaker, 338 Mo. 797, 92 S. W. (2d) 169 (1936); *In re* Flynn Estate, 338 Mo. 522, 92 S. W. (2d) 671 (1936); Whitworth v. Monahan's Estate, 339 Mo. 1123, 100 S. W. (2d) 460 (1936).
15. 92 S. W. (2d) 110 (Mo. 1936).
16. 338 Mo. 1067, 93 S. W. (2d) 911 (1936).
17. 98 S. W. (2d) 534 (Mo. 1936).
18. 92 S. W. (2d) 698 (Mo. 1936). See also Hendrix v. Goldman, 92 S. W. (2d) 733 (Mo. 1936).
19. 338 Mo. 1039, 93 S. W. (2d) 882 (1936).

defenses thereto. In the later case of *Welsh v. Brown*,[20] it was held that in a similar case where defendant asked to have title adjudged, the supreme court had jurisdiction of the appeal. In this opinion, *Ballenger v. Windes* is discussed and possibly a little doubt is cast upon that decision. Of course where in an ejectment action defendant does not claim title nor the right to possession, the supreme court has no jurisdiction of the appeal as one involving title to realty. This was decided in *Haynes v. Dunstan*.[21]

Peer v. Ashauer[22] holds that there is no issue involving title to real estate in a suit for the construction of a will, wherein the petition alleged that plaintiff and defendant were each seized of a one half interest in the land and defendant demurred. *In re Flynn Estate*[23] is a case in which a widower, after renouncing his wife's will, petitioned for $500 as part of his distributive share of the estate. The circuit court denied the petition and the supreme court upon appeal denied its own jurisdiction though the estate consisted in part of realty. When the circuit court upon a creditor's appeal set aside the probate court's sale of decedent's realty and the purchaser attempted to appeal to the supreme court, it was held in *Bank of Forest City v. Pettijohn*[24] that title to real estate was not involved so as to permit the review.

Extraordinary Legal Remedies

Actions of mandamus, prohibition and certiorari are, strictly speaking, original rather than appellate proceedings when the writs are issued by the supreme court. However, in so far at least as these writs review the action of the court below, they fall fairly in the field of appellate practice.

State ex rel. *Dilliner v. Cummins*[25] decided two points of procedure with reference to the court's original proceedings in mandamus. It was first decided that while the alternative writ should be abstracted as the first or basic pleading in the action, still if the respondent in his abstract furnishes all the information which a proper abstract of the writ would give, the proceedings should not be dismissed. The further holding of the court was to the effect that when the relator asked for proper relief in his application for the alternative writ, but the writ as issued did not comply with this application, the alternative writ might be amended. This amendment was considered necessary so that peremptory writ could follow the alternative writ.

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20. 339 Mo. 235, 96 S. W. (2d) 345 (1936).
21. 98 S. W. (2d) 539 (Mo. 1936).
22. 92 S. W. (2d) 154 (Mo. 1936).
23. 338 Mo. 522, 92 S. W. (2d) 671 (1936).
24. 338 Mo. 506, 92 S. W. (2d) 189 (1936).
25. 338 Mo. 609, 92 S. W. (2d) 605 (1936).

In *State* ex rel. *Kansas City Bridge Co. v. Missouri Workmen's Compensation Commission*,[26] the employer filed a writ of mandamus to compel the commission to assume jurisdiction over a claim which it had dismissed as being within the admiralty jurisdiction of the federal courts. It appeared that subsequent to this dismissal, the employee started his action in the federal court. It was held that writ should be denied as nugatory because the federal court's determination of its jurisdiction would be controlling and also for the reason that claimant could not be compelled to prosecute his claim before the commission.

That a writ of certiorari does not review the action of an inferior tribunal upon its merits but goes only to matters of jurisdiction or power to proceed was held in *State* ex rel. *Kennedy v. Remmers*.[27] Accordingly the court declared that a bill of exceptions or transcript of the evidence would be disregarded as the review is on the record proper. *State* ex rel. *Hoyt v. Shain*[28] deals with certiorari to review an opinion of the court of appeals upon the ground that it was conflicting with supreme court decisions. It was held that the supreme court was bound by the conclusions of fact made by the court of appeals and that the action of the supreme court would be confined to quashing the part of the opinion found to be conflicting. It is clearly stated that the supreme court does not tell the court of appeals what to do when the latter undertakes to make a new record in the case.

State ex rel. *Cowden v. Knight*[29] and *State* ex rel. *Johnson v. Sevier*[30] are cases in which it was deemed proper, upon the facts shown, to make absolute a writ of prohibition to prevent the circuit court from proceeding with certain mandamus actions. Particularly in the later case it appears that prohibition may have a somewhat broader scope than that of forbiding the court below from exceeding its jurisdiction.[31]

In *State* ex rel. *McGrew Coal Co. v. Ragland*,[32] the plaintiff had obtained judgment for damages below, which judgment had been reversed by the Supreme Court of Missouri and review by certiorari denied by the United States Supreme Court. After mandate of reversal had been forwarded to the

26. 92 S. W. (2d) 624 (Mo. 1936).
27. 101 S. W. (2d) 70 (Mo. 1936).
28. 338 Mo. 1208, 93 S. W. (2d) 992 (1936).
29. 338 Mo. 584, 92 S. W. (2d) 610 (1936).
30. 339 Mo. 483, 98 S. W. (2d) 677 (1936).
31. See generally McBaine, *The Extraordinary Writ of Prohibition in Missouri* (1924) 30 U. OF MO. BULL. LAW SER. 3; (1924) 31 *id.* at 3; (1925) 32 *id.* at 3. In particular see (1924) 31 *id.* at 27-30.
32. 339 Mo. 452, 97 S. W. (2d) 113 (1936).

trial court, an original suit of mandamus was commenced in the Supreme Court of Missouri to compel the clerk of the trial court to issue execution upon the original judgment. Relator justified this astounding procedure upon the ground that the decision of the Missouri Supreme Court altered the pre-existing law and violated provisions of the Federal and Missouri Constitutions. The court holds very properly that its judgments cannot be collaterally attacked through such mandamus proceedings.

Laying Foundation For Appeal—Appealable Orders

In *State v. Herring*,[33] it was held that the admission of certain testimony could not be reviewed though an objection was made and exception was taken to its admission, when there was no motion to strike the answer nor request that the jury be instructed to disregard it. Overruling an earlier case, it was announced in *Clay v. Owen*[34] that where defendant demurred to plaintiff's evidence at the close of the latter's proofs, which demurrer was overruled and defendant then offered testimony and without renewing the demurrer requested certain charges to the jury, he had waived his demurrer to the evidence.

Magee v. Mercantile-Commerce Bank and Trust Co.[35] announced the rule that a "judgment" which disposed of only one of several counts of the petition was interlocutory and hence did not permit an appeal. In *Lucitt v. Toohey's Estate*,[36] it was held that neither the order of the probate court setting aside the admission of the will, nor the order rejecting the will, nor the orders setting aside the appointment of the executor and appointing an administrator were appealable to the circuit court, not coming within the statutory enumeration of appealable orders. It was pointed out that the remedy of proponent must be found in a separate action in the circuit court for the establishment of the will.

Four cases involved procedure concerning the involuntary nonsuit taken by a plaintiff. When the plaintiff submitted to an involuntary nonsuit with leave to move to set it aside and the trial court gave a purported "judgment" for costs in favor of the plaintiff and discharging the jury, it was held in *Harriman v. Stix, Baer & Fuller Co.*,[37] that this was not a final order which

33. 92 S. W. (2d) 132 (Mo. 1936). See also State v. Powell, 339 Mo. 80, 95 S. W. (2d) 1186 (1936); (1936) 1 Mo. L. Rev. 365.
34. 338 Mo. 1061, 93 S. W. (2d) 914 (1936).
35. 339 Mo. 559, 98 S. W. (2d) 614 (1936).
36. 89 S. W. (2d) 662 (Mo. 1936).
37. 92 S. W. (2d) 593 (Mo. 1936).

would support an appeal by plaintiff. *Boonville Nat. Bank v. Thompson*[38] and *Arp v. Rogers*[39] settle, for both departments, the rule that where the trial court marks the defendant's peremptory instruction as "given" though it is not actually read to the jury, plaintiff may then take a nonsuit with leave to move to set it aside and then appeal. Such nonsuits are deemed involuntary and outside the class of cases where plaintiff is precluded from appealing after taking a voluntary nonsuit. Prior to these cases there was some doubt as to whether or not the peremptory instruction had to be actually read to the jury before taking the nonsuit in order to have the latter considered involuntary for the purpose of appeal. In *Wallace v. Woods*,[40] the court was confronted with whether the announcement of the taking of the nonsuit before the giving of the peremptory instruction appeared from the record on appeal. The court points out that this should appear from the bill of exceptions but while no specific mention in the bill was found as to when the announcement of the nonsuit was made, it appeared from the other parts of the record in the proceedings that the nonsuit must have been taken by the plaintiff at the proper time to permit an appeal. The case also makes clear that it is the judgment of dismissal, entered after an involuntary nonsuit, from which the appeal should be taken.

It is certainly open to serious question whether the taking of an involuntary nonsuit at this stage and in this manner should be permitted. The practice is more or less anomolous in Missouri procedure. First, it can be questioned whether the plaintiff should be entitled to carry on an appeal for the purpose of establishing that he is entitled to go to the jury and at the same time reserve the right to try his case anew if the upper court's decision is adverse. Second, it is doubtful if many plaintiffs take advantage of a second action after being beaten in the appellate court. Finally even if the procedure does foster some measure of justice and utility, the pitfalls of the practice are so great as to render it a doubtful procedural device. For example, the plaintiff may take his nonsuit at the wrong time or in an unproper manner, thereby precluding himself from appeal because the nonsuit is voluntary. Inexpert attempts to preserve the privilege of a second suit, which is of secondary importance, have frequently prevented plaintiff from obtaining his right of appeal, which is primary.

38. 339 Mo. 1049, 99 S. W. (2d) 93 (1936), noted in (1937) 2 Mo. L. REV. 253; (1937) 22 WASH. U. L. Q. 565.
39. 99 S. W. (2d) 103 (Mo. 1936).
40. 102 S. W. (2d) 91 (Mo. 1936).

A motion to modify a divorce decree was considered, in *North v. North*,[41] to be in the nature of a separate action, and it was therefore unnecessary for the purpose of review to save an exception to the resultant order or judgment. Where the record does not show that the motion for new trial was made within four days after verdict and no extensions of time appear, *State v. Brown*[42] decides that the alleged errors cannot be considered even with consent of counsel for the state. In *State* ex rel. *Chicago, R. I. & P. Ry. v. Shain*,[43] it was held that the statement in the bill of exceptions to the effect that the evidence had been introduced in support of the petition and answer did not permit the review of instructions for the reason that it could not be told whether the instructions, though technically erroneous, were sufficient to cause reversal of the case.

While the parties may agree upon a statement of facts for the case, still according to *Bakersfield News v. Ozark County*,[44] there can be no review except as to matters appearing upon the record proper unless the agreed statement is included in a bill of exceptions. *State v. Gautney*[45] holds that nothing except the record proper is presented for review when the bill of exceptions is uncertified. A similar case is *State v. Hodges*,[46] also showing the mischief that may come from failure of the clerk to certify that the transcript contained a record of all entries in the case.[47] If this had been done in the latter case, the filing of the information in one county and trial in another county with nothing to show change of venue would have caused reversal of the conviction.

Form of Briefs and Abstracts

If there is any high point in the year's decisions relating to the appellate practice, it is that the court has been bearing down upon counsel who fail to observe the rules relating to the form and contents of briefs. Warnings are frequently given and there are many examples of the treatment which the careless briefer may expect. Derelictions in the future are sure to incur the wrath of the court and are likely to cause dismissal of the appeal. This attitude does not strike the writer as being one of mere insistence upon technicality. Rather it is a reasonable attempt to secure compliance with rules which are designed to lighten the mechanical burdens of the court. It is only that the

41. 339 Mo. 1226, 100 S. W. (2d) 582 (1936).
42. 339 Mo. 1014, 98 S. W. (2d) 777 (1936).
43. 338 Mo. 217, 89 S. W. (2d) 654 (1936).
44. 338 Mo. 519, 92 S. W. (2d) 603 (1936).
45. 93 S. W. (2d) 668 (Mo. 1936).
46. 93 S. W. (2d) 881 (Mo. 1936).
47. See also State v. Hanks, 98 S. W. (2d) 541 (Mo. 1936).

remedy may be more harsh on the client than on the erring lawyer, that the writer regrets. While precedents are probably lacking, it may be asked why something in the nature of a fine cannot be placed upon counsel for errors of this avoidable nature.

According to supreme court rule 15 it is provided that the brief for appellant (1) shall distinctly allege the errors committed by the trial court and contain in addition thereto, (2) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument, (3) a statement, in numerical order of the points relied on, with citation of authorities thereunder, and, (4) a printed argument if desired.

Such assignments of error as that "the verdict is against the weight of the evidence" and "the verdict is against the law under the evidence" are insufficient, the former being a matter upon which the appellate courts do not pass and the latter being too broad and indefinite. This was held in *Clay v. Owen*,[48] which also decides that assignments of error which are not mentioned in the points and authorities or in the printed argument are deemed abandoned.

In criminal cases where the statute,[49] requires motions for new trial to set forth in detail and with particularity the specific grounds thereof, it is natural that the court should seize upon absence of the required particularity in the motion made below without inquiry as to the form of the specifications of error in the brief. A number of cases have refused to consider alleged errors for this reason.[50] In some of these the court may be speaking of deficiencies in either the assignments of error in the motion for new trial, or the assignments of error in the appellant's brief. In *State v. White*,[51] it was held that the insufficient assignments of error in the motion for new trial could not be broadened or made specific by the points and authorities in appellant's brief.

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48. 338 Mo. 1061, 93 S. W. (2d) 914 (1936). See also Colin v. Moldenhauer, 338 Mo. 827, 92 S. W. (2d) 601 (1936), holding that assignments of error that "the judgment on the record is erroneous" and "the record will not support the judgment" were insufficient basis for the argument that the trial court decided the case without hearing evidence.

49. Mo. REV. STAT. (1929) § 3735.

50. State v. Thompson, 338 Mo. 897, 92 S. W. (2d) 892 (1936); State v. Arnett, 338 Mo. 907, 92 S. W. (2d) 897 (1936); State v. Bagby, 338 Mo. 951, 93 S. W. (2d) 241 (1936); State v. Kaner, 338 Mo. 972, 93 S. W. (2d) 671 (1936); State v. Maples, 96 S. W. (2d) 26 (Mo. 1936); State v. Flinn, 96 S. W. (2d) 506 (Mo. 1936); State v. Smith, 339 Mo. 950, 98 S. W. (2d) 657 (1936); State v. Mansker, 339 Mo. 913, 98 S. W. (2d) 666 (1936); State v. White, 339 Mo. 1019, 99 S. W. (2d) 72 (1936); State v. Arenz, 100 S. W. (2d) 264 (Mo. 1936). See generally Comment (1936) 1 Mo. L. REV. 175.

51. 339 Mo. 1019, 99 S. W. (2d) 72 (1936).

State v. McKeever[52] refuses to pass upon errors alleged in the brief, which were not mentioned in the motion for new trial. *State v. Frazier*[53] makes the point that it is even more unfair for appellant to bring general assignments of error to the supreme court than to present these below when there is a chance for questioning and argument.

In *Shaw v. Fulkerson*,[54] respondent filed a motion to dismiss the appeal because the statement of facts in the brief contained argumentative matter in violation of statute and court rule. While the court indicated that its action might be too lenient, it refused to dismiss because, ignoring the argumentative matter, appellant had stated all the facts including those favorable to respondent.

Where the points and authorities are merely a repetition of the assignments of error followed by a list of citations and without stating the reasons for the errors complained of, the brief fails to comply with rule 15. For this reason the appeals were dismissed in *Hartkopf v. Elliott*,[55] and *Majors v. Malone*.[56] Putting it another way, the assignments of error should show in particular to *what* ruling of the trial court objection is being taken, while the points should tell the legal reason *why* the complaint is being made. Moreover the connection between these two matters should be made apparent. Mere abstract propositions of law such as "fraud is never presumed" when contained in the points of the brief are insufficient for they do not show the applicability of the legal proposition to the facts of the case.[57] The seriousness with which the court views these matters is illustrated by the dismissals of the appeals.

In *Payne v. Payne*,[58] an equity appeal was dismissed for appellant's failure to include an index at the end of his abstract of the record as required by rule 13, although the abstract contained only 27 pages. *Bank of Kennett v. Tatum*[59] is in accord though the abstract was longer, and the case further holds that the court will not consider a supplemental abstract filed after objection is raised.

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52. 101 S. W. (2d) 22 (Mo. 1936).
53. 339 Mo. 966, 98 S. W. (2d) 707 (1936).
54. 339 Mo. 310, 96 S. W. (2d) 495 (1936).
55. 339 Mo. 1009, 99 S. W. (2d) 25 (1936).
56. 339 Mo. 1118, 100 S. W. (2d) 300 (1936), noted in (1937) 2 Mo. L. REV. 206.
57. See Clay v. Owen, 338 Mo. 1061, 93 S. W. (2d) 914 (1936), cited note 48, *supra;* also cases cited *supra* notes 55 and 56.
58. 338 Mo. 224, 89 S. W. (2d) 665 (1936).
59. 100 S. W. (2d) 475 (Mo. 1936).

State v. Mason,[60] settles an important point in criminal appeals. It held that when appellant's counsel abandoned in his brief some of the assignments of error contained in the motion for new trial, the court would not pass upon these assignments. The court admits that under the statute it is its duty to search the record proper for all errors there appearing regardless of whether or how such questions were raised below or on appeal; it further conceded that when a bill of exceptions preserves proper assignments of error in the motion for new trial, the court will look to all such assignments if the cause is not briefed by appellant. But where appellant filed a brief in the supreme court expressly or by implication abandoning such assignments of error, the court will not consider the points. Leaving the point entirely out of the brief is deemed an abandonment thereof,[61] though this was not extended to cases where there is merely a faulty brief.

Disposition of Cases on Appeal[62]

Where there are separate or cross-appeals in a single case, the whole case on appeal must be considered as a unit, according to *Punch v. Hipolite Co.*[63] *State* ex rel. *Ashby v. Cairo Bridge & Terminal Co.*[64] lays down the same rule, though one party appeals and another takes out a writ of error.

The general doctrine that the decision upon a first appeal will be followed as the law of the case in a second appeal involving the same issue was applied in *Lober v. Kansas City*.[65] However certain qualifications upon this doctrine are illustrated in *Poe v. Illinois Cent. R. R.*[66] There, it was held that the divisional court would not follow the law announced in a prior appeal of the same case if convinced that the first appeal was incorrectly decided, especially when a contrary doctrine had been announced in the interim by the court in banc.

In *State v. Bliss*,[67] there had been a prior review of the same judgment upon the record only. The affirmance upon that appeal was deemed to be res judicata and preclude a second review, although the present appeal included

60. 339 Mo. 874, 98 S. W. (2d) 574 (1936).
61. See also Clay v. Owen, 338 Mo. 1061, 93 S. W. (2d) 914 (1936), cited note 48, *supra*.
62. As to the revival of actions in the Supreme Court, see section on Wills and Administration *infra* notes 58 to 60.
63. 100 S. W. (2d) 878 (Mo. 1936).
64. 100 S. W. (2d) 441 (Mo. 1936).
65. 339 Mo. 1087, 100 S. W. (2d) 267 (1936).
66. 339 Mo. 1025, 99 S. W. (2d) 82 (1936).
67. 99 S. W. (2d) 71 (Mo. 1936).

a bill of exceptions. *Benz v. Powell*[68] adds to the legion of decisions holding that a case must be heard on appeal upon the same theory as in the trial court. In *Moberly v. Leonard*,[69] the court refused to pass upon a certain question because it was moot. It is of interest to notice that the court discovered the non-justiciable character of the matter from an examination of the record in another case before the court. The effect of a judge concurring "in result" is considered in *State* ex rel. *Dengel v. Hartmann*.[70] Speaking of a prior decision which contained language inconsistent with that in a still earlier one, it was declared that the later of the two could not be considered a ruling decision when only three judges concurred absolutely, two others in the result, with one judge dissenting and another absent.

In *Lambert v. Jones*,[71] there was judgment below against three tort feasors but only two appealed. Finding reversible error upon questions of liability but none upon questions of damages, the judgment was reversed as to all defendants with directions to hold in abeyance the verdict as to the non-appealing defendant, until the case was disposed of as to the liability of the appealing defendants and then enter judgment against the non-appealing defendant and such other defendant or defendants finally found liable. This procedure was considered necessary in order to have only one final judgment in the same amount against all alleged joint-feasors who are held liable. The disposition also resulted in a partial new trial upon the issue of liability without redetermination of damages, which question was correctly decided on the first trial.

Tanner v. West[72] presents an interesting question of the disposition of a case upon appeal, though the court after stating the facts at length decides the matter in short order. In a damage action defendant demurred to the evidence at the close of all the testimony. This demurrer was overruled and a verdict returned for plaintiff. Defendant then moved for new trial upon the ground, among others, that his demurrer to the evidence should have been sustained. The trial court granted the new trial however upon the ground of error in the giving of a certain instruction upon plaintiff's request. Plaintiff appealed from the order granting the new trial, but the order was affirmed upon the ground that defendant's demurrer to the evidence should have been

68. 338 Mo. 1032, 93 S. W. (2d) 877 (1936).
69. 339 Mo. 791, 99 S. W. (2d) 58 (1936).
70. 339 Mo. 200, 96 S. W. (2d) 329 (1936).
71. 339 Mo. 677, 98 S. W. (2d) 752 (1936).
72. 339 Mo. 738, 99 S. W. (2d) 7 (1936).

sustained, refusing to pass upon the further question of the correctness of the instruction given at plaintiff's request.

It thus appears that the case may be retried although plaintiff did not make out a case sufficient to go to the jury. It further appears that defendant would have been in a better position had his motion for new trial been denied and had he then appealed from judgment upon the verdict. Apparently the supreme court would then have reversed the case without ordering new trial. There is no reason why plaintiff should then have been given another chance to make out a case for the jury.[73] An efficient procedural device which has some application to the instant cause is that found in some jurisdictions[74] of submitting the case to the jury with power to set the same aside and order judgment for the opposite party if the law and facts after due consideration warrant such disposition. Technically the disposition of the instant cause seem defensible for the reason that as defendant has asked for a new trial, he can scarcely complain that one is ordered, and the further fact that he did not, and probably could not, appeal after the granting of the new trial. But is this the "very right" of the cause?

When the evidence in a criminal case was insufficient to sustain the conviction by the court below and there was no showing that the state could make a better case on retrial, it was held, in *State v. DeMoss*,[75] that a new trial should not be ordered but the defendant discharged, especially when defendant's motion for new trial disclosed newly discovered evidence of an important nature. In *State v. White*,[76] the supreme court noticed that the verdict assessed punishment at five years imprisonment, while a memorandum of the sentence indicated that four years had been imposed. It was declared that the record on appeal should show the actual entry of the judgment and the case was remanded for sentence in accordance with the verdict, if that had not already been done, and, finding no other error, the court expressly ordered that there be no new trial.

When the trial court erroneously imposed two years more imprisonment than the jury had assessed, the supreme court, in *State v. Franks*,[77] refused to

73. See *supra* text at notes 37-40 and following.
74. CAL. CODE CIV. PROC. (1923) § 629; MASS. G. L. (Ter. ed. 1932) c. 231, §§ 120-122; MINN. STAT. (Mason, 1927) § 9495; PA. STAT. (West, 1936) tit. 12, § 681. See also Cruikshank v. St. Paul Fire & Marine Ins. Co., 75 Minn. 266, 77 N. W. 958 (1899). *Cf.* Slocum v. New York Life Ins. Co., 228 U. S. 364 (1913).
75. 338 Mo. 719, 92 S. W. (2d) 112 (1936).
76. 339 Mo. 1019, 99 S. W. (2d) 72 (1936).
77. 339 Mo. 86, 95 S. W. (2d) 1190 (1936). See also State v. Melton, 92 S. W. (2d) 107 (Mo. 1936).

remand the case but itself entered the lawful judgment in accordance with the jury's findings.

State v. Gregory[78] contains an interesting and helpful discussion of when the supreme court will grant a new trial in a criminal case upon the ground that the verdict is against the great weight of the evidence. While no definition of such matters could be tangible or mechanical, it is laid down that the evidence in order to support the verdict must be substantial, or such as the jury could reasonably find the issues as it did. Moreover the measure of proof required in criminal cases and the apparent credibility of witnesses must be considered in this connection. The court declined to interfere upon the facts of the *Gregory* case, and indicated that it would seldom do so.

IV

BANKING AND NEGOTIABLE INTRUMENTSS

LAWRENCE R. BROWN*

I. BANKS AND BANKING

" 'The presumption is that a deposit is a general one and the burden of proving otherwise is on the person claiming priority as a special depositor. A special deposit in its truest sense is one where the bank merely assumes custody and charge of the property without authority to use it, and the depositor is entitled to receive back the identical thing deposited. The title to the thing deposited remains with the depositor and, as a general rule, if the special deposit be money the bank has no right to mingle it with its other funds. However, the rule has been greatly relaxed so that, where the money deposited is to be used for a specifically designated purpose, it may still be regarded as a special one, even though the funds were deposited under an agreement allowing them to become mingled with other funds in the bank and they are so mingled that the identical money deposited can no longer be identified. However, that purpose must be evidenced by a mutual understanding or agreement on the

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78. 339 Mo. 133, 96 S. W. (2d) 47 (1936).

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part of the depositor and the bank and the intention or purpose, merely on the part of the depositor, that it should become a special deposit is not sufficient to make it so.' "[1]

This rule as laid down in an earlier case was quoted, approved and adopted by the Supreme Court of Missouri in the recent case of *Landwehr v. Moberly, State Finance Com'r.*[2] The fact that the deposit is made by a trustee or executor of funds intrusted to his care does not make the deposit "special" merely because the funds are to be used only for the purpose of carrying out the purpose of a trust. The court in the *Landwehr* case also held that since the closing of the bank resulted from withdrawals over a period of a year and since there was no suggestion of mismanagement, there could be no preference against the bank liquidation on the ground that bank officials knew the bank was insolvent at the time of accepting the deposits.

Where trust funds are transferred to a bank and its officers had knowledge that they were trust funds, they will be impressed with a trust and do not become part of the general assets of the bank. In so ruling the court, in the case of *Happy v. Cole County Bank*,[3] followed the well established doctrine that equity will follow trust property when the purchaser has notice the property is held in trust regardless of consideration.[4]

In *Security National Bank Savings & Trust Co. v. Moberly*,[5] one Barton conveyed to the defendant Chauteau Trust Company, as trustee, certain property to secure payment of $500,000 in notes in the sum of $500 each. In order to meet semi-annual interest payments and annual principal pay-offs, the mortgage obligated the mortgagor to make certain regular monthly deposits with the trustee. The funds in suit represented the regular monthly deposits. The suit was in equity on behalf of the noteholders to establish a preferred claim against the assets of the Chauteau Trust Company, since insolvent, to the extent of the deposits. The plantiff intended that the funds were accepted as special deposits and were impressed with a trust. The court, after pointing out that "deposits made by fiduciaries are usually considered simply as general deposits;" that "a special deposit of money...consists of the delivery thereof...pursuant to an agreement...to hold same for a pre-

1. City of Fulton v. Harrison, 69 S. W. (2d) 312, 315 (Mo. App. 1934); City of Fulton v. Home Trust Co., 336 Mo. 239, 78 S. W. (2d) 445 (1934).
2. 338 Mo. 1106, 93 S. W. (2d) 935 (1936).
3. 338 Mo. 1025, 93 S. W. (2d) 870 (1936).
4. PERRY, TRUSTS & TRUSTEES (7th ed. 1929) 379, 380.
5. 101 S. W. (2d) 33 (Mo. 1936).

scribed purpose...and to return the same money or its equivalent;" that "the presumption obtains that the deposits were general;" stated that the right of a bank to commingle and use deposits is determinative of whether the deposit is special and not the fact that it is commingled.

The court expressly overruled the following statement made in the case of *City of Fulton v. Harrison*:[6]

> "However, the rule has been greatly relaxed so that, where the money deposited is to be used for a specifically designated purpose, it may still be regarded as a special one, even though the funds were deposited *under an agreement allowing them to become mingled with other funds* in the bank and they are so mingled that the identical money deposited can no longer be identified." (*italics the author's*).

Such a ruling seems proper for it is impossible to reconcile the old rule with the established law in Missouri that "it is the right or not of the bank to commingle and use the funds as its own" that determines the character of the deposit as special or general.[7] With these principles as a background the court ruled that the deposits in this case were not special but general and not subject to a preference. In so doing the court held that the fact that no interest is to be paid is not determinative of the nature of a deposit, and although a bank enters a transaction as a "trustee" account, it does not change the nature of the deposit from a general one.

A transaction whereby one bank took over all of the assets of another bank and assumed certain liabilities was held to be a sale of the second bank's assets except those equal to its capital stock and other liabilities not assumed in *Moberly v. Leonard*.[8]

In *Town of Canton v. Bank of Lewis County*,[9] it was held that the sureties on a depository bond which provided that the depository should act as such for one year and until a successor qualified were liable until a successor is appointed even though a year has gone by.

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6. City of Fulton v. Harrison, 69 S. W. (2d) 312 (Mo. App. 1934); City of Fulton v. Home Trust Co., 336 Mo. 239, 78 S. W. (2d) 445 (1934).

7. Craig v. Bank of Granby, 210 Mo. App. 334, 238 S. W. 507 (1922); *In re* Sturdivant Bank, 89 S. W. (2d) 89 (Mo. App. 1936); RESTATEMENT, TRUSTS (1935) § 12, comment h.

8. 339 Mo. 791, 99 S. W. (2d) 58 (1936).

9. 338 Mo. 817, 92 S. W. (2d) 595 (1936).

When a bank gives a depositor of a check credit and allows the depositor to check against this credit the bank becomes the owner of the check and not an agent for collection.[10]

II. Negotiable Instruments

An endorsement worded "For value received Reuben Josephson hereby assigns and transfers the within note and coupons with all his interest in and rights under the Mortgage or Deed of Trust securing the same to....Signed Reuben Josephson," was interpreted (in accordance with the well settled Missouri rule) in the case of *Home Trust Co. v. Josephson*,[11] as an unqualified endorsement.

The court also reiterated the rule that in the absence of suspicious circumstance the presumption is that erasures on a negotiable instrument were made at or prior to the time of signing. A failure to attempt to rebut the presumption amounts to an admission of its correctness. In the case of *Lampe v. Franklin American Trust Co.*,[12] the circumstances were so suspicious as to rebut the presumption.

Because "the law does not require the doing of a vain and useless act," the court, in the *Josephson* case, held that although "ordinarily presentment for payment and notice of dishonor of a negotiable instrument are necessary in order to bind the indorser" it is not necessary "where the indorser is the person to whom the instrument is presented for payment," and where as in that case the failure to give notice did not prejudice defendant.

"...where...the plaintiff is entitled to a directed verdict and there is *no controversy* as to the amount, and the contract sued on calls for interest at a stated rate for a certain time, so that the ascertainment of the amount of interest is only a matter of mathematical computation, it is not error for the court to make the calculation and direct a verdict for the total amount due, including the interest."[13] In so holding, many Missouri cases to the contrary (in regard to interest) were expressly overruled.[14]

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10. Liberty National Bank of Kansas City v. Vanderslice-Lynds Co., 338 Mo. 932, 95 S. W. (2d) 324 (1936).
11. 339 Mo. 170, 95 S. W. (2d) 1148 (1936).
12. 339 Mo. 361, 96 S. W. (2d) 710 (1936).
13. Home Trust Co. v. Josephson, 339 Mo. 170, 95 S. W. (2d) 1148 (1936).
14. Cates, Adm'r. v. Nickell, 42 Mo. 169 (1868); Burghart v. Brown, 60 Mo. 24 (1875); Johnson v. Grayson, 230 Mo. 380, 130 S. W. 673 (1910); Boutross v. Miller, 223 S. W. 889 (Mo. 1920).

Any alteration is a material one which may in any event alter rights duties or obligations of a person sought to be charged, according to the holding in *Lampe v. Franklin American Trust Co.*[15]

V

CONSTITUTIONAL LAW

SOLBERT M. WASSERSTROM*

I. SEPARATION OF POWERS

Encroachment of the Legislature on the Judiciary. The statute,[1] involved in *State* ex inf. *Crain*, ex rel. *Peebles v. Moore*,[2] provides for circuit clerks being ex officio recorders in counties of less than 20,000 inhabitants and provides that in counties over 20,000 the offices may be combined on a vote of the voters of the county. It was objected that the legislature cannot hamper the work of the circuit clerk since that is an infringement on the judiciary. It was held that while the courts may not be bound by any and all statutes of the legislature affecting the office of circuit clerk,[3] the provisions here are not unconstitutional.

In *State* ex rel. *Pitcairn v. Public Service Commission*[4] and in *State* ex rel. *Gehrs v. Public Service Commission*,[5] it was held that the statute,[6] purporting to allow an appeal to the supreme court of decisions of the circuit court reviewing action by the Public Service Commission, is unconstitutional insofar as it attempts to invade the jurisdiction of the courts of appeals and to enlarge the jurisdiction of the supreme court; the respective jurisdictions are

15. 339 Mo. 361, 96 S. W. (2d) 710 (1936).

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1. Act of 1933, MO. STAT. ANN., §§ 11526, 11528, 11529, 11534, 11535, 11538, 11541, pp. 6696-6699.

2. 99 S. W. (2d) 17 (Mo. 1936).

3. Relative to the nature of the office of clerk of the court, see 11 C. J. 848, § 1. It appears that although endowed with certain judicial attributes the office is essentially a ministerial, not a judicial one; however, some jurisdictions consider the clerk an essential constituent part of the court. For a rather extended discussion of the nature of the circuit clerk's office in Missouri, see State *ex rel.* Hensen v. Sheppard, 192 Mo. 497, 91 S. W. 477, 482 (1905).

4. 92 S. W. (2d) 881 (Mo. 1936).

5. 90 S. W. (2d) 394 (Mo. 1936), followed in State *ex rel.* to Use of Alton R. R. v. Public Service Commission, 100 S. W. (2d) 474 (Mo. 1936).

6. MO. REV. STAT. (1929) § 5237.

defined by the constitution[7] and the legislature may not either enlarge or subtract therefrom.

Encroachments of the Judiciary on the Legislature. In *Peterson v. Kansas City Life Ins. Co.*,[8] defendant had foreclosed a deed of trust after plaintiff had defaulted. Plaintiff sues for damages for wrongful foreclosure, his contention being that defendant should have granted a moratorium in such bad times. The court held that the right to grant a moratorium because of critical conditions is a legislative and not a judicial power. Defendant's refusal to grant a moratorium cannot be any basis for an action for damages.

In *State* ex inf. *McKittrick v. Gate City Optical Co.*,[9] the question was whether defendants were practicing optometry within the meaning of the optometry code.[10] The court held that the statute is plain on its face, and it is not the province of the court to write exceptions or qualifications which the Legislature did not see fit to insert.

Encroachment of the Judiciary on the Executive. In *State* ex rel. *State Highway Commission v. Sevier*,[11] the question was the jurisdiction of the trial judge to issue a temporary injunction prohibiting the Highway Commission to sign a contract with a construction company for the building of a highway bridge. It was held that under article 4, Section 44a, of the Missouri constitution, the commission has absolute discretion as to construction of bridges. It has sole jurisdiction to determine the question of whether promised cooperation by the city of Atchison, Kansas and the State of Kansas would be forthcoming; and the courts cannot interfere with the ordinary functions of the executive department of the state government.

II. Legislation

Titles to Acts. It was held in *State* ex inf. *Crain*, ex rel. *Peebles v. Moore*,[12] that catchwords prefixed by the compiler are not part of the title in a constitutional sense, and hence cannot give the statute[13] more than one subject. All the matter covered was held to have a natural connection with the general subject of the bill and properly could be embodied in one act.

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7. Art. 6, § 12, and amendment of 1884 to art. 6, § 5.
8. 98 S. W. (2d) 770 (Mo. 1936).
9. 97 S. W. (2d) 89 (Mo. 1936).
10. Mo. Rev. Stat. (1929) §§ 13497 *et seq.*
11. 97 S. W. (2d) 427 (Mo. 1936).
12. 99 S. W. (2d) 17 (Mo. 1936).
13. Act of 1933, Mo. Stat. Ann., §§ 11526, 11528, 11529, 11534, 11535, 11538, 11541, pp. 6696-6699.

In the same case, it was contended that the statute above was so contradictory and conflicting as to be unconstitutional since the subject matter cannot be clearly expressed in the title. It was held that the provisions are not new or novel,[14] the meaning of the statute is plain, and the objection is not vaild.

In *State* ex rel. *Mueller Baking Co. v. Calvird*,[15] the court held that the statute[16] was part of a substitute act[17] to replace a former act,[18] and the title of the original act became the title of the new act. Section 8707 comes within the purview of the original act and objection is without merit.

Special Legislation. In *State* ex rel. *Ashby to Use of Capital School Fund of Mississippi County v. Cairo Bridge & Terminal Co.*,[19] the statute[20] imposing a penalty on defendants for failure to render a property statement for tax purposes was held unconstitutional as special legislation in violation of article 4, Section 53, sub-division 32. The statute imposed a penalty on only four types of utility companies whereas the statute[21] providing for the rendition of the property statements in question applied to a larger number of public utilities.

In *State* ex inf. *Crain*, ex rel. *Peebles v. Moore*,[22] it was held that classification on a population basis was valid, where offices of recorder and circuit clerk were combined in counties of less than 20,000.

In *State* ex rel. *Mueller Baking Co. v. Calvird*,[23] it was held that the permissible classification doctrine is applicable to the first 31 sub-divisions of Section 53, article 4, of the Missouri constitution as well as to the 32nd subdivision; the court disapproves the statement to the contrary made in *State* ex rel. *Standard Fire Ins. Co. v. Gantt*.[24] Thus the classification effected by a special venue statute,[25] not arbitrary or unreasonable, is valid.

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14. See Mo. Rev. Stat. (1825) p. 655, and G. S. Mo. 1865, c. 26, § 23, p. 161.
15. 338 Mo. 601, 92 S. W. (2d) 184 (1936).
16. Mo. Rev. Stat. (1929) § 8707.
17. Act against pools, trusts, conspiracies and discriminations.
18. Mo. Rev. Stat. (1909) art. 1, c. 98.
19. 100 S. W. (2d) 441 (Mo. 1936).
20. Mo. Rev. Stat. (1929) § 10070.
21. Mo. Rev. Stat. (1929) § 10066.
22. 99 S. W. (2d) 17 (Mo. 1936).
23. 338 Mo. 601, 92 S. W. (2d) 184 (1936).
24. 274 Mo. 490, 203 S. W. 964 (1918).
25. Mo. Rev. Stat. (1929) § 8707, which is part of the act against pools, trusts, conspiracies, and discriminations.

Presumptive Validity. In *State* ex rel. *Jacobsmeyer v. Thatcher*,[26] the familiar rule was repeated that every presumption is in favor of the validity of legislative acts.

Effect of Constitutional Amendment on Statutes. In *State* ex rel. *Dengel v. Hartmann*,[27] it was held that if a previous law[28] conflicts with the constitutional amendment of 1924, which sets up limitations on the secrecy of ballot, said previous law is nullified as if specifically repealed.[29]

III. Delegation of Legislative Power

Local Option Law. In *State* ex inf. *Crain*, ex rel. *Peebles v. Moore*,[30] the statute[31] providing for local option in counties over 20,000 as to the combining of the offices of circuit clerk and recorder was upheld.[32] The criteria of the validity of such laws are: (a) the statute must take effect ex propio vigore without requiring assent of local authorities or electorate to make it such; (b) the legislation must generally be on a matter of local concern so far that varied and varying local conditions may be consulted in its application; (c) a statute cannot delegate unfettered discretion, but must be complete enough to declare the will of the law makers within practicable limits. The court also adverts to the rule[33] that a statute cannot allow a county to create and discontinue an office at pleasure; but the court decides that rule has no application in this case.

Highway Toll Bridges under Private Corporations. The statute[34] provides that not less than three nor more than seven qualified electors might become a body corporate with the right to perpetual succession and should be deemed a public agency for the purpose of building a highway toll-bridge. Bonds were to be issued against the income of the bridge, and after retirement of said bonds the bridge would become free to the public. The constitutionality of the statute was attacked in *State* ex rel. *Jones v. Brown*,[35] one ground of attack

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26. 338 Mo. 622, 92 S. W. (2d) 640 (1936). The same case was before the court in 337 Mo. 1225, 88 S. W. (2d) 187 (1935).
27. 96 S. W. (2d) 329 (Mo. 1936).
28. Mo. Rev. Stat. (1919) § 5403.
29. 12 C. J. 725, § 97.
30. 99 S. W. (2d) 17 (Mo. 1936).
31. Act of 1933, Mo. Stat. Ann., §§ 11525, 11528, 11529, 11534, 11535, 11538, 11541, pp. 6696-6699.
32. See State *ex inf.* Crow v. Evans, 166 Mo. 347, 66 S. W. 355 (1902).
33. State *ex rel.* Rosenthal v. Smiley, 304 Mo. 549, 263 S. W. 825 (1924).
34. Mo. Stat. Ann., §§ 7914d *et seq.* and §§ 7907a note, 7907b note, 7907c *et seq.*
35. 338 Mo. 448, 92 S. W. (2d) 718 (1936).

being that there was an unlawful delegation of power. This divided into two branches: (1) this was an unlawful delegation to citizens of the power to create public agencies of the state, the court so held; (2) further, the legislature proposes to leave to the unbridled discretion of this alleged public agency the number of bridges to be acquired, the character and location, or whether any will be acquired at all. It was held to constitute an unconstitutional delegation.

Sub-division of Townships by County Court. In *State* ex rel. *Frank v. Tegethoff*,[36] a statute[37] permitting sub-division of townships by the county court was attacked as an unreasonable delegation of legislative power. It was held that the statute in question in harmony with the constitution[38] defines one of the powers of the county courts growing out of their supervisory control over the administrative affairs of the county.

IV. Due Process

Administrative Proceedings. In *State* ex rel. *Anderson Motor Service Co. v. Public Service Commission*,[39] the statute[40] providing for court review of proceedings before the Public Service Commission was attacked as denying due process in that it deprived appellant of a hearing. The statute provides for a writ of certiorari from the circuit court to the commission; but the party who prevailed before the commission is not made a party to the proceeding before the circuit court and there is no provision for notice to or service upon him. The court held that the proceedings in the circuit court being a mere continuance of the proceedings before the commission, it was incumbent on appellant to take note of the progress of the case; appellant had the right to appear before the circuit court, to be heard there, and to appeal from the judgment of the circuit court.

In *State v. Phillips Pipe Line Co.*,[41] it was contended that the assessment and judgment of the Tax Commission[42] contravenes the due process require-

36. 338 Mo. 328, 89 S. W. (2d) 666 (1936).
37. Mo. Rev. Stat. (1929) § 12041.
38. Art. 6, § 36.
39. 97 S. W. (2d) 116 (Mo. 1936).
40. Public Service Commission Act, Mo. Rev. Stat. (1929) § 5234.
41. 97 S. W. (2d) 109 (Mo. 1936); 57 Sup. Ct. 668 (1937), on motion of the Attorney-General of the State of Missouri, this case was continued to the October Term, 1937, of the Supreme Court of the United States.
42. Under Mo. Rev. Stat. (1929) §§ 4596, 4641.

ment. The court disposes of the point on the authority of *St. Louis-San Francisco Ry. v. Middlekamp.*[43]

In *Kansas City Power & Light Co. v. Midland Realty Co.*,[44] defendant contended his contract rates for steam could not be abrogated by the higher schedule of rates approved by the Public Service Commission. One ground of complaint was that the defendant was not a party to the proceeding before the commission wherein the schedule rates were approved and the commission did not have an opportunity to and did not find that the contract was unreasonable. The court held that the commission's action was only a tentative and prima facie determination of facts controlling defendant's rights and did not determine the rights themselves. Both parties availed of the usual and statutory mode of procedure, adequate to safeguard defendant's contractual rights, and the requirements of due process were met.

Assessment of Railroad for Crossing Improvement. In *State* ex rel. *Wabash Ry. v. Public Service Commission*,[45] the railroad company complained that assessment against it of 40%[46] of the cost of the separation of a grade[47] was a denial of due process. The separation resulted in a slight increase in safety which was of benefit to the company in that it was protected to that extent from damage suits. However, the crossing was already reasonably safe, and the major benefit of the separation was convenience to the highway public and the beautification of St. Louis' Forest Park and the surrounding residential district. It was held that aside from the safety factor, the convenience and necessity of the traveling public must be considered; apportionment should include a consideration of the extent to which the presence of the railroad at the place enhanced the cost of a necessary improvement. The court says further that the apportionment of the cost to the railroad was reasonable since there was a full hearing by the commission on the question, and relator was allowed to introduce evidence to support its contentions; e. g., it was allowed to prove in detail the use of the crossing by the railroad in comparison

43. 256 U. S. 226 (1921). In that case it was argued that the statute made no requirement of a hearing by the commission; but the United States Supreme Court held that the question of a proper hearing could be raised when a court suit was brought by the state to collect the tax on the assessment, and there was therefore no denial of due process.

44. 338 Mo. 1141, 93 S. W. (2d) 954 (1926), *aff'd*, 300 U. S. 109 (1937); petition for rehearing denied, 57 Sup. Ct. 504 (1937).

45. 100 S. W. (2d) 522 (Mo. 1936).

46. The other 60% was assessed to the city.

47. This elimination of the grade crossing was a part of a complete plan of separation which was before the Commission and the Supreme Court in State *ex rel.* Wabash Ry. v. Public Service Comm., 306 Mo. 149, 267 S. W. 102 (1924).

to use by vehicular traffic. It will be noticed that it is held that convenience to the traveling public justifies assessment of part of the cost to the railroad. In this case, the factor of beautification of the park and residential district was considered only on the question of whether the plan actually adopted was permissible in preference to the railroad's plan for a cheaper but less beautifying construction. It has been held that an assessment against a railroad is not justified if the sole object of the separation is beautification.[48]

Refinancing of Trust Certificates by R. F. C. In *Seigle v. First Nat. Co.*,[49] certificate holders of a trust fund consisting of mortgage securities brought equity suits for liquidation of the trust fund, and judgment to that effect was granted. Subsequently, the decree was modified on an intervening petition to permit a loan to be accepted from the R. F. C. and to permit the transfer of the securities to the R. F. C. as a pledge with the power in the R. F. C. to try to liquidate the securities; provison was made for distribution of the proceeds of the loan to the certificate holders and for distrbution of the proceeds of the liquidation to the certificate holders after repayment of the loan. It was held there is no denial of due process to appellant certificate holders.

Ouster of Utility at Expiration of Franchise. It was held in *State on Inf. of McKittrick* ex rel. *City of California v. Missouri Utilities Co.*[50] that the use of city streets by a utility company is not a vested right but a privilege which ceases at the expiration of the franchise period. Hence it is held that the company has no property of which it is or can be deprived by an ouster from the streets.[51]

V. Obligation of Contracts

Ouster of Utility at Expiration of Franchise. In *State on Inf. of McKittrick* ex rel. *City of California v. Missouri Utilities Co.*,[52] it was held that as originally made, the contract (franchise) was to expire in 1929, the contract ceased to exist on that date, and a non-existing contract cannot be impaired by an order of ouster on a subsequent date.[53]

The utility company further contended that a certificate of convenience and necessity issued by the Public Service Commission in 1924 modified the original contract and made it a perpetual one. The court points out in reply

48. State *ex rel.* and to Use of Wabash Ry. v. Public Service Comm., 306 Mo. 149, 267 S. W. 102, 108 (1924), and cases cited.
49. 338 Mo. 417, 90 S. W. (2d) 776 (1936).
50. 96 S. W. (2d) 607 (Mo. 1936).
51. See also Detroit United Ry. v. Detroit, 229 U. S. 39 (1913).
52. 96 S. W. (2d) 607 (Mo. 1936).
53. See also Detroit United Ry. v. Detroit, 229 U. S. 39 (1913).

that the Public Service Commission Act[54] makes the consent of the municipality a condition precedent to the granting of the certificate; hence the granting of the certificate did not extend the life of the original contract.

Schedule Rate, Approved by Commission, Abrogating Contract Rate. It was held in *Kansas City Power & Light Co. v. Midland Realty Co.*[55] that the Public Service Commission may fix by order reasonable rates exceeding the maximum prescribed by individual contracts, and such an order does not in the constitutional sense impair the obligation of such contracts; this being so because the police power cannot be contracted away.[56]

Administrative Hearing on Rate Schedule. In *Kansas City Power & Light Co. v. Midland Realty Co.*,[57] it was held that hearings before the Public Service Commission detailed *supra* do not impair a consumer's individual contract rate.

Refinancing of Trust Certificates by R. F. C. In *Seigle v. First Nat. Co.*,[58] it was argued that the decree detailed above impaired the obligation of the certificate holders' contract. The court held that the decree does not disturb the contract but seeks to enforce it in a manner which, to the court, appeared to be the most effective means.

VI. Equal Protection

Refinancing of Trust Certificates by R. F. C. In *Seigle v. First Nat. Co.*,[59] it was argued that the decree detailed above denied appellant certificate holders the equal protection of the law. The court points out that appellants do not indicate in what respect the decree denies to them equal protection, and no grounds for such objection occurs to the court.

Statutory Penalties. In *State* ex rel. *Ashby to use of Capital School Funds of Mississippi County v. Cairo Bridge & Terminal Co.*,[60] it was held that the statute detailed above[61] was unconstitutional as a denial of equal protection.

VII. Taxation

Franchise Tax on Corporation Doing Solely Inter-state Business. In *State v. Phillips Pipe Line Co.*,[62] it was held that the corporation franchise

54. Mo. Rev. Stat. (1929) § 5193.
55. 338 Mo. 1141, 93 S. W. (2d) 954 (1936), *aff'd*, 300 U. S. 109 (1937); petition for rehearing denied, 57 Sup. Ct. 504 (1937).
56. Mo. Const., art. 12, § 5.
57. 338 Mo. 1141, 93 S. W. (2d) 954 (1936), *aff'd*, 300 U. S. 109 (1937); petition for rehearing denied, 57 Sup. Ct. 504 (1937).
58. 338 Mo. 417, 90 S. W. (2d) 776 (1936).
59. *Ibid.*
60. 100 S. W. (2d) 441 (Mo. 1936).
61. Mo. Rev. Stat. (1929) § 10070.
62. 97 S. W. (2d) 109 (Mo. 1936), 57 Sup. Ct. 668 (1937).

tax[63] applies only to corporations doing intra-state business. The court then delivers this *dictum*: a statute taxing foreign corporations doing a purely inter-state business would not necessarily be unconstitutional; a state may not lay a tax on the privilege or right to do business where the corporation is engaged in purely inter-state business, but here the tax is on the right to do business as a corporation.[64]

Tax Exemption to Toll Bridge in Which State Has a Contingent Reversion. In *State* ex rel. *Jones v. Brown*,[65] it was held that the constitution[66] prohibits the tax exemption attempted to be given the bridge companies organized under the statute *supra*.[67] The court says that even if it be true that the beneficial ownership by a state in property held by a trustee is tax exempt,[68] here the state has no interest until retirement of the revenue bonds; and until that time there can be no exemption. The state cannot declare property to be state property when it is not; nor can it declare that property, for the purpose of taxation, shall be deemed state property when in fact it is not.

Sales Tax on Purchases by Highway Department. In *State* ex rel. *Missouri Portland Cement Co. v. Smith*,[69] it was stated that the 1% sales tax[70] was an excise, not a property tax, and might therefore be charged to the State Department on its purchases without violating the constitutional provision[71] exempting from taxation the property of state, counties and other municipal corporations. But the court goes on to hold that the legislative intent was not to include under the tax the purchases by state agencies.

VIII. Courts Open and Justice Without Delay

In *State* ex rel. *Kennedy v. Remmers*,[72] it was held that a rule of the St. Louis Board of Police Commissioners,[73] requiring permission from the chief

63. Mo. Rev. Stat. (1929) §§ 4596 and 4641.
64. See 12 C. J. 109, § 153; St. Louis & East St. Louis Electric Ry. v. Hagerman, 256 U. S. 314, 318 (1921); St. Louis-San Francisco Ry. v. Middlekamp, 256 U. S. 226, 231 (1921); St. Louis Southwestern Ry. v. Arkansas, 235 U. S. 350 (1914); Atlantic and Pacific Tel. Co. v. Philadelphia, 190 U. S. 160 (1903); Minot v. Philadelphia, Wilmington and Baltimore R. R., 85 U. S. 206 (1873).
65. 338 Mo. 448, 92 S. W. (2d) 718 (1936).
66. Mo. Const., art. 10, §§ 6, 7.
67. Mo. Stats. Ann., §§ 7914d *et seq.* and 7907a note, 7907b note, 7907c *et seq.*
68. It will be noticed that the court reserves judgment on whether the rule contended for is the law.
69. 338 Mo. 409, 90 S. W. (2d) 405 (1936).
70. Laws of Missouri 1935, p. 411.
71. Mo. Const., art. 10, § 6.
72. 101 S. W. (2d) 70 (Mo. 1936).
73. Rule 10, § 178 of the Police Manual, promulgated under Mo. Rev. Stat. (1929) § 7547.

of police with approval of the Board before a policeman might retain counsel and sue in court, was unreasonable and void; further, this violates Section 10, article 2, of the Missouri constitution. In *State* ex rel. *Anderson Motor Service Co. v. Public Service Commission*,[74] it was held that there was no violation of Section 10, article 2, of the Missouri constitution by Section 5234.[75]

IX. Miscellaneous

Who May Challenge Constitutionality of Statute. In *State* ex inf. *Crain*, ex rel. *Peebles v. Moore*,[76] appellant claims office in a county of less than 20,000 inhabitants. The provision of the statute appellant seeks to attack and which he must overcome deals with counties of more than 20,000 inhabitants. The court says it is doubtful whether appellant can raise the question, but since appellant contends the defect makes the whole act void, the court considers the assigned error.[77]

In *Citizens Mut. Fire & Lightning Ins. Soc. v. Schoen*,[78] defendants sought to avoid an assessment of a mutual fire insurance company on the ground that the loss to be paid by the assessment was that of a school district, and Section 47, article 4, of the Missouri constitution prohibits such a body from becoming a member of any corporation, association, or company. The court held that the constitutional provision is intended to protect the credit, moneys and assets of the school district. Since the defense is not based on any right of defendants in the credit, moneys, or assets of the school district, and since they therefore are not within the classification of those entitled to the protection of the provision, no constitutional question is properly presented.

Manner of Presenting Constitutional Question. In *State* ex rel. *Jacobsmeyer v. Thatcher*,[79] it was held that it is gravely questionable whether a statute should be held unconstitutional in order to award a discretionary writ of mandamus.[80] Clearly it should not be done where the right to the remedy, existing from the question of validity, is doubtful.

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74. 97 S. W. (2d) 116 (Mo. 1936).
75. Public Service Commission Act, Mo. Rev. Stat. (1929) § 5234.
76. 99 S. W. (2d) 17 (Mo. 1936).
77. See 12 C. J. 760, § 177.
78. 93 S. W. (2d) 669 (Mo. 1936), followed in State v. Moore, 99 S. W. (2d) 17, 20 (Mo. 1936).
79. 338 Mo. 622, 92 S. W. (2d) 640 (1936); 337 Mo. 1225, 88 S. W. (2d) 187 (1935).
80. See State *ex rel.* Crandall v. McIntosh, 205 Mo. 589, 103 S. W. 1078 (1907).

Admissions of Unconstitutionality. In *State* ex rel. *Jacobsmeyer v. Thatcher*,[81] it was held that a demurrer does not admit conclusions of law as to unconstitutionality of a statute, and if it did admit this, the court would not be bound by the admission.

Timeliness of Objection. In *State* ex rel. *Dengel v. Hartmann*,[82] it was held that an objection to constitutionality of statutes, not in the pleadings and raised for the first time in the briefs, cannot be considered.[83]

"Taking" of Private Property for a Private Use.[84] In *Seigle v. First Nat. Co.*,[85] it was held an equity court taking over administration of a trust fund may be technically a "taking", but this is not unconstitutional since the taking was to the use of plaintiffs and at their request.

Grant of Valuable Right to Private Corporation by Legislature. In *State* ex inf. *McKittrick v. Southwestern Bell Telephone Co.*,[86] it was contended that the statute[87] granting the right to place telephone poles and wires on the state highways was void as a grant of a thing of value to a corporation.[88] The court held that the section prohibits only a gratuitous grant, and here the contemplated benefit to the public from the extension of service takes the grant in question out of the class of grants prohibited.

Elections. In *State* ex rel. *Dengel v. Hartmann*,[89] it was held that Section 3, article 8, of the Missouri constitution applies in all its provisions to primary elections as well as to general elections, and the limitations on secrecy of ballot contained in this section are applicable to primary elections. This is contrary to the prevailing general rule that the term "election" does not include primary elections.[90] The decision in this case extends the ruling of *State* ex rel. *Hollman v. McElhinney*,[91] which held that because of a certain other

81. 338 Mo. 622, 92 S. W. (2d) 640 (1936); 337 Mo. 1225, 88 S. W. (2d) 187 (1935).
82. 96 S. W. (2d) 329 (Mo. 1936).
83. For exceptions and qualifications to this general rule, see 12 C. J. 786, § 217; Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 689, 113 S. W. 1108, 1110 (1908).
84. Mo. Const., art 2, § 20.
85. 338 Mo. 417, 90 S. W. (2d) 776 (1936).
86. 338 Mo. 617, 92 S. W. (2d) 612 (1936).
87. Mo. Rev. Stat. (1889) § 2721; Mo. Rev. Stat. (1929) § 4921.
88. Mo. Const., art. 4, § 46.
89. 96 S. W. (2d) 329 (Mo. 1936).
90. 20 C. J. 57, § 4; 20 C. J. 114, § 111; State *ex rel.* Dorsey v Sprague, 326 Mo. 654, 33 S. W. (2d) 102 (1930); State *ex rel.* Feinstein v. Hartman, 231 S. W. 982 (Mo. 1921); Haas v. Neosho, 139 Mo. App. 293, 123 S. W. 473 (1909).
91. 315 Mo. 731, 286 S. W. 951 (1926).

provision of the section the opening clause "all elections" of Section 3, article 8, referring to the granting of secrecy of ballot, must be construed to include primary elections; the instant case holds that likewise "election" as subsequently used in reference to limitations on secrecy of ballot includes primary elections.

VI

CRIMINAL LAW

FRANKLIN E. REAGAN*

I

PLEADINGS

Missouri criminal pleading has become so standardized that few cases reach the appellate courts wherein serious and doubtful questions of pleading are involved. A forgery indictment charging the cashier of a bank with making false entries of deposits in a depositor's pass book was held sufficient notwithstanding there was no allegation that no deposits were made. This indictment is a work of art and shows on its face it was meticulously prepared.[1]

In the preparation of an information relative to the description of a gambling game, extreme care must be exercised. An information which failed to specify the *manner* in which the table is adapted, devised and designed for gambling was held to be bad.[2] In the case of *State v. Mitnick*[3] it is pointed out that an information in order to charge a person with engaging in the business of selling securities, in violation of Section 7744 of the Revised Statutes of Missouri 1929, must allege more than one sale of securities. But it is not necessary that an indictment specify the day of the month on which the offense was committed.[4]

II

TRIAL COURT PROCEDURE

(a) *Information or Indictment*

The reading of an information to the jury is not reversible error.[5] While an information may be amended at any time before the jury is sworn,[6] an

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1. State v. Arnett, 338 Mo. 907, 92 S. W. (2d) 897 (1936).
2. State v. Herndon, 96 S. W. (2d) 376 (Mo. 1936).
3. 96 S. W. (2d) 43 (Mo. 1936).
4. State v. Cohen, 100 S. W. (2d) 544 (Mo. 1936).
5. State v. Truce, 338 Mo. 744, 92 S. W. (2d) 135 (1936).
6. State v. McPhearson, 92 S. W. (2d) 129 (Mo. 1936).

indictment cannot be amended. However, a defective indictment may be replaced by an information.[7] Changing the name of the owner of the property burglarized and stolen is a departure and a change of the subject matter.[8]

(b) *Change of Venue*

The filing of five affidavits alleging prejudice in compliance with the statute[9] is mandatory on the court to grant a change of venue.[10] This is in line with previous decisions of the court.[11]

(c) *Evidence*

The admissibility of a dying declaration does not depend upon the length of interval between the declaration and death but solely upon the state of declarant's mind and belief that he is in dying condition. A statement made immediately after the shooting, and repeated shortly thereafter and made later in the same day in the hospital after he had been advised by a physician that there was a chance for recovery, and statements made on the third day after the injury and again two days prior to his death which occurred three weeks after the injury held admissible as a dying declaration.[12] This is the rule supported by *State v. Custer*.[13]

The testimony and opinion of a ballistic expert as to bullets having been fired from the same gun was given judicial sanction in *State v. McKeever*.[14] In *State v. Williamson*,[15] the court held a statement against interest, a confession, inadmissible because prior to making the confession to a deputy sheriff and others the defendant had talked to the sheriff and the sheriff told him that he would recommend to the court and prosecuting attorney that the defendant be returned to the Illinois penitentiary to complete a former sentence. The court viewed the statement of the sheriff as a *promise* by one not authorized, which invalidated a subsequent confession. The other twin, coercion, which makes a confession likewise involuntary and inadmissible was recently held to be a violation of the Fourteenth Amendment of the Constitution of the United States.[16]

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7. State v. Cutter, 318 Mo. 687, 1 S. W. (2d) 96 (1927).
8. State v. Wright, 95 S. W. (2d) 1159 (Mo. 1936).
9. Mo. Rev. Stat. (1929) § 3630.
10. State v. Smith, 98 S. W. (2d) 572 (Mo. 1936).
11. State v. Parker, 24 S. W. (2d) 1023 (Mo. 1930); State v. Stough, 318 Mo. 1198, 2 S. W. (2d) 767 (1928); State v. Golden, 40 S. W. (2d) 1044 (Mo. 1936).
12. State v. Flinn, 96 S. W. (2d) 506 (Mo. 1936).
13. 336 Mo. 514, 80 S. W. (2d) 176 (1935).
14. 101 S. W. (2d) 22 (Mo. 1936).
15. 99 S. W. (2d) 76 (Mo. 1936).
16. Rounds v. State, 106 S. W. (2d) 212 (Tenn. 1937).

Three cases appear to have been reversed because of the admission or exclusion of evidence. The admission of evidence of an altercation between the defendant and a third person in a homicide case, out of the presence of the deceased, required a new trial.[17] The exclusion of evidence tending to show bias and prejudice of a witness toward a defendant,[18] and the exclusion of evidence by an accomplice that he had been promised immunity for testifying,[19] required reversal in the new trial.

(d) *Cross Examination*

The state may in good faith cross examine defendant's witnesses for the purpose of ascertaining whether they know or are acquainted with notorious criminals.[20] The state may also cross examine the defendant's character witnesses with reference to remarks or matters affecting defendant's reputation, including references to other offenses.[21] The rule as to cross examination of character witnesses is also approved in *State v. Mitchell.*[22]

(e) *Instructions*

This is perhaps one of the most treacherous fields of the criminal law. When to give and when not to give an instruction invariably leads the court into the twilight zone. The court is required[23] to instruct the jury upon all questions of law arising in the case which are necessary for their information in giving their verdict; which instruction shall include *whenever necessary* the subjects of good character and reasonable doubt.

The correct answer to this perplexing problem always turns upon the word "necessary", a word which literally has no well defined boundary. Generally it may be said that instructions necessary to establish the state's case must be given.[24] Set apart from this general rule is the remaining field embracing collateral matters wherein the court is not required to give an instruction on collateral matters until requested to do so.[25]

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17. State v. Maddox, 98 S. W. (2d) 535 (Mo. 1936).
18. State v. Day, 95 S. W. (2d) 1183 (Mo. 1936).
19. State v. Rose, 96 S. W. (2d) 498 (Mo. 1936).
20. State v. Bagby, 338 Mo. 951, 93 S. W. (2d) 241 (1936).
21. State v. Pope, 338 Mo. 919, 92 S. W. (2d) 904 (1936).
22. 96 S. W. (2d) 341 (Mo. 1936). That the holding of these cases is bottomed upon sound judicial reasoning is clearly demonstrated by a casual examination of a few of the many cases on this question. State v. Pine, 18 S. W. (2d) 48 (Mo. 1929); State v. Hutchison, 186 S. W. 1000 (Mo. 1916); State v. Harris, 22 S. W. (2d) 1050 (Mo. 1929).
23. Mo. Rev. Stat. (1929) § 3681.
24. State v. Broaddus, 315 Mo. 1279, 289 S. W. 792 (1926); State v. McBroom, 238 Mo. 495, 499, 141 S. W. 1120 (1911).
25. State v. Lackey, 230 Mo. 707, 132 S. W. 602 (1910).

In line with these general principles the court continued to adhere to the rule that instructions which are a part of the law of the case include the giving of an instruction on larceny where in a robbery prosecution the evidence tends to show that the taking of the money was not by force or violence.[26] Collateral matters, which are not a part of the law of the case and upon which the court is not bound to instruct unless requested so to do, include alibi,[27] credibility of witnesses,[28] the information as evidence of guilt,[29] and motive.[30]

It is now well settled in this state that matters of defense are treated as collateral matters and the defendant must request such an instruction. This doctrine has heretofore been applied to alibi,[31] to credibility of witnesses,[32] to an accomplice's testimony,[33] and to voluntary statements or confessions of the defendants.[34] However, where the prosecution is based upon a conspiracy an alibi instruction, even though requested, should not be given.[35] In a burglary and larceny prosecution, an instruction which omitted the element of intent to steal as applied to a defendant who was present at the commission of the offense, was erroneous.[36] The intent to kill A cannot be attached to the actual killing of B.[37] The refusal to give an instruction on self defense, stating that it was not necessary for the accused to nicely gauge the quantity of force necessary to repel the assault,[38] as well as the refusal to give an instruction to the effect that the proof of other offenses was admitted for the sole purpose of establishing the guilt or innocence of the defendant under the charge for which he was being tried,[39] were reversible error.

(f) *Argument*

The term "Prosecuting Attorney" as used in the statute of procedure includes any attorney assisting in the prosecution.[40] In presenting the state's

26. State v. Craft, 338 Mo. 831, 92 S. W. (2d) 626 (1936); State v. Pope, 338 Mo. 919, 92 S. W. (2d) 904 (1936).
27. State v. Bagby, 338 Mo. 951, 93 S. W. (2d) 241 (1936); State v. Trice, 338 Mo. 744, 92 S. W. (2d) 135 (1936).
28. State v. McPhearson, 92 S. W. (2d) 129 (Mo. 1936).
29. State v. White, 99 S. W. (2d) 72 (Mo. 1936).
30. State v. Wolff, 101 S. W. (2d) 973 (Mo. 1937).
31. State v. Brown, 270 S. W. 275 (Mo. 1925); State v. Wilson, 12 S. W. (2d) 445 (Mo. 1928).
32. State v. Park, 16 S. W. (2d) 30 (Mo. 1928); State v. Headley, 18 S. W. (2d) 37 (Mo. 1929).
33. State v. London, 295 S. W. 547 (Mo. 1927).
34. State v. Baker, 278 S. W. 987 (Mo. 1925).
35. State v. Craft, 338 Mo. 831, 92 S. W. (2d) 626 (1936).
36. State v. Moore, 95 S. W. (2d) 1167 (Mo. 1936).
37. State v. Batson, 96 S. W. (2d) 384 (Mo. 1936).
38. State v. Traylor, 98 S. W. (2d) 628 (Mo. 1936).
39. State v. Walters, 98 S. W. (2d) 527 (Mo. 1936).
40. State v. Arnett, 338 Mo. 907, 92 S. W. (2d) 897 (1936).

argument the prosecuting attorney may resort to unwarranted references and unsound arguments. Neither are ground for reprimand nor error when based upon facts in the record.[41] However, the expression of personal opinion by the prosecuting attorney as to the guilt of the defendant falls within a different category and invariably brings a reversal.[42] The same results await the misquoting of testimony by the prosecuting attorney.[43] All of the argument of the prosecuting attorney must be preserved in the bill of exceptions,[44] and unless it is so preserved it is not error.[45]

(g) *Jury*

A sheriff may be a material witness in the case and yet qualified to select the jury. This is true even though the sheriff has advised the defendant to plead guilty.[46] The conduct of the jury, particularly when deliberating upon the case, is guarded with the utmost scrutiny. Communications with the jury except through the regularly constituted court officers are prohibited and the rule is strictly enforced with few exceptions. One of the exceptions is found in *State v. Maples*,[47] where a certain juror was treated during the court recess by a physician. The only communication passing between the physician and the sick juror related to his complaint and illness. The mere physical separation of the jury for sleeping purposes in case of necessity or for better accommodation does not require a new trial.[48] This case reviews and approves *State v. Shawley*,[49] where the jury during their deliberation were kept in two separate hotel rooms on the second floor and there was no connection between the two rooms. This case also approved the separation of a jury where eleven jurors occupied rooms upstairs, yet an officer and one juror occupied a room downstairs, subsequent to the conclusion of the case but prior to its submission.[50] These cases specifically overrule the ever questionable holding in *State v. Asbury*.[51]

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41. State v. Rosegrant, 338 Mo. 1153, 93 S. W. (2d) 961 (1936).
42. State v. Pope, 338 Mo. 919, 92 S. W. (2d) 904 (1936).
43. State v. Crouch, 98 S. W. (2d) 550 (Mo. 1936).
44. State v. Mitchell, 96 S. W. (2d) 341 (Mo. 1936).
45. State v. Thompson, 92 S. W. (2d) 892 (Mo. 1936); State v. Mitchell, 96 S. W. (2d) 341 (Mo. 1936).
46. State v. McPhearson, 92 S. W. (2d) 129 (Mo. 1936).
47. 96 S. W. (2d) 26 (Mo. 1936).
48. State v. Pope, 338 Mo. 919, 92 S. W. (2nd) 904 (1936).
49. 334 Mo. 352, 67 S. W. (2nd) 74 (1933).
50. State v. Arnett, 338 Mo. 907, 92 S. W. (2nd) 897 (1936).
51. 327 Mo. 180, 36 S. W. (2d) 919 (1931).

But these liberties of the jury, based upon necessity, are not to be extended to include pleasure. Where the sheriff took a jury while deliberating on a case to a crowded railway station five blocks from the courthouse to see a new train, it was held to be error even though there was no showing of improper influence being exercised on any of the jurors.[52]

The jury is to be allowed a reasonable or liberal time in which to consider and decide the case. The failure to discharge the jury after twenty-three hours of deliberation was not an abuse of discretion.[53]

(h) *Motion for New Trial*

While many cases deal with the sufficiency of the motion for new trial, it is sufficient here to merely point out the long adhered to rule reiterated in *State v. Smith*,[54] that a motion for new trial must be specific and sufficient and call to the trial court's attention each and every item of error complained of in the trial. This rule has been a great deterrent in preventing the sandbagging of trial courts by eliminating on appeal the consideration of those errors complained of which the trial court was denied the opportunity to pass upon.[55]

III

Appellate Procedure

It is the duty of the appellant to cause a full transcript of the record to be made out, certified and transmitted to the appellate court. Where the certificate to the proceeding contains no certification or reference to any proceedings in the interim between the filing of the information and the filing of the motion for new trial there is nothing before the court for consideration and the appeal will be dismissed.[56]

While the record generally on appeal consists of two parts, one, the record proper, and two, the bill of exceptions, the bill of exceptions may be incorporated into the record proper and become a part of it.[57] It is necessary that the record proper show the filing of the bill of exceptions in the circuit court

52. State v. Dodson, 338 Mo. 846, 92 S. W. (2d) 614 (1936).
53. State v. Herring, 92 S. W. (2d) 132 (Mo. 1936).
54. 98 S. W. (2d) 657 (Mo. 1936).
55. Only the amended motion for new trial can be considered, State v. Renfro, 279 S. W. 702 (Mo. 1926). General assignments in the motion for new trial preserve nothing for review. State v. Barbata, 336 Mo. 362, 80 S. W. (2d) 865 (1935). The effect of a general assignment constitutes a waiver of a motion filed after allocution and judgment is void, State v. Selleck, 46 S. W. (2d) 570 (Mo. 1932).
56. State v. Hanks, 98 S. W. (2d) 541 (Mo. 1936).
57. State v. Herring, 92 S. W. (2d) 132 (Mo. 1936).

and where the record proper does not show the filing of the bill of exceptions the case is for review solely on the record proper.[58] The bill of exceptions must be certified to in compliance with the statute; otherwise the appeal will be disposed of on the record proper.[59]

Where the judgment is incorrect in the amount of punishment, the supreme court will enter a new judgment, inserting therein the correct amount of punishment. This question was raised in a number of robbery cases wherein the robbery was perpetrated by means of a deadly weapon and the court under statutory authority added two years imprisonment in the pentitentiary to the imprisonment fixed by the jury. The court held the trial court was without authority to add two years imprisonment and entered a new judgment for the correct sentence.[60] Where the evidence is insufficient to sustain the conviction and it appears that the state *might* in making a better case on retrial, the case will be reversed and the defendant discharged.[61]

A case of particular interest, the most far reaching and progressive, is *State v. Mason*,[62] wherein the court decided for the first time in this state that the appellant may abandon certain assignments of error in his motion for new trial; and in filing a brief on appeal actually does abandon all points in the motion for new trial not briefed. This lifts from the shoulders of the court an undue burden which heretofore required a careful examination of all points in the motion for new trial even though not briefed.

Many cases reach the supreme court and are disposed of on the record proper. This may be due to the absence of the bill of exceptions,[63] or the filing of a motion for new trial too late,[64] and this is equally true of writs of error.[65]

IV

Substantive Law

The case of *State v. Mitchell*[66] is of particular interest because it approves in a rape case the introduction of testimony showing the physicial condition

58. State v. Miller, 95 S. W. (2d) 1189 (Mo. 1936).
59. State v. Gautney, 93 S. W. (2d) 668 (Mo. 1936).
60. State v. Melton, 92 S. W. (2d) 107 (Mo. 1936); State v. Franks, 95 S. W. (2d) 1190 (Mo. 1936).
61. State v. DeMoss, 92 S. W. (2d) 112 (Mo. 1936).
62. 98 S. W. (2d) 574 (Mo. 1936).
63. State v. Melton, 92 S. W. (2d) 107 (Mo. 1936); State v. Hightower, 95 S. W. (2d) 1198 (Mo. 1936).
64. State v. Lyscio, 95 S. W. (2d) 1161 (Mo. 1936).
65. State v. Hardy, 98 S. W. (2d) 593 (Mo. 1936); State v. Timmons, 98 S. W. (2d) 550 (Mo. 1936).
66. 96 S. W. (2d) 341 (Mo. 1936).

of the prosecutrix for a six months period prior to the assault, and also the development of a gonorrheal infection within ten days thereafter. This appears to be the first case in this state in which this matter has been specifically passed upon and approved.

Another case of particular interest is *State v. Frazier*,[67] wherein the defendant was charged with second degree murder and convicted of manslaughter. In this case the deceased was afflicted with hemophilia, sometimes referred to as the disease of Kings, and the individual commonly known as a bleeder. The defendant had struck the deceased on the jaw with his fists which broke the skin on the inside of the mouth from which deceased died from excessive bleeding ten days later. There was no evidence showing the defendant at the time of the assault knew of deceased's physical condition. The court held that it was immaterial whether the defendant knew about the condition or not since the defendant was responsible for the natural consequences of his act. This was true even though the blow struck may not have been of sufficient force to injure a normal healthy person. The case is of further interest because it sets at rest in this state the right of a person who has no knowledge of the crime to make an affidavit upon which a preliminary hearing may be held.

Where the defense to a crime is that it was accidental the court should not instruct on self defense.[68]

VII

EVIDENCE

WILLIAM H. BECKER, JR.*

I. JUDICIAL NOTICE

In *Barnes v. St. Louis-San Francisco Ry.*,[1] the court took judicial notice of the pleaded statutes of a foreign state and the judicial decisions construing the statute, pursuant to Section 806 of Missouri Revised Statutes 1929. The court took judicial notice that real estate values decreased between 1927 and 1931 to such an extent that evidence of value in 1927 constitutes no substan-

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67. 98 S. W. (2d) 707 (Mo. 1936).
68. State v. Whitchurch, 96 S. W. (2d) 31 (Mo. 1936).

*Attorney, Columbia. LL.B. University of Missouri, 1932.

1. 338 Mo. 497, 92 S. W. (2d) 164 (1936).

tial evidence of value in 1931.[2] Further notice of the depression was taken in *Saxbury v. Coons*.[3]

In *Smith v. Harbison-Walker Refractories Company*,[4] the court refused to take judicial notice that there is disease of silicosis which is peculiar to or the natural result of continuous breathing or exposure to silica dust. The court refused to take judicial notice that one Hays and one Stephenson were well known gangsters in *Bellovich v. Griese*.[5]

II. Presumptions, Inferences and Burden of Proof

In *Lampe v. Franklin American Trust Company*,[6] it was held that the burden of proving consideration for a note showing suspicious alterations on its face and requiring explanation in order to be admitted in evidence rests upon the holder suing upon the note. The court distinguished cases where the execution of the note is not denied but lack of consideration is asserted by the defendant. In those instances the rule in Missouri is that the burden of proof rests upon the party asserting lack of consideration. The case further held that the "presumption of integrity" making admissible a note regular on its face did not attach to a note showing suspicious alterations on its face; that such a note is not admissible until the alterations have been satisfactorily explained; that to make a case for the jury, the plaintiff will not be aided by any presumptions but must sustain the burden of proof as well as the burden of the evidence to make out every element necessary to impose liability upon the defendant. It is noted that this rule requires the plaintiff to bear the risk of nonpersuasion on the issue of consideration which in this state ordinarily would be borne by the defendant. It was further held in this case that the burden of proof or risk of nonpersuasion requires the party bearing it to prove by a preponderance of the evidence that the facts asserted are true rather than that his version of the issues are "more probable".

It was again held in this case that presumptions ordinarily are not for the consideration of the jury but concern only the courts in administering the rules relating to the burden of the evidence and the burden of ultimate proof. However, the inference permitted in favor of a plaintiff in a *res ipsa loquitur* case does not disappear but remains in the case to the end and takes the case

2. Peterson v. Kansas City Life Insurance Co., 339 Mo. 700, 98 S. W. (2d) 770 (1936).
3. 98 S. W. (2d) 662 (Mo. 1936).
4. 100 S. W. (2d) 909 (Mo. 1936).
5. 100 S. W. (2d) 261 (Mo. 1936).
6. 339 Mo. 361, 96 S. W. (2d) 710 (1936).

to the jury notwithstanding the evidence, however probative, given in rebuttal on behalf of the defendant.[7] On the other hand it was held that the "presumption" or inference that a truck bearing the name of the defendant was owned and being operated by a servant of the defendant in the scope of his employment may be overcome by unequivocal evidence to the contrary.[8]

III. Admissibility of Extra Judicial Declarations

In *Shelton v. Wolf Cheese Company*,[9] the plaintiff sued a corporation for damages for personal injuries charging that he was struck by an automobile driven by an employee of the defendant corporation in the scope of his employment. Proof of the master-servant relationship at the time of the casualty depended solely upon a telephone conversation between plaintiff's attorney and an alleged agent of the defendant. Three and one half months following the casualty, plaintiff's attorney secured the telephone number of the defendant corporation from the directory and called that number. The party answering the call stated that he was "manager" and in response to inquiry of plaintiff's attorney made certain statements which plaintiff contended constituted admissions that the operator of the automobile was acting within the scope of his employment when the casualty occurred. In holding that there was no proof of the master-servant relationship, the supreme court held: (1) that *post rem* narrative declarations of an employee are hearsay and inadmissible against the employer; (2) that statements made by a person answering a telephone call to a place of business are admissible even though no personal identification of the speaker is made, if the conversation occurs in the course of negotiations relating to and in the transaction of the ordinary business of the party called; (3) that however, where the admissibility against the employer of the *post rem* declaration of the employee depends upon the nature of the agent's authority and his position with the employer, such authority may not be established by the alleged agent's declarations but must be proved by other evidence, consequently the statement of the party answering the telephone that he was the "manager" of the defendant does not prove his authority to bind the defendant corporation by *post rem* narrative statements. The holdings mentioned above are weakened somewhat by the court's construction of the conversation as not constituting a clear admission

7. Pandjiris v. Oliver Cadillac Company, 339 Mo. 726, 98 S. W. (2d) 969 (1936).
8. Ross v. St. Louis Dairy Co., 339 Mo. 982, 98 S. W. (2d) 717 (1936).
9. 338 Mo. 1129, 93 S. W. (2d) 947 (1936).

of the fact sought to be proved. The decision recognizes the rule announced in *State* ex rel. *Strohfeld v. Cox*,[10] which distinguishes between the admissibility of telephone conversations, on the one hand where the declarant is called by his number and answers admitting to be the person called, and on the other hand where the declarant calls from an unknown number stating who he is and making the declaration. In the first situation the identity of the declarant is held to be sufficiently established to make the declaration admissible and in the second situation the identity of the declarant is held to be insufficiently established to make the declaration admissible.

In *State* ex rel. *S. S. Kresge Co. v. Shain*,[11] the plaintiff sought damages for personal injuries resulting from slipping on some grease upon the floor of defendant's store. Written statements of the manager and porter, employes of the defendant, made three months after the casualty were held admissible against the defendant to prove *notice* of the greasy condition prior to the injury of plaintiff against the objection that the evidence was hearsay. On the other hand, portions of the statement tending to show delay in removing the condition were held inadmissible as hearsay. The case therefore holds that *post rem* extrajudicial declarations of an employee are admissible against the employer to show notice of the defective condition of the premises of the employer but are inadmissible to prove what was or was not done about the defective condition. The opinion is supported by some authority cited therein but fails to give any satisfactory reason for the distinction.

A declaration against interest is admissible despite the death of the declarant and is not rendered incompetent because the declarant is not available to refute the evidence.[12]

In *State v. Crouch*,[13] a declaration by the defendant charged with murder, that three or four minutes after the shooting, defendant walked a distance of 140 yards and stated to witnesses, "Boys, you know I had to do it in self defense to save myself" was held to be inadmissible as *res gestae* because the declaration lacked spontaneity and was simply a considered and self serving statement.

On the issue of drunkenness of a railroad employee, the testimony of a yard master that he had occasion to discipline the employee for drinking

10. 325 Mo. 901, 30 S. W. (2d) 462 (1930).
11. 101 S. W. (2d) 14 (Mo. 1936).
12. Wills v. Berberich's Delivery Co., 339 Mo. 856, 98 S. W. (2d) 569 (1936).
13. 339 Mo. 847, 98 S. W. (2d) 550 (1936).

while on duty was held inadmissible. The yard master did not profess personal knowledge of drunkenness on the part of the employee. The court held that proof of disciplinary finding by a private agency was not proof of the facts found.[14]

IV. Witnesses

1. *Competency*

In *Burnam v. Chicago Great Western R. R.*,[15] an eight and one half year old child was found competent to testify concerning a casualty in a suit brought by his parents for loss of his services, despite the fact that a court found him incompetent to testify about the same transaction in his suit for personal injuries two years previously. The court held that the adjudication of incompetency to testify in his suit did not foreclose the right to have a new determination of his competency to testify about the same transaction two years later.

In *Lampe v. Franklin American Trust Company*,[16] the court held that the incompetency of a claimant testifying against the estate of a deceased party was waived by the personal representative when he offered in evidence the transcript of the cross-examination of the claimant concerning the transaction in issue which testimony had been elicited by the personal representative in another suit between the estate and a third party. The waiver was held to make the claimant competent to testify concerning the whole transaction and not merely to the matters referred to in the transcript of the cross-examination. In so holding, the court expressly followed the New York court in preference to a contrary ruling of the Illinois court and followed the majority rule with reference to the extent of the waiver.[17] The ruling as to the extent of the waiver followed a prior ruling of the court in *Trautmann v. Trautmann*.[18]

The grantees in two separate deeds of two separate properties delivered on the same evening were held competent to testify, each in favor of the other on the issue of delivery after the death of the grantor. At the same time it was held that neither was competent to testify in her own behalf because of

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14. Hancock v. Kansas City Terminal Ry., 339 Mo. 1237, 100 S. W. (2d) 570 (1936).
15. 100 S. W. (2d) 858 (Mo. 1936).
16. 339 Mo. 361, 96 S. W. (2d) 710 (1936).
17. See note (1929) 64 A. L. R. 1168.
18. 300 Mo. 314, 254 S. W. 286 (1923).

the death of the grantor.[19] In the two cases it was held that the delivery of each deed was "a separate, completed transaction between the grantee therein" and the grantor.[20]

2. *Cross Examination*

In *Burnam v. Chicago Great Western R. R.*,[21] the court announced and applied the rule that the right to cross examine a witness is dependent upon hostility of the witness or adversity of the interest of the witness. Under the statute permitting cross examination of adverse parties,[22] the plaintiff was permitted to cross examine a defendant. At the same time it was held that a suggestive insinuating cross examination of a witness called by the cross examiner and exhibiting no hostility or adverse interest was reversible error. In *State v. Rose*,[23] it was held to be reversible error to unduly restrict cross examination of a state's witness even though there was no explicit offer of proof of the matters sought to be elicited.

3. *Conclusions*

Statements of witnesses in answer to questions concerning the witnessing of certain facts, that the witness had a certain "impression"; that he "thought", "understood" "supposed" or "figured" certain facts were true or untrue are mere conclusions and have no probative value.[24]

4. *Opinion Evidence*

In *Stevens v. Meadows*,[25] the court reiterated the rule that a lay witness giving an opinion of *insanity* must state the facts upon which his opinion is based; that the opinion of a lay witness as to the insanity of an individual has no probative force when not based upon facts inconsistent with sanity. On the other hand, in *Buchholz v. Cunningham*,[26] it was held that a lay witness might give an opinion that a person is *sane* without stating the facts upon which he bases his opinion.

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19. Mo. Rev. Stat. (1929) § 723.
20. Lanphere v. Affeld, 99 S. W. (2d) 36 (Mo. 1936); Schoenwetter v. Affeld, 99 S. W. (2d) 41 (Mo. 1936).
21. 100 S. W. (2d) 858 (Mo. 1936).
22. Mo. Rev. Stat. (1929) § 1725.
23. 339 Mo. 317, 96 S. W. (2d) 498 (1936).
24. Masonic Home of Missouri v. Windsor, 338 Mo. 877, 92 S. W. (2d) 713 (1936).
25. 100 S. W. (2d) 281 (Mo. 1936).
26. 100 S. W. (2d) 446 (Mo. 1936).

V. Criminal Law

In *State v. Amende*,[27] a prosecution for statutory rape, it was held that admission of evidence of *subsequent* intercourse with the prosecutrix was held to be error. The court disapproved and refused to follow two prior decisions.[28] In *State v. Lebo*,[29] a prosecution for forcible rape, evidence of the commission of prior acts of forcible rape of prosecutrix are held inadmissible. A distinction was drawn between prosecutions for forcible and statutory rape on the ground that commission of *prior* acts for forcible rape did not tend to prove "antecedent probability" of commission of the later offense.

Promises to a prisoner by officers to use their influence with the prosecuting attorney to procure an advantage for the prisoner were held to render a confession procured by such promises involuntary and inadmissible in *State v. Williamson*.[30]

In *State v. Flinn*,[31] several dying declarations were held admissible in a homicide case. There the court held that the express statement of the declarant alone is sufficient to show that the declarations were made under the sense of impending death and without hope of recovery; that length of the interval between the declaration of death of the declarant does not control admissibility of the declaration.

VIII
PUBLIC UTILITIES

Frank E. Atwood*

Opinions dealing only with questions common to other branches of law are not listed herein.

Quo Warranto

In quo warranto proceeding entitled *State* ex inf. *McKittrick, Atty. Gen. v. Southwestern Bell Tel. Co.*,[1] the court en banc held that statute permitting telephone company to construct telephone lines along, across, or under public

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27. 338 Mo. 717, 92 S. W. (2d) 106 (1936).
28. State v. Miller, 263 Mo. 326, 172 S. W. 385 (1915); State v. Hamilton, 263 Mo. 294, 172 S. W. 593 (1915).
29. 339 Mo. 960, 98 S. W. (2d) 695 (1936).
30. 339 Mo. 1038, 99 S. W. (2d) 76 (1936).
31. 96 S. W. (2d) 506 (Mo. 1936).

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1. 338 Mo. 617, 92 S. W. (2d) 612 (1936).

highways is not violative of constitutional prohibition against grant of thing of value to corporation, in view of benefit derived therefrom by general public.

In quo warranto proceeding entitled *State* ex inf. *McKittrick, Atty. Gen.* ex rel. *City of Campbell v. Arkansas-Missouri Power Co.*,[2] the court *en banc* held that consent of municipality is condition precedent to right to use streets and alleys of municipality in operating private electric plant and its distribution system, that without such consent no right exists in private electrical distribution system to operate plant after termination of franchise unless municipality does some act that would estop it from asserting that such right does not exist, that supreme court may properly exercise judicial discretion in granting or refusing judgment of ouster, and that public good is the element chiefly to be considered as the guide to the court in exercise of such discretion.

Another ouster proceeding is *State* ex inf. *McKittrick, Atty. Gen.*, ex rel. *City of California v. Missouri Utilities Co.*,[3] division one there held that quo warranto will lie by city to oust electrical company from use of city's streets after expiration of municipal franchise, and grant of certificate of public convenience and necessity to electrical company does not give company right to operate in municipality after expiration of municipal franchise; and city may require such company to cease use for lines and poles of city's streets which were part of state highway system, notwithstanding highway department had exclusive jurisdiction over highway insofar as public travel was concerned. Also, questions as to nature and application of doctrine of estoppel are discussed and ruled.

Interstate Commerce

In *State* ex rel. *to Use of Panhandle Eastern Pipe Line Co. v. Public Service Commission*,[4] division two held that movement of natural gas from other states through foreign corporations interstate pipe line remained interstate movement until gas entered distribution system of local distributing utility, notwithstanding construction of lateral pipe lines and measuring stations at termini thereof outside limits of municipality; and, hence, service thus rendered was not subject to Public Service Commission's orders, and commission's order requiring foreign corporation operating interstate pipe line to furnish natural gas to city at reasonable rates was void as interfering with interstate commerce, though corporation had constructed pipe line to point outside city limits in order to deliver gas to industrial plant therein.

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2. 339 Mo. 15, 93 S. W. (2d) 887 (1936).
3. 339 Mo. 385, 96 S. W. (2d) 607 (1936).
4. 93 S. W. (2d) 675 (Mo. 1936).

State ex rel. *and to Use of Baldwin v. Public Service Commission*[5] was an appeal from a judgment of the circuit court approving an order of the Public Service Commission. In reversing this judgment division one held that where railroad gave 45 cents per ton allowance to shippers on interstate shipments of coal to certain city to meet competition, Public Service Commission's order to either raise interstate rate 45 cents or lower interstate rate to that extent is invalid as imposing direct burden upon interstate commerce and must fall though Congress had not attempted to regulate situation.

RATES

In *Kansas City Power & Light Co. v. Midland Realty Co.*,[6] division one held that rates fixed by Public Service Commission for telephone, light, power and heat automatically supersede all rates coming into conflict therewith, and order of commission that schedule of rates for steam filed by public utility were unreasonably high and unjust and therefore unlawful, was not final and conclusive in subsequent action by public utility to recover from consumer difference between contract rates for steam heat and scheduled rates, where commission subsequently found that scheduled rates were inadequate, uniust and unreasonably low.

DEPRECIATION RESERVES

State ex rel. *Empire District Electric Co. v. Public Service Commission*[7] was an appeal from a judgment of the circuit court affirming an order of the Public Service Commission. In reversing this judgment division one held that statute authorizing commission to require utility depreciation reserve and subjecting reserve to regulation authorized only prospective order, and, where no such order had been made, the commission was without power to order return of funds transferred from depreciation reserve of electric company, since accumulation of reserve without order was voluntary and reserve was subject to control of utility, absent showing that company did not properly maintain property and render efficient service.

APPORTIONMENT OF EXPENSE

In *State* ex rel. *Wabash Ry. v. Public Service Commission*,[8] division two held that where park roads were improved at public expense and used by the public as roadways, they were public highways and the commission could

5. 339 Mo. 814, 99 S. W. (2d) 90 (1936).
6. 338 Mo. 1141, 93 S. W. (2d) 954 (1936).
7. 339 Mo. 1188, 100 S. W. (2d) 509 (1936).
8. 100 S. W. (2d) 522 (Mo. 1936).

assess part of the cost of removing railroad grade crossings against the railroad, especially when made necessary by separation of grades outside the park, and where relocation of city's water mains was made necessary by separation of grades of railroad and city streets, cost thereof was properly allowed as part of total cost assessed against city and railroad.

OTHER DECISIONS INDIRECTLY AFFECTING PUBLIC UTILITIES

Typical of cases indirectly affecting public utilities is *Grossman v. Public Water Supply Dist. No.1 of Clay County*,[9] where the court en banc held that constitutional limitation on indebtedness which municipality may incur contemplates debt which must be paid directly or indirectly by resort to taxation, and not indebtedness payable only out of income derived from property purchased. In *State* ex rel. *to Use of Alton R. R. v. Public Service Commission*,[10] division one held supreme court without jurisdiction of appeal it not appearing that constitutional question was not involved. To like effect is *State* ex rel. *Missouri Electric Power Co. v. Allen*.[11] In *State* ex rel. *Anderson Motor Service Co., Inc. v. Public Service Commission*,[12] the court en banc construed statutory provision of "right to appear" in review proceedings. In *State* ex rel. *St. Paul & Kansas City Short Line R. R. v. Public Service Commission*,[13] division one held that in proceeding to review order of Public Service Commission dismissing railroad's application for permission to maintain bridge constructed improperly and without commission's permission, railroad had burden to show order was unreasonable and unlawful, and that under the evidence the commission's order was not unreasonable.

IX

TAXATION

J. W. MCAFEE*

There is contained herein a review of all decisions of the supreme court handed down during 1936 as they are disclosed under the heading "Taxa-

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9. 339 Mo. 344, 96 S. W. (2d) 701 (1936).
10. 100 S. W. (2d) 474 (Mo. 1936).
11. 100 S. W. (2d) 868 (Mo. 1936).
12. 339 Mo. 469, 97 S. W. (2d) 116 (1936).
13. 339 Mo. 641, 98 S. W. (2d) 699 (1936).

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tion"[1] by the digests found in the volumes of the South Western Reporter for the period covered.

Two cases[2] digested under "Taxation" are only incidentally connected with the subject and are not reviewed in detail. In the main, the decisions reviewed are consistent with established principles.

I

Inheritance Tax

In re Costello's Estate[3] is an appeal from a judgment of the circuit court sustaining an inheritance tax against the distributive shares of the Estate of James Costello, who died December 27, 1933, bequeathing residue of his estate equally to N. and K. In September, 1934, and before any distribution of James' estate had been made, R. died, leaving appellants as sole legatees. Appellants except to the assessment of the tax against the shares of James Costello's Estate on the ground that R. never came into possession or enjoyment of any of the property. Judge Gantt, in giving an opinion affirming the judgment, said that no question of double taxation is involved.

The tax in question is provided for by Section 570, Missouri Revised Statutes 1929, which reads in part:

> "Such tax shall be imposed when any person . . . actually comes into the possession and enjoyment of the property. . . ."

The court construes the term "any person" to mean a person lawfully entitled to take the distributive shares and holds that the tax became payable when the executrices of the estate of R. came into possession of R.'s distributive share. Although the court approves the result reached in *In re Kinsello's Estate,*[4] the reasoning in that opinion is criticised and departed from.

II

Corporate Franchise Tax

State v. Phillips Pipe Line Co.[5] is an action brought by the Attorney General to collect corporate franchise taxes for the year 1934. Defendant's

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1. State *ex rel.* Hotchkiss v. Lemay Ferry Sewer District, 338 Mo. 653, 92 S. W. (2d) 704 (1936) is not included in the digest under "Taxation."
2. State v. Gomer, 101 S. W. (2d) 57 (Mo. 1936), contains an interesting review of the history of the current method of assessing property and of compensating assessors; Dennig v. Swift & Co., 98 S. W. (2d) 659 (Mo. 1936), construes a contract containing the words "general taxes payable for the year 1931" to refer to taxes arising from assessments made June 1, 1930. It is held that the term "fiscal year" is synonymous with "calendar year."
3. 338 Mo. 672, 92 S. W. (2d) 723 (1936).
4. 293 Mo. 545, 239 S. W. 818 (1922).
5. 339 Mo. 459, 97 S. W. (2d) 109 (1936), *aff'd,* per curiam opinion, 58 Sup. Ct. 53 (1937).

demurrer was sustained and the petition dismissed below. Plaintiff appealed. Defendant was a Delaware Corporation, engaged in piping oil into and through Missouri. It maintained a terminal in Missouri where it had large tanks in which some of the oil which it transports is blended and ultimately delivered to dealers. Judgment was reversed with direction to enter a judgment for the plaintiff. Judge Collet, in the opinion, construes Sections 4596 and 4641, Missouri Revised Statutes 1929, as follows:

> "Although the statute contemplates the payment of this tax only by corporations engaged in business within this state, respondent cannot escape its payment if it is actually engaged in intrastate business."

The court finds that final delivery is made in tanks upon arrival at the terminal; that the blending operations performed at the terminal are not necessary to transportation but are an accommodation to the shipper, enabling him to secure business; that the bills of lading, which were used for gasoline withdrawn from the delivery tanks, were issued by respondent in the name of the shipper and that the fiction indulged in of designating the carrier in these bills of lading as though another carrier performed the transportation from the terminal was destroyed by the testimony. The court, therefore, concluded that the operations engaged in at the terminal in Missouri were not necessary incidents to interstate transportation and amounted to intrastate business.

The court, by way of dictum, refers to the contention of the plaintiff that the statutes involved apply, even though the foreign corporation is doing interstate business, and says that, in view of its construction of the statutes, the point is not important, but it indicates that the court feels that the legislature may have power to so provide.

III

Penalties—Public Utilities

In *State* ex rel. *Ashby v. Cairo Bridge & Terminal Company*,[6] the prosecuting attorney brought proceedings in his official capacity to collect from defendant a penalty of one hundred dollars per day for failure of defendant to file a statement of its property with the State Tax Commission.[7] There was a judgment for the plaintiff. Defendant appealed. Westhues,

6. 100 S. W. (2d) 441 (Mo. 1936).
7. Mo. Rev. Stat. (1929) § 10066.

Commissioner, in an opinion adopted by the court, reversed the judgment. Section 10070, Missouri Revised Statutes 1929, provides that some (although not all) of the utility companies shall, if they do not file a statement of their property with the *state auditor* on or before January 1st of each year, be assessed a penalty of one hundred dollars per day in each County where it shall have used its franchise. Subsequent to the enactment of the above sections, the legislature created a State Tax Commission and required that all statements relating to assessment be made to that commission.[8] The court holds that the Tax Commission Act covers the whole subject of the earlier statute; that, since Section 10070 is a penalty act, it cannot be read into the Tax Commission Law; and that the effect of enactment of the latter was to repeal the penalty section.

The court proceeds to say further that Section 10066 placed all utility owners in one class, but that Section 10070 attempted to impose a penalty on only four of the number and that it thus denied to the members of the general class equal protection of the laws and was, therefore, unconstitutional; that Section 10070 is in the nature of a special law and that, since a general law could be made applicable, it also violates Section 53, subdivision 32 of article 4 of the Missouri constitution.

IV

EXEMPTION

A. *Sales Tax*

In *State* ex rel. *Missouri Portland Cement Co. v. Smith, State Auditor,*[9] mandamus was brought to compel respondent to audit an invoice for sand purchased from relator by the State Highway Commission, which respondent had refused to do because 1% had not been added, by relator, as sales tax. In the opinion by Judge Leedy, it was held that the exemption from taxes granted the state by Section 6, article 10, of the constitution of Missouri is limited to real and personal property and does not apply. It is pointed out in the opinion that this is an excise tax, and that, under the general rule applying to exemption from taxation of subsidiary agencies of government, there would be no exemption; nevertheless, after examining the act in question,[10] the court concluded that the legislature did not intend that the state

8. MO. REV. STAT. (1929) § 9853.
9. 338 Mo. 409, 90 S. W. (2d) 405 (1936).
10. Laws of Missouri 1935, p. 411.

should merely take money from one pocket to put it in another, and that the sale here in question was exempt. Corroboration for the result reached is found by the court in the fact that the legislature which passed the Sales Tax Act, made no appropriation for the payment of such tax by the Highway Commission.

B. *Bridge Trustees*

In *State* ex rel. *Jones v. Brown, Secretary of State*,[11] mandamus was brought to compel respondent to file in his office certain articles of agreement tendered by relators and to issue a certified copy thereof. The articles of agreement involved conform to acts of the legislature[12] providing for the incorporation of toll-bridge trustees, as a public agency, for the purpose of building or acquiring toll bridges and appurtenances, granting to such trustees power to pay the cost thereof by issuing bonds secured by a lien on the property so acquired, such bonds to be retired from income. The act provides that property acquired by such trustees is to be held for the benefit of the state and that when the bonds are paid in full the property or properties shall become free public facilities. The act further provides[13] that the property acquired and bonds issued by such trustees have for purposes of taxation the status of property and bonds of the state. Judge Frank, in an opinion concurred in by all of the court, held that the act was unconstitutional in that it delegated to private citizens power to create agencies of the state.

In considering whether the attempt to exempt property from taxation violates Section 7, article 10 of the Missouri constitution, it is said:

> ". . . if and when, the net income derived from the operation of the bridges discharges the bonds with interest, the state might acquire a beneficial interest in them, but until that time comes, if ever, it has *no interest*."

The court points out that the legislature may not validly provide for the exemption of property from taxation by merely declaring that such property shall, for the purpose of taxation, be deemed state property when, as a matter of fact, it is not the property of the state. The peremptory writ of mandamus was denied. It will be observed that, since the court holds that

11. 338 Mo. 448, 92 S. W. (2d) 718 (1936).
12. Mo. Rev. Stat. (1929) §§ 7914d *et seq.*; Laws of Missouri 1933, pp. 115-117.
13. Mo. Rev. Stat. (1929) § 7914-H.

the provisions for the incorporation of such trustees is unconstitutional, it is unnecessary for the court to decide the question of tax exemption; and that what is said on the latter subject is obiter dictum. That accounts, no doubt, for the failure of the court to explain in more detail some of the points suggested.

The statement that the state can have no interest in the bridge property until the bonds are fully paid, gives no heed to the possibility that the state may, under the act, have an interest contingent upon the payment of the bonds. If a substantial portion of the bonds are retired so that there is a valuable equity, would not the beneficial interest of such equity, under the statutes in question, vest in the state? The statement may be explainable upon the theory that the real interest of the state is in the free public user of the bridge facilities, and that such user would not be available until all bonds are paid.

As said above, however, the dictum is concerned chiefly with approval of the established rule that what amounts to property of the state under the constitution, is a matter for judicial, not legislative, determination.

V

Assessment of Special Taxes—Sewer Districts

In *State* ex rel. *Hotchkiss v. Lemay Ferry Sewer District*,[14] a proceeding by mandamus was brought to compel the levying of additional taxes to pay outstanding warrants of the districts[15] which were issued to pay preliminary expenses. Section 11037 of the Act authorized the levying of a uniform tax of not more than ten cents per hundred square feet for preliminary expenses. Section 11062 provides, that if the circuit court finds that the estimated cost of the proposed improvement exceeds the benefits to be derived from its construction, the district shall be dissolved as soon as all costs incurred are paid, and that ". . . if the uniform tax . . . be found insufficient to pay all costs . . ." the board of the district shall make such additional levy as may be necessary to discharge such deficiency. Immediately after its organization, the district in question made the maximum levy for expenses. Preliminary expenses incurred, however, exceeded the amount of the levy.

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14. 338 Mo. 653, 92 S. W. (2d) 704 (1936).
15. The sewer district in question was organized under chapter 65, Mo. Rev. Stat. (1929).

Before any construction on the proposed sewer was begun, the above Act was repealed[16] with the provision, however, that the Act repealed should "continue in force for the purpose of paying all outstanding and lawfully incurred costs . . . .", and that the district should stand as if the circuit court had ordered dissolution under Section 11062.

Judge Frank, with Judges Gantt, Collet, Leedy and Tipton concurring, held that Section 11037 fixed an absolute limit for preliminary expense levies; that the provisions in Section 11062 for additional levies where the district is to be dissolved by order of the court means additional levies within the maximum fixed by Section 11037. It is, therefore, held that any preliminary costs incurred in excess of such maximum are not "lawfully incurred." *Macon County Levee District v. Goodson*[17] is expressly overruled, and *State* ex rel. *Becker v. Wellston Sewer District*[18] is distinguished on the ground that the point here under consideration is not decided in that case. The alternative writ of mandamus is quashed. Judge Ellison, with Judge Hayes concurring, filed a dissenting opinion in which it is contended that the maximum for uniform levies on an area basis fixed by Section 11037 contemplates a project which will be carried to completion. In such case, any expenses exceeding the amount of the levy may be paid out of the ultimate benefit assessments. However, where dissolution is ordered under Section 11062, there will be no benefit assessments, and if expenses are to be paid, it must be by additional uniform levies. Thus, it is reasoned that Section 11037 provides the maximum, unless there is an order of dissolution, in which event no maximum limit is prescribed. It is the opinion of the dissenting judges that the peremptory writ should issue.

There is nothing in the facts to indicate whether or not the warrants in question were issued to pay costs which arose before the total expenses exceeded the amount of the original levy. Such facts, it would seem under the reasoning of the majority opinion, might have some bearing on whether expenses governed by such warrants were "lawfully incurred" as that term is used in the repealing act. It can be said in favor of the dissenting opinion that it does present a reasonable hypothesis under which the public agency can, upon dissolution, pay obligations incurred in good faith.

16. Laws of Missouri 1931, p. 355.
17. 224 Mo. App. 131, 22 S. W. (2d) 651 (1929).
18. 332 Mo. 547, 58 S. W. (2d) 988 (1933).

X

TORTS

GLENN MCCLEARY*

The table showing the topical analysis of the decisions indicates that tort cases continue to supply much of the subject matter for the court. The tremendous growth of tort law, particularly in the field of negligence since the middle of the last century, has resulted from a continuous demand from injured persons for protection to interests which in the past had not been protected and for further protection to interests already protected to a certain extent. The basic idea of liability for wrongful conduct is that, upon a balancing of the social interests involved in each situation, the law determines that the actor should or should not be held responsible. Our more detailed principles of tort law are grounded upon this basic idea of liability.

Most of 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 only the more significant variations or advances in the application of negligence principles will be mentioned. Because of jurisdictional limitations, many, if not most of the interesting advances in liability during the year did not appear in the decision of the supreme court, but they are found in the decisions by our courts of appeals and, necessarily, are to be excluded from this study.[1]

I. NEGLIGENCE

A. *Duties of Persons in Certain Relations*

1. Possessors of Land

The protection given by negligence principles was applied in the case of *Paubel v. Hitz*,[2] where a postman was injured while delivering mail because

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1. For example, the extension of liability of a manufacturer to a consumer for personal injuries resulting from unwholesome food and beverages on the theory of implied warranty in the case of Madouros v. Kansas City Coca-Cola Bottling Co., 90 S. W. (2d) 445 (Mo. App. 1936); the extension of liability of a manufacturer of articles, other than food and beverages to the consumer, who has suffered injuries of some defect in the manufactured product, by the application of straight negligence principles in Jacobs v. Frank Adams Electric Co., 97 S. W. (2d) 849 (Mo. App. 1936); the extension of liability for misrepresentations by turning back the speedometer on a used car by permitting a purchaser to rely upon such misrepresentations in Jones v. West Side Buick Co., 93 S. W. (2d) 1083 (Mo. App. 1936).

2. 339 Mo. 274, 96 S. W. (2d) 369 (1936).

of an unsafe condition in the sole approach to the defendant's place of business. While the judgment for the plaintiff was reversed on the grounds of contributory negligence, the interesting extension of protection through negligence principles is found in the fact that the court first found the status of the postman to be that of a business invitee or business guest. Under Missouri law, had the court determined his status to be that of a licensee, there would have been no duty on the part of the possessor to warn or make safe those conditions which are known to be dangerous to licensees, even if there was no reason to expect an alert licensee to discover the dangers, and contributory negligence would not have been in the case. The case is interesting in that the court reexamined the basic principles which go to determine the liability of a possessor of land for injuries to others which have been received while on the land. The court recognized that the old common law conception of an owner's or occupier's sovereignity and immunity for acts done within the limits of his land has been encroached upon by the modern principles of negligence. The possessor at old common law was considered to be sovereign over his land and could use it in any way he pleased, just so long as he did not interfere with the land or the enjoyment of the land of his neighbor. The modern principles of negligence, which govern one's conduct in most situations where injury has resulted, have had an exceptionally difficult time in being applied to the relations of the possessor to those coming on the land. Property law had had several centuries of growth before the principles of negligence emerged in the middle of the last century.

To determine the relationship between the possessor and the person injured while on the premises, the court quite properly looked first to see to whose advantage it was that the plaintiff was on the premises at all. A licensee is one who comes on the premises for his own purpose and with the consent of the possessor. Since he is the only one receiving a benefit from his presence, he must take the premises in Missouri in the condition in which he finds them; he has no reason to expect that the possessor will make any preparation for his use of the premises. But, even here, the tendency in the law is to impose an affirmative obligation to make the premises safe or to warn of hidden 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. The basis for this encroachment on the traditional position of the possessor to use his land as he pleases is that the possessor gave his consent to the licensee to visit the premises, and he must, therefore, assume a certain responsibility to prevent injuries. He voluntarily

gave his consent, and out of the desire to preserve life the imposition of such a duty does not seem unreasonable.

The court found, however, that the "plaintiff's presence was not solely for plaintiff's benefit, but for the mutual benefit of defendant (to and from whom plaintiff delivered and received mail) and plaintiff." Therefore, "the status of plaintiff on defendant's premises was that of a business invitee, visitor, or guest." Since the business guest knows that the possessor is to receive a benefit from his visit, he is entitled to expect that reasonable care will be exercised to discover existing dangers and those dangers made safe, or, at least, that a warning will be given to enable the visitor to determine whether to enter the premises or not.

A significant advance is seen in the terminology used in the opinion by discarding the old term "invitee" or "invited licensee" for a neater term "business invitee, visitor, or guest." The important fact is the purpose of the visit and not whether there was in fact an invitation. The latter fact is inferred from the existence of the former. The use of the word "invitee" is confusing and misleading when used alone. But to speak of a "business invitee," "business visitor", or "business guest", the emphasis is placed on the purpose of the visitor which, after all, is the important fact in determining the amount of protection to be given.

The holding of the court on the duty problem is in accord with cases in other jurisdictions involving postmen and other governmental employees, such as revenue agents and inspectors, with the exception of firemen and policemen. The Missouri courts have not had to determine the status of firemen and policemen, but any reason for distinguishing between governmental employees such as revenue agents and inspectors as against firemen and policemen seems entirely lacking. Both groups are privileged to enter the premises irrespective of any permission or benefit which may result to the possessor. It is a law given privilege. There may be good reasons for not holding the possessor responsible to those whose privilege is law given rather than by his own consent. Furthermore, he may not know when to anticipate their presence in performance of duty, which imposes a hardship on him. The postman, however, is even in a stronger position since governmental employees of that class have no absolute right to enter the premises of another. The possessor may even prevent him from entering, something he cannot do to other governmental employees in performance of their public duties. Until his consent is withdrawn he can anticipate the postman's more or less regular entry.

A business guest, in the case of *McKeighan v. Kline's, Inc.*,[3] sustained injuries in a fall, while passing through the store vestibule of the defendant. Other customers had tracked oil on the floor of the vestibule from the public alley adjoining. There was no evidence to show how long the condition had existed before the plaintiff entered. To establish negligence, it was held necessary for the plaintiff to establish both the actual existence of the condition for such a time as to charge the defendant with actual or constructive notice thereof, so that by the exercise of ordinary care the condition could have been remedied or warning given. The mere likelihood that other persons might create this danger upon the premises was material only to charge the defendant with a duty to exercise ordinary care to make an inspection for the purpose of discovering the danger.

In *Bagby v. Kansas City*,[4] a boy ten and one half years of age was injured when rock became loosened and rolled down a cliff in a municipal park. The cliff was at least twenty feet high, too steep to climb, and very difficult to scale along side to side. The city had constructed a fence to keep the public from crossing to the part at this point. The cliff was permitted to remain in its natural state as an object of beauty and it was evident that that portion of the park was not to be used as a playground. The court held that, although a municipality was required by the law of Missouri to exercise ordinary care in maintaining public parks in a reasonably safe condition, this does not mean that the city must eliminate every danger. "It would... be impracticable and a heavy burden upon a municipality to keep portions of a park, not intended for a playground, in a safe condition." Neither was the city under a duty to place warning signs advising the public of the danger from climbing up or along the rock cliff since the cliff itself was more impressive as a warning than any sign which may have been placed there to children of the plaintiff's age.

To place some restrictions upon the manner in which a possessor uses his premises in favor of those to whom he has given his consent to come on the land, and, therefore, has surrendered voluntarily some liberty in using this area while they are upon it to avoid injuring them seems fair; but to impose restrictions upon possessors, merely because they have not gone to the trouble or expense to keep persons from trespassing, imposes an obligation on the possessor by the wrongful acts of the intruders. However, the social interest

3. 339 Mo. 523, 98 S. W. (2d) 555 (1936).
4. 338 Mo. 771, 92 S. W. (2d) 142 (1936).

in the preservation of the lives of members of the public demands that some protection be at least given a certain group of trespassers as to activities conducted on the premises. Where members of the public intrude over a limited area to the knowledge of the possessor, the possessor is subject to liability for bodily harm there caused by his failure to carry on the activity, involving a risk of death or serious bodily injury, if he does not conduct that activity with reasonable care for their safety. This duty does not arise from the owner's consent, but from the probability of serious injury, and public policy requires that it be prevented even though it does invade the traditional privileges of possessors. Where children have been playing around railroad cars in a switchyard so continuously and for such a length of time that the employees of the railroad should have known of this intrusion, the railroad was held to owe a duty to keep a reasonable lookout for the children.[5]

In *Yakubinis v. Missouri-Kansas-Texas R. R.*,[6] the following instruction was upheld:

> "The Court instructs the jury that (although they may find from the evidence that persons were in the habit of walking on the railroad track from time to time where plaintiff was injured, and that the defendant knew it, yet, unless they further find that its track at this place was habitually so used and that defendant knew it), or by the exercise of ordinary care might have known it, then the defendant's servants in charge of the train owed no duty to keep a lookout at that place for persons on the track and it was not liable in that case for injuries received by the plaintiff unless its servants in charge of the engine and train which injured him saw or knew that he was in a dangerous position, or by the exercise of ordinary care could have known his dangerous position on the track in time to have stopped the train and avoided injuring him and failed to do so."

2. Transferors

The case of *Billings v. North Kansas City Bridge & R. R.*[7] raises the question as to the liability of a transferor for bodily harm caused by a dangerous condition after the vendee has taken possession. Here the defendant bridge company, in the construction of the bridge, had placed girders in a

5. Burnam v. Chicago Great Western R. R., 100 S. W. (2d) 858 (Mo. 1936).
6. 339 Mo. 1124, 100 S. W. (2d) 461 (1936).
7. 338 Mo. 1122, 93 S. W. (2d) 944 (1936).

certain manner which the plaintiff maintained constituted a nuisance. The girders were surrounded by a curbing six or eight inches in height which made it impossible for an automobile to hit a girder unless it mounted the curbing. After the transfer of the bridge to the vendee, a part of the curbing was removed and the girders painted in black and white stripes. The plaintiff was injured when a truck in which she was riding collided with one of the girders. It is a general principle that a vendor of a thing is not subject to liability for bodily harm caused by a condition which comes into existence after the vendee has taken possession. If the structure which caused the injury involved a risk of injury to persons because of its plan or construction, then a nuisance may be found to exist during the time it was under the control of the vendor, and liability is not cut off by a transfer of the thing. In this case, however, there was no evidence to support a finding that the girder was so constructed that it constituted a nuisance under the conditions which existed during the period the bridge was operated by the vendor. The danger was created by a new and different use to which the girder was put after the defendant's control over it had ceased.

3. Lessors

The responsibility of a lessor for insufficient lighting of a stairway, which was under the control of the lessor for the common use of tenants and those on the premises as business guests of the tenants, was before the court in *Lambert v. Jones*.[8] The evidence was that the tenants should furnish lights when their business guests used the stairway, and that they had installed and maintained their own lights in the stairway. The lessor had never provided or maintained any lights there. By assuming this obligation, a duty was created on the part of the tenant to his business guests to exercise care to keep the lights in good working order, so that the stairway would be lighted sufficiently to make it reasonably safe for them to use on the occasions when he invited them to do so. The lessor, however, owes no duty at common law to light a stairway, either for the benefit of the tenants or of persons visiting them for business, social or other purposes. Two reasons have been given by the courts: first, that this would impose too onerous a burden on lessors; and second, that tenants take the premises as they find them and they cannot complain if they are maintained in the condition in which they were when the tenancy began, and persons coming on the premises in the right of the tenants

8. 339 Mo. 677, 98 S. W. (2d) 752 (1936).

can have no greater rights. Where the landlord agrees to furnish light to the stairways and hallways, where he assumes gratuitously to keep these places lighted and fails to do so without warning to those who have a right to reply on the continuance of the service, or where the construction of the way is such as to require artificial light even in very ordinary times to be reasonably safe, or where a statute imposes a duty on him to supply light, the lessor has been held liable.[9] In this case none of these special situations was presented.

4. Supplier of a Chattel

One who supplies to another a chattel, to be used for the supplier's business purpose, is liable to those for whose use the chattel is supplied, if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied. In determining whether the chattel is supplied for the supplier's business purpose, the fact that it is being used for the purpose of completing a contract or business dealing is important. Thus, in *Stoutimore v. A. T. & S. F. Ry.*,[10] and *Markley v. Kansas City Southern Ry.*,[11] the carrier was held liable to loaders for negligence in furnishing a defective freight car, without making adequate inspection to discover a defective condition existing in the car. The loaders came in contact with this dangerous condition while loading the car. These defects were in the thing furnished to the plaintiffs for the purpose of having them use it, as they did, for the benefit of the defendant. The defendant, therefore, owed a duty to see that the car was properly inspected before being brought into use, and he is liable for those dangers which reasonable inspection would have discovered. In the former case, this duty extended to the shipper's employees as a risk of injury may be foreseen as to them.

5. Host-Guest

An interesting application of straight negligence principles was involved in the case of *Arp v. Rogers*,[12] where a guest brought an action against a truck driver for negligence in stopping in a dangerous neighborhood to repair his engine. The neighborhood had the reputation of being a "gangsters layout," which was known to the driver. While stopped there, a stranger ordered the driver to move on. When the driver was about to enter the truck to drive on,

9. (1923) 25 A. L. R. 1273, 1312.
10. 338 Mo. 463, 92 S. W. (2d) 658 (1936).
11. 338 Mo. 436, 90 S. W. (2d) 409 (1936).
12. 99 S. W. (2d) 103 (Mo. 1936).

the stranger fired a pistol at the truck, injuring the plaintiff who was a guest therein. Here is a situation where the modern principles of negligence may be applied in pure form, as contrasted to the approach in the property cases where other principles of liability or non-liability had developed to govern one's conduct with relation to others. Thus, negligent conduct may consist of an act which a reasonable man should realize as involving an unreasonable risk of injury to another, or a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do. In the instant case the court held that the defendant as a reasonable man, could not be said to have foreseen a risk of injury to the plaintiff in stopping his truck in the district under the arc light. The fact that the driver considered the neighborhood dangerous was thought not to be of consequence. It appeared that the driver moved on as soon as he had reasonable cause to anticipate violence on the part of the stranger and, therefore, used the care of an ordinary reasonable man under the same or similar circumstances. That is, as soon as an unreasonable risk of injury could be foreseen, the defendant acted as a reasonable man would act so that there was no breach of the duty and, therefore, no negligence. This case will receive further consideration under the discussion of legal or proximate cause.

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 legislative enactment which was intended to protect the plaintiff against an injury of the sort which he received. The fact that the statute imposed a penalty for doing the prohibited act, or for failing to do a required act, is immaterial in determining whether the defendant is subject to liability for an invasion of the plaintiff's interest. The most common type of case in which negligence may be shown in this manner, involves violation of statutes requiring certain safety appliances[13] and devices for protecting workmen from harmful dust, smoke, or poisonous gases which their work demands that they encounter.[14] In *Felber v. Union Electric Light and Power Co.*,[15] violation of an ordinance requiring left-hand turn signals was relied upon by plaintiff to establish liability for injuries sustained when the truck, making

13. Gieseking v. Litchfield & M. Ry., 338 Mo. 1, 94 S. W. (2d) 375 (1937).
14. Busen v. Chevrolet Motor Co., 339 Mo. 1098, 100 S. W. (2d) 277 (1937).
15. 100 S. W. (2d) 494 (Mo. 1937).

the left turn, was struck by an oncoming automobile and forced into the plaintiff, who was using the walk for pedestrians on the cross street. The ordinance requiring the arm signal by the driver, to show his intention to make a left turn, was intended to warn persons approaching from the rear and, therefore, to prevent injuries of that type. The purpose of the ordinance was not to prevent injuries of the sort that actually happened, and the violation could not be relied on to establish 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 applicable in *Pandjiris v. Oliver Cadillac Co.*,[16] in an action for injuries received by a pedestrian on the sidewalk who was hit by half a brick which fell from the upper story of a building owned by and in the exclusive possession and control of defendants. The evidence showed that the owner of the building was keeping open house to enable its patrons and employees and their friends to view a parade. It was contended by the defendant that it was not in control of the instrumentality causing the injury since its evidence disclosed that a trespasser caused the brick to fall. The court held that control "does not mean actual physical control, but refers rather to the right of control at the time the negligence was committed." This right of complete and exclusive control was present.

On the other hand, the mere skidding of a motorcar is not in and of itself negligence for it is an occurrence which in the ordinary course of events may happen even if due care has been exercised. In *Annin v. Jackson*,[17] it was held with reference to skidding that it is as consistent with due care as it is with negligence of the driver, "and it may and as a matter of experience does occur without fault."

D. *Imputed Negligence*

The question of imputed negligence was presented in *Kourik v. English*,[18] where an insurance company had engaged an adjusting company to investi-

16. 339 Mo. 726, 98 S. W. (2d) 969 (1936).
17. 100 S. W. (2d) 872 (Mo. 1936).
18. 100 S. W. (2d) 901 (Mo. 1936).

gate a claim arising from a stolen automobile, without direction as to particulars, and on the basis of a per diem compensation. The adjusting company performed services for eighty-seven different insurance companies. The adjusting company was held an independent contractor and not a servant or agent of the insurance company, as regards the latter's liability to one injured in an automobile driven by the adjusting company's president while making an investigation. While the insurance company had the right to tell the adjusting company what to do and not to do, it did not, under their arrangements, have the right to tell them how to do what they desired to have accomplished.

The weight of the presumption, which is raised from the plaintiff's evidence showing the name of the defendant on the truck causing the injuries complained of, that the truck was being operated by the defendant through its agents was raised in *Ross v. St. Louis Dairy Co.*[19] The defendant offered evidence that the driver of the truck was the agent of an independent contractor and that the defendant held no property interest in the truck, but for advertising purposes the defendant's name was on the truck, together with the name of the independent contractor. At the close of the evidence the trial court gave a peremptory instruction directing a verdict for the defendant. The appellant contended that the presumption made a prima facie case that could not be taken from the jury regardless of the strength of the defendant's evidence. The court cleared up some of the uncertainty that had arisen in previous decisions and denied that such prima facie case, where it rests alone on this presumption, cannot be destroyed by positive and unequivocal testimony introduced by the defendant. "...when defendants introduced positive and unequivocal evidence to the contrary, the presumption disappeared and in so far as plaintiff's case rests upon said presumption it fails." On the other hand, if the defendants had introduced no evidence, the court by *dictum* stated that the presumption might have carried the plaintiff's case to the jury.[20]

In *Mullally v. Langenberg Bros. Grain Co.*,[21] the question presented was whether the negligence of an employee would be imputed to his employer to permit a recovery by the employee's wife who was injured through the

19. 339 Mo. 982, 98 S. W. (2d) 717 (1936).

20. This case is commented on in (1937) 2 Mo. L. REV. 213. On the question of presumptions as evidence, see (1936) 1 Mo. L. REV. 359. Discussing charges on presumptions, see (1937) 2 Mo. L. REV. 87.

21. 339 Mo. 582, 98 S. W. (2d) 645 (1936).

employee-husband. While the court denied a recovery on the ground that the employee-husband was acting outside the scope of his authority at the time of the alleged injury, it did recognize the right of recovery against the employer even though, under the law of Missouri, the wife could not maintain a civil action against her husband for a personal tort. The case marks a significant advance, and the reader is referred elsewhere in the *Review* for a more extended discussion of this problem than is permitted here.[22]

E. *Causation*

Assuming the duty and the breach of duty to have been made out and the defendant to have been negligent, there was still the question of causation or responsibility in law to be determined in a few decisions. In *Annin v. Jackson*,[23] the instructions hypothesized that the skidding of an automobile in which plaintiff was a guest was the sole factual cause, without other hypothesized facts bearing thereon that the skidding of the car was the legal or proximate cause of the injury. The court points out that not only must there be a causal connection in fact (actual cause) between the defendant's conduct and the plaintiff's injury, but it must be the "efficient, immediate and proximate cause" (cause in law). Actual cause denotes any occurrence which is a necessary antecedent or *sine qua non* of an event. If the injury would not have happened "but for" the defendant's negligence, there is causal relation in fact and the defendant's conduct may be said to be an actual cause of the injury. However there is no liability unless it also is the legal cause of the injury.

Concurrent causation was involved in *Felber v. Union Electric Light and Power Co.*,[24] and in *Levins v. Vigne*.[25] In the former case the plaintiff's injuries were received when the defendant was alleged to have made a left turn at a street intersection in such a negligent manner that its truck was struck by an oncoming car which forced the truck into the plaintiff, who was a pedestrian using a pedestrian walk on a cross street. The court pointed out that, to hold the defendant liable, it was not necessary that its negligence was the sole legal cause of the injury; that if the concurrent negligence of two persons causes injury to a third, both are liable. In the latter case there was evidence to the

22. See (1937) 2 Mo. L. Rev. 232.
23. 100 S. W. (2d) 872 (Mo. 1936).
24. 100 S. W. (2d) 494 (Mo. 1936).
25. 339 Mo. 660, 98 S. W. (2d) 737 (1936).

effect that plaintiff's decedent was struck by one automobile and left lying on the highway when he was picked up, carried and dragged by defendant's automobile. The appellant assigned as error the refusal of the trial court to give an instruction which seemed to convey the direction that the jury could not find for the plaintiff unless they could separate the injuries sustained when struck by the supposed first automobile, and further find that such injuries sustained from being struck by defendant's automobile were the sole cause of death. The instruction would have excluded liability on the part of the defendant for negligence which caused an injury or injuries contributing to, or combining or concurring with, the other prior injuries to cause death. The court quoted text book authority with approval: "If the concurrent or successive negligence of two persons, combined together, results in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury."[26]

The matter of intervening cause, which cuts off the responsibility in law of the defendant's negligence, was presented in *Arp v. Rogers*,[27] where the plaintiff was shot by an assailant when the driver of a truck, in which the plaintiff was riding as a guest, stopped to repair a defect in the engine in a district known to be a hangout for gangsters. Here the alleged intervening cause was the criminal act of a stranger. While the case was decided on other grounds, the court gave a considerable discussion to this problem and seemed to conclude that the intentional crime or tort of a third person is a superseding cause, although the defendant's negligence created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the defendant at the time of his negligent conduct should have realized the likelihood that such a situation might be created thereby and that the third person might avail himself of the opportunity to commit such a tort or crime.

One who supplies through a third person a thing to be used for the supplier's business purposes is liable if reasonable care has not been exercised to make the thing safe for the use for which it is supplied, although the dangerous character or condition of the thing is discoverable by an inspection which the third person is under a duty to the person injured to make. Thus, in *Markley*

26. See discussion of concurrent negligence under the recent case comments to be found elsewhere in this issue.

27. 99 S. W. (2d) 103 (Mo. 1936).

v. Kansas City So. Ry.,[28] and *Stoutimore v. A. T. & S. F. Ry.*,[29] the defendant carriers were not relieved of their responsibility in permitting cars to go out of their hands in a dangerous condition to be loaded by the shipper or his employees, even though a third person in each situation was under a duty to the person injured to make an inspection. The negligence of the third person, who also owed a duty to inspect, is not an intervening cause to relieve the supplier of liability; instead, it may be a concurring cause.

F. *Defenses in Negligence Cases*

In *Herring v. Franklin*,[30] in an action against a railroad for injuries sustained when the truck in which plaintiff was riding was struck by a train at a street crossing, the plaintiff contended that, having once looked for the train and not seeing it, he was entitled to assume that the defendant would operate it in a careful manner both as to speed and proper warnings and in compliance with the local speed ordinance, and that he could not be guilty of contributory negligence as a matter of law when relying on that assumption. But the court pointed out that, before one may take advantage of that assumption, he must exercise due care for his own protection. The plaintiff stated that he looked west no more after the truck started some twenty-five or thirty feet north of the north track. There was nothing to prevent him doing so except, as he expressed it, the fear of a train from the other direction. There was nothing to have prevented him from seeing the train had he looked, and the evidence further showed that the truck could have been stopped almost instantly.

An instruction to return a verdict for motorist, who was sued for injuries sustained in a collision, if the jury should find that plaintiff failed to avoid the collision, although he could have done so by the exercise of the highest degree of care for his own safety, was held in *Bloch v. Kinder*[31] not erroneous as assuming that the plaintiff, by the exercise of the highest degree of care, could have avoided the collision. The court stated, however, that the instruction could and should have been written so as to obviate this criticism.

Whether a guest is necessarily negligent in relying upon the driver of an automobile, where the driver has exclusive control and management of the automobile, was again presented in *Annin v. Jackson*.[32] Following earlier

28. 338 Mo. 436, 90 S. W. (2d) 409 (1936).
29. 338 Mo. 463, 92 S. W. (2d) 658 (1936).
30. 339 Mo. 571, 98 S. W. (2d) 619 (1936).
31. 338 Mo. 1099, 93 S. W. (2d) 932 (1936).
32. 100 S. W. (2d) 872 (Mo. 1936).

precedents in Missouri, the court said: "Though a guest is bound to exercise his faculties and not trust himself entirely to the driver, yet 'it is a matter of common knowledge that under ordinary circumstances such occupants do largely rely upon the driver, who has the exclusive control and management of the vehicle, exercising the required degree of care, and for that reason courts are not justified in adopting a hard and fast rule that they are guilty of negligence in doing so.' "

In *Gwaltney v. Kansas City Southern Ry.*,[33] the court repeated the Missouri rule that a person is not excused from the consequences of contributory negligence in voluntarily exposing himself to a known peril for the purpose of saving property. Most courts have taken the other position, and hold that the voluntary effort of a plaintiff to avert threatened harm, caused by the defendant's negligent conduct, to property is not a superseding cause of injury from such efforts, nor is it contributory negligence. This is true not only where the harm is sustained by the one whose property is put in peril by the defendant's negligence, but also where a third person sustains injury in attempting to protect the property of another from the threatened harm. The *Restatement of Torts* supports the latter position.[34]

G. *Humanitarian Doctrine*

In the case of *Bumgardner v. St. Louis Public Service Co.*,[35] the court dealt with the effect which antecedent negligence has under the humanitarian doctrine. Since this interesting case is discussed fully at another place in this issue of the *Review*, it is desired only to call attention to the case at this point.[36] Other decisions involving the humanitarian doctrine presented nothing of significance beyond earlier applications.

H. *Burden of Proof*

It is apparent that 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 *Nelson v. Evans*,[37] the objectionable portion of an instruction dealing with the burden of proof in negligence cases is as

33. 339 Mo. 249, 96 S. W. (2d) 357 (1936).
34. Section 472. The Missouri decisions are discussed in (1920) 18 U. OF MO. BULL. L. SER. 33.
35. 102 S. W. (2d) 594 (Mo. 1936).
36. See discussion of this case under the recent case comments to be found elsewhere in this issue.
37. 338 Mo. 991, 93 S. W. (2d) 691 (1936).

follows: "If, therefore, you find the evidence touching the charge of negligence against the defendant is evenly balanced, or the truth as to the charge of negligence as against the defendant *remains undetermined in your minds*, after fairly considering the evidence, then your verdict must be for the defendant." In *Bellovich v. Griese*,[38] and *Timper v. Missouri Pac. Ry.*,[39] the instruction read the same except, for the words italicized above, the phrase "*remains in doubt in your minds*" was substituted. In all of these cases the instruction was condemned on the ground that a greater burden was cast upon the plaintiff than the law imposes. This objection was overcome in *Doherty v. St. Louis Butter Co.*[40] as follows: "If, therefore, you find the evidence touching the charge of negligence against the defendant does not preponderate in favor of the plaintiff, or is evenly balanced, then and in that case plaintiff is not entitled to recover against the defendant and you will find your verdict for the defendant."

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 presented in *Pandjiris v. Oliver Cadillac Co.*[41] The court reiterated its previous rule on these matters in pointing out "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.... And when all the evidence is in, it is then for the jury to say whether the preponderance thereof is for the plaintiff."

II. Libel

In *Fisher v. Myers*,[42] in an action based on libel, the question was presented whether the occasion of the publication was privileged. The parties were members of the same fraternal order. The defendants had distributed pamphlets at the annual state meeting of the order, accusing plaintiff of immoral conduct. It was shown by the plaintiff that the local chapters only were vested with jurisdiction, under the regulations of the order, to hear and determine charges of immorality or misconduct of any kind affecting a mem-

38. 100 S. W. (2d) 261 (Mo. 1936).
39. 98 S. W. (2d) 548 (Mo. 1936).
40. 339 Mo. 996, 98 S. W. (2d) 742 (1936).
41. 339 Mo. 726, 98 S. W. (2d) 969 (1936).
42. 339 Mo. 1196, 100 S. W. (2d) 551 (1936).

ber's moral fitness or her membership in the order. Had charges such as these been instituted in the local chapter of which the plaintiff was a member, the court recognizes that the occasion would be a privileged one when done in good faith. Here, there would be a common interest in the subject matter to a certain extent between the author of the communication and the recipients. But mere common membership in a fraternal order or other similar organization does not afford a sufficient common interest in the subject-matter which makes a communication, otherwise libelous, qualifiedly privileged. The court quite properly felt that the damage to the reputation of the individual in such circumstances would be much greater than any benefit to society from extending the doctrine of qualified privilege.

Qualified privilege was raised in the case of *Heitzeberg v. Von Hoffman Press*,[43] where a letter was alleged to have been written to a third person referring to the fact that the plaintiff had been an editor of a certain publication, and charging the plaintiff with loose financial policy and laxness as manager. The court held the petition was not demurrable as showing that the statements in the letter were qualifiedly privileged, especially in view of the allegation that the letter was not written in response to any inquiry. These allegations were also sufficient on demurrer to show injury to the plaintiff in his business or profession at the time of the alleged false statements, notwithstanding the further allegation that the plaintiff's employment with a certain publishing corporation was severed about one year before the date of the letter, and that he had obtained no permanent employment since that date

III. Fraud

In the case of *Orlann v. Laederich*,[44] the court treated at considerable length the rules which determine whether a plaintiff is entitled to rely upon misrepresentations of opinion made by the antagonistic party to a transaction. Here the vendor of an interest in land misrepresented its value. The plaintiff stressed the tendency of the courts in fraud cases "to condemn the falsehood of the fraud-feasor rather than the credulity of his victim." However, where the subject matter is one upon which the two parties have an approximately equal capacity to form an opinion, neither is justified in relying upon the opinion of the other, for it is not reasonable for people to rely upon the opinion of others in such situations. The ordinary man in determining the

43. 100 S. W. (2d) 307 (Mo. 1936).
44. 338 Mo. 783, 92 S. W. (2d) 190 (1936).

advisability of entering into transactions, such as the sale and purchase of an interest in land in the instant case, ordinarily relies upon his own opinion. This is so even though the purchaser in this sort of transaction knows that the other is somewhat more familiar with the value of such things. The court said: "Parties, sui juris, in full possession of their faculties and unrestrained in their action, when about to enter a business transaction, should not look to the law or the courts as a child does to its parent or a ward to its guardian. The exercise of common sense, self-reliance, and ordinary diligence and prudence is to be expected in such transactions between adults, and indolence, listlessness, indifference, and unwarranted credulity should not be encouraged." The court, however, recognizes other situations in which reliance would be justified such as where the maker holds himself out as having special knowledge of the matter which the recipient does not have, or where the maker stands in a fiduciary or other similar relation of trust and confidence to the recipient, or where the recipient was hampered or interferred with in making his own investigation by the maker.

The remedy in tort for damages for fraud is only one of the means for protecting those who have suffered this form of harm. Most of the cases decided in the period under review, in which legal redress has been sought because of fraud, fall outside the tort field. For example, there are the cases in which a creditor seeks to set aside a fraudulent conveyance, [45] or in which the plaintiff seeks rescission of contract and to get his money back,[46] or in a contest to set aside a will.[47]

XI

TRUSTS

W. L. NELSON, JR.*

I. EXPRESS TRUSTS

A. *Court Ordering Action not Provided for by Trust Agreement*

In *Seigle v. First National Co.*,[1] a bank held certain securities, owned by the defendant company, in trust to secure participation certificates issued by the latter. The trust agreement provided that in the event of default

45. Hendrix v. Goldman, 92 S. W. (2d) 733 (Mo. 1936); Farmers & Merchants Bank of Festus v. Funk, 338 Mo. 508, 92 S. W. (2d) 587 (1936).
46. Patzman v. Howey, 100 S. W. (2d) 851 (Mo. 1936).
47. Shelton v. McHaney, 338 Mo. 749, 92 S. W. (2d) 173 (1936).

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1. 338 Mo. 417, 90 S. W. (2d) 776 (1936).

in the payment of interest or principal on the certificates, the bank should sell enough of the securities to enable it to make these payments, or should sell all the securities and divide the proceeds among the certificate holders.

After an announcement that the company was unable to meet its obligations on the certificates the court, as a result of the filing of several suits by certificate holders, appointed a co-trustee and directed that the assets be liquidated. Two small distributions were made by the trustees. Later the company filed an intervening petition stating that the Reconstruction Finance Corporation had agreed to lend it money for the purpose of distributing a dividend of approximately 46 per cent to the certificate holders, provided that the bank would pledge to the Reconstruction Finance Corporation all the company's assets which it was holding in trust. The circuit court found the proposal to be fair and directed the trustees to enter into the agreement. This decree was appealed from, one of the grounds for the appeal being that since the trust agreement provided only for a liquidation of the securities and the distribution of the proceeds in the event of default the court had exceeded its power in directing that the securities be pledged to secure a loan. The supreme court upheld the action of the lower court and quoted with approval the following language of the Court of Chancery of New Jersey in the case of *New Jersey National Bank & Trust Company v. Lincoln Mortgage and Title Guaranty Co.*:[2] "but it is also true that a court of equity, in its capacity as universal trustee, may in cases of emergency, for the preservation of the trust estate and the protection of the cestuis, authorize and direct the trustees to do acts which under the terms of the trust and under ordinary circumstances they would have no power to do." The court indicated that a liquidation at a time when the assets were not readily salable was an "emergency" not contemplated by the parties to the trust agreement, and was such a circumstance as to authorize the court to proceed as it did in attempting to preserve the corpus of the estate.[3]

The lower court had also directed that the maturity dates of the certificates be extended. In holding that the court had no power to make this

2. 105 N. J. Eq. 557, 148 Atl. 713 (1930).

3. In discussing an earlier Missouri decision the court said: "The question of whether a court in the liquidation of a trust estate in an emergency possessed the power to vary the terms of a trust arrangement made prior to, and not in contemplation of, the emergency and when the trust estate was not subject to the control of the court, was not involved."

order the supreme court said that although a court did have the power "to suspend the enforcement of the contract pending the administration of the trust estate by the court," it did not have a right to make a new contract, which would be the result of this order, over the objection of either party.

B. *Powers of Trustee*

Although the courts will, as stated in *Seigle v. First National Co.*,[4] direct the trustee to proceed in a manner not provided for by the trust agreement if such procedure is necessary to preserve the trust res and protect the beneficiary, they will ordinarily hold the trustee to the terms of the agreement even though a different course of procedure would be to the benefit of the cestui.

In *Carter v. Boone County Trust Co.*,[5] the trustee had directed that certain property which he owned should be leased by his executors and the income used to pay annuities. He further directed that the property be kept insured so that it could be rebuilt in the event of fire. After the death of the testator the building burned and another was erected. The money for this construction was derived from insurance and from rent paid in advance by a bank which had leased the new building from the administrator with the will annexed. In an action to construe the will and to cancel the lease one of the testator's grandchildren contended that the administrator had no right to invest the rent money and the proceeds from the insurance in the new building. The court held that the executor was limited by the powers given in the will and it was therefore the duty of the administrator with the will annexed to replace the building and lease it, even though he could have obtained a larger income for the estate by lending the money received from the insurance.

Irvine v. Ross,[6] although digested as involving a trust question, primarily involved the construction of a will. The only reference to trusts was a statement by the court that the executor took the property in trust, as directed by the testator, to carry out the purposes stated in the will.

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4. 338 Mo. 417, 90 S. W. (2d) 776 (1936).
5. 338 Mo. 629, 92 S. W. (2d) 647 (1936).
6. 339 Mo. 692, 98 S. W. (2d) 763 (1936).

C. *Following Trust Property*

Happy v. Cole County Bank[7] was an action to have certain funds impressed with a trust. One of the defendants, the trustee of an estate in which the plaintiff was beneficiary, had the trust funds on deposit in a bank of which the defendant was president. When the Commissioner of Finance ordered that certain notes be cancelled as assets of the bank, and that the assets be restored, the defendant trustee transferred the trust funds to the bank. The beneficiary then brought suit to have this money impressed with a trust. The lower court entered a decree in his favor, and that judgment was affirmed on appeal, the supreme court holding that one who takes property without having paid a valuable consideration takes it charged with any trusts to which it may be subject, and that equity will follow the property and fasten the original trust upon it for the benefit of the person holding the equitable interest, whether or not the donee has notice of the trust.

Benz v. Powell[8] also involved an alleged misappropriation of trust funds. The petition alleged that one Powell, trustee, had wrongfully and wilfully intermingled a trust fund, of which the plaintiffs were beneficiaries, with his private estate, and that the plaintiffs were entitled to a preferred claim against the assets of the estate of the trustee, then deceased. The court held that in order for the plaintiffs to recover in this action to follow trust funds they had to prove that the trustee had misappropriated the trust funds and that the part so misappropriated had reached, in some form, the estate of the trustee. The court decided in favor of the defendants, as did the lower court, holding that there was no evidence to show that the trust fund had come into the hands of the trustee or his executor.

D. *Jurisdiction*

In *Winning v. Brown*,[9] the husband of the sole heir of the grantor in a trust deed brought suit to have the deed declared void. The trustee filed an answer and cross-bill asking for an accounting, the appointment of a receiver, and a construction of the deed. The defendants appealed from a judgment in favor of the plaintiff's wife, and asserted that the plaintiff had

7. 338 Mo. 1025, 93 S. W. (2d) 870 (1936).
8. 338 Mo. 1032, 93 S. W. (2d) 877 (1936).
9. 100 S. W. (2d) 303 (Mo. 1936).

no capacity to maintain the action. The court did not make a finding as to this contention, but held that the cross-bill and answer of the trustee conferred jurisdiction on the court of the subject matter of the litigation.

II. Implied Trusts

A. *Resulting Trusts*

Three of the cases decided by the Missouri Supreme Court in 1936 were suits to establish resulting trusts. In each of these the court went into the degree of proof necessary to maintain such actions, pointing out that the evidence must be clear and positive, and that the court must be convinced beyond a reasonable doubt that a trust was intended.

Lieberstein v. Frey[10] was a suit brought by the heirs of Louis Lieberstein against his wife's heirs, and their grantee, to establish a resulting trust in certain real estate in favor of the plaintiffs. The evidence was undisputed that the deeds were made to the wife under the direction of the husband, but there was conflicting testimony as to whether the property was to be held for the benefit of the husband, or whether the wife obtained fee simple title. The trial court found for the defendants. On appeal the supreme court affirmed this judgment, holding that when property is taken in the name of the wife, under the directions of and with full knowledge of the husband, there is a rebuttable presumption that no trust was intended, even though the purchase money belonged to the husband, and that to overcome this presumption, "the evidence must be 'clear, strong, unequivocal, and so definite and positive as to leave no room for doubt in the mind of the chancellor' that a trust was intended."[11]

In *Parker v. Blakeley*,[12] the plaintiff brought suit to cancel a deed which he had executed to his sister. His contention was that an implied trust had arisen in his favor because the deed, though absolute on its face, was in reality a conveyance to his sister in trust, the oral agreement being that she should hold the land until it could be disposed of. The lower court found for the plaintiff. This decision was reversed by the supreme court, that court

10. 92 S. W. (2d) 114 (Mo. 1936).
11. 92 S. W. (2d) 114, 118 (Mo. 1936).
12. 338 Mo. 1189, 93 S. W. (2d) 981 (1936).

denying that the evidence proved that it was the intention of the parties, at the time the deed was executed, to separate the legal and beneficial estates and convey only the former to the sister. The court first pointed out that if there was an actual trust agreement it was unenforcible as an express trust because not in writing.[13] In discussing the type of evidence needed to establish a trust by operation of law the court made the same requirements that it set forth in *Lieberstein v. Frey*,[14] and said that "the evidence must be so clear, cogent, positive, and convincing 'as to exclude every reasonable doubt from the chancellor's mind'."[15] It added that such a trust must arise from the facts of the transaction itself, and not by virtue of subsequent occurrences.

In *Little v. Mettee*,[16] the plaintiff contended that a resulting trust was created in his favor in certain real estate devised by his grandmother. As originally written the codicil to the will would have given the plaintiff an interest in the property, but when the will was presented for probate it had been altered in such a manner as to exclude him. The property was conveyed to the defendants, according to the provisions of the altered codicil, and they went into possession. Plaintiff then brought this suit on the theory that the will was altered after its execution, that the defendants knew of such alteration, and that when they took the land they held an interest in it in trust for the plaintiff. In affirming the judgment for the defendants the court quoted from numerous Missouri decisions to show that in order to establish a resulting trust an extraordinary degree of proof is required, and that a mere preponderance of the evidence is not sufficient. The court also set out the various situations which might give rise to such implied trusts.[17]

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13. Mo. Rev. Stat. (1929) § 3104.
14. 92 S. W. (2d) 114 (Mo. 1936).
15. 338 Mo. 1189, 93 S. W. (2d) 981 (1936).
16. 338 Mo. 1223, 93 S. W. (2d) 1000 (1936).
17. The court said: "The general types of a resulting trust, recognized and enforced in equity, may be said to be: (1) Where a purchase has been made and the legal estate is conveyed or transferred to one party but the purchase price is paid by another party; (2) where a person standing in a fiduciary relation uses fiduciary funds or assets to purchase property in his own or a third person's name; (3) where property is transferred without any consideration coming from the donee or grantee under such circumstances that he is considered as holding the property for the benefit of the donor or grantor; (4) where property is acquired by a person under circumstances which show that it is conveyed to him on the faith of his intention to hold it for or convey it to another, or to hold it for or convey it to the grantor or the grantor and another; and (5) the trust which arises in favor of the donor, or those claiming under him, where the trust is not fully declared, or fails, in whole or in part. . . ."

B. *Constructive Trusts*

In *Parker v. Blakeley*,[18] the court, after deciding that a resulting trust had not arisen, went on to discuss constructive trusts. It denied that the plaintiff had made out a case for the latter since he had failed to show that the conveyance was induced by fraudulent means. The court pointed out that the mere refusal of a trustee to execute an express trust does not make out a case for a constructive trust.

A decision which also may be classed under the heading of constructive trusts, though no active fraud was present, is *Cantley v. Beard*.[19] That suit was an action to determine the interests of the plaintiffs, the State Commissioner of Finance and his deputy, and the defendants, one of these being the County of Morgan, in certain notes and collections. County funds had been turned over to the bank, although it had not been designated as a county depository as was required by law. It appeared that the funds were then used by the individual defendants, the officers of the bank, to purchase certain notes held by the bank. The notes were then assigned to the defendants to secure them on a depository bond executed by them to the county. The bank later closed and the plaintiffs, who took it over, contended that the defendants held the notes and the collections on the notes in trust for the plaintiffs. The contention of the county was that the bank, not having been selected as a depository according to law, held the funds as trustee *ex maleficio*, and that this trust extended also to the notes. The court agreed that the bank became trustee *ex maleficio* of the original funds, but denied that a trust relation was created as to the notes and collections thereon. It said that since there was no authority for investing the funds of the county in the notes held by the bank the transaction was void *ab initio*, and the title to the notes and collections remained in the bank. The court said that the county should have proceeded for a preference as to its deposit, because the bank did hold the original funds deposited by the county as trustee *ex maleficio*.

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18. 338 Mo. 1189, 93 S. W. (2d) 981 (1936).
19. 339 Mo. 649, 98 S. W. (2d) 730 (1936).

XII

WILLS AND ADMINISTRATION

THOMAS E. ATKINSON*

It is the purpose of this section to review the decisions relating broadly to the law of succession to property upon death. Hence the subject matter treated is somewhat more extensive than that included within the topics of Descent and Distribution, Executors and Administrators and Wills, in the digests. On the other hand a line must be drawn somewhere. Consequently cases are not included simply because the parties happen to be personal representatives, testamentary trustees or heirs of deceased persons.

I. PROBATE AND CONTEST OF WILLS

The judicial tendency to find that a will has been executed with the required formalities is illustrated in the case of *Buchholz v. Cunningham*.[1] There the attestation clause did not state expressly that the testator signed the will in witnesses' presence; yet the attesters' statement that testor signed the will was taken as the equivalent of a declaration of his signing in the presence of the witnesses. The testimony of the sole surviving witness was inconclusive and to the effect that some of the formalities might or might not have been performed. Still the court held that a prima facie case had been made by proponents.

It was also held in the same case that proponents, having the burden of proof upon issues of proper execution and mental capacity, have the right to open and close even when contestants attempted, in a case consolidated for trial, to set up an earlier will conceded to be executed properly when deceased was of sound mind. The opinion also affirms the right of proponents after qualifying witnesses as to their association with deceased, to ask whether they had noticed any sign of insanity. It is further held that when there is a proper charge as to the necessary elements for mental capacity, it is not erroneous to instruct that no particular degree of understanding is necessary on the part of testator and that he need not understand the ordinary affairs of life.

When a correct charge was given to the effect that testator must have the ability to understand: (1) the nature and extent of his property, (2) the

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1. 100 S. W. (2d) 446 (Mo. 1936). Other points in this case are noted *infra* note 14.

reasonable claims of all persons who may have been within the reasonable range of his bounty, and (3) to whom he wished to and was giving his property,[2] it was held not reversible error, in *Townsend v. Boatmen's Nat. Bank*,[3] to instruct the jury that the testator had a right to exclude his heirs at law and that they should not consider whether the will's provisions were appropriate or inappropriate. It is doubtless true that the unreasonableness of a will's provision cannot by itself make a case for the jury upon the issue of mental capacity. As said by the court however, this matter may be considered by the jury along with other evidence. The non-reversible character of these particular instructions is made out from (1) the other portions of the charge set forth above, (2) the fact that the will was not particularly unnatural in its provisions, and (3) that the will was read to the jury and its provisions frequently called to their attention.

The well-founded judicial attitude to uphold wills against the claim of mental incapacity is again illustrated in *Stevens v. Meadows*.[4] There the will was rejected below upon the ground that the testatrix was suffering from insane delusions. In reversing the case and ordering establishment of the will the court held that witnesses who testify to unsound mind must give the details of facts upon which their opinion is based and that the court will scan these with care. Upon review of the testimony the court found that, while testatrix was strong-willed and perhaps unjustly objected to her mature daughter keeping company with men and later leaving home to marry, this was not sufficient evidence that she was laboring under insane delusions when making a will disinheriting the daughter.

While not involving a will but rather an inter vivos transfer of property, *Lastofka v. Lastofka*[5] is closely related to testamentary problems. In reversing a decree for plaintiffs, children of deceased grantor, setting aside a deed by their mother to the defendant son, the court took occasion to remark that the tests of mental capacity and undue influence were practically the same as

2. This charge was given at the request of contestant and appellant. It was further held that the instruction was not in conflict with one given at proponent's request, that if testator knew and understood: (1) that he was executing his will, (2) the nature and extent of his property, and, (3) the natural objects of his bounty, he had capacity to execute the will. It is probably true that it is only the *ability* to know and understand, which is required for testamentary capacity. A proponent might complain of a charge requiring actual knowledge and understanding, but surely a contestant could not.

3. 104 S. W. (2d) 657 (Mo. 1936).

4. 100 S. W. (2d) 281 (Mo. 1936).

5. 339 Mo. 770, 99 S. W. (2d) 46 (1936).

in the testamentary cases. This suggests a comparison of the respective beneficial features of deed or will in such cases. On the one hand, the will, being entirely revocable, offers much greater protection of the interests of the parent in his lifetime. This feature should be decisive in all doubtful cases in favor of the will device. On the other hand, all other arguments are in favor of the deed transaction: (1) the avoidance of probate and administration, (2) the fact that possible litigation is carried on in court cases with trial de novo on appeal and accordingly with much less chance for "sympathetic" decisions than in jury trials of similar issues in will contests.

In *Shelton v. McHaney*,[6] it was held that the burden of proof as to fraud upon the testator in procuring execution of the will was upon the contestant and was not shifted by virtue of the fact that the one accused of the fraud was the attorney who drafted the will and was named executor and trustee therein. The decision is consistent with an earlier case, *Ryan v. Rutledge*,[7] where the issue of undue influence was involved. The *Shelton* case establishes the doctrine that there will be no presumption of fraud from the mere fact that the executor-trustee drafted the will, when he was not a devisee or legatee.

Questions frequently arise as to whether a certain instrument is a will or a deed. These two types of instruments require respectively different formalities in the matter of execution. In addition, to be effective, the deed must be delivered. The beneficiaries under a will must have the instrument probated in order to establish their interests thereunder, while probate is not required for a deed. The character of the instrument must be determined to ascertain which set of formalities is required by the former owner and by the beneficiaries after his death. A will is ambulatory in its nature, while a deed creates actual present legal relations. Sometimes, upon the offer of an instrument for probate, the question may arise whether the document does not by its terms attempt to create present legal relations and is hence a deed and therefore not entitled to probate. More frequently a beneficiary claims that the instrument is a deed, while the heirs of the former owner contend that it is testamentary in nature. Three cases of the latter category were decided by the supreme court in 1936. In *Lanphere v. Affeld*,[8] the owner of land and his wife gave their daughter a warranty deed reciting consideration of one dollar and love and affection, regular in all respects except that it contained the

6. 338 Mo. 749, 92 S. W. (2d) 173 (1936).
7. 187 S. W. 877 (Mo. 1916).
8. 99 S. W. (2d) 36 (Mo. 1936).

provision "grantors retain possession until after their death." Later the owner made a will leaving all his property to his son and appointed him executor. The son went into possession of the land, whereupon the daughter brought an equitable action to obtain possession thereof, to have title therein declared vested in her, and for the rents and profits of the land. The court held that the instrument was a deed and that the provisions thereof vested title in plaintiff at once, subject to a life estate retained by the parent. The decree for rents and profits was held to be properly against the defendant personally as there was no evidence that he was authorized to take possession of the land as executor. A like decision is found in the companion case of *Schoenwetter v. Affeld*,[9] except that there was testimony of an understanding that the deed was not to be recorded until after the grantor's death. The opinion holds that this evidence is immaterial as the provision was not contained in the instrument. Had it been, the court intimates some doubt as to the result. It would seem that such provision should not make an instrument testamentary in character, as it is the delivery rather than the recording which makes a deed effective between the parties.

On the other hand, an instrument which grants land to one and his heirs, and (1) reserves a life estate in the grantor, (2) states an intention that the instrument should not take effect until grantor's death, (3) provides in case grantee died without children the property should go to the grandchildren of the grantor, was held testamentary in the case of *Thorp v. Daniel*.[10] Of course the first provision does not by itself make the instrument testamentary. The second provision, however, especially when coupled with the third, was deemed to cause the instrument to be considered entirely ambulatory and to create no interest at the time of execution and delivery. The court distinguishes the second provision from one in an earlier case wherein the language was that the instrument was not to take effect *in full entirety* until grantor's death. As there was no claim that the instrument had been executed with the formalities required for a will, or probated as such, the purported beneficiary could receive nothing thereunder.

While testator's widow may not ordinarily contest a will for the reason that she may take as much against the will as when it is set aside, it was held in *Jensen v. Hinderks*[11] that she should be permitted to amend her petition in a will contest by alleging the existence of an earlier will making her sole

9. 99 S. W. (2d) 41 (Mo. 1936).
10. 339 Mo. 763, 99 S. W. (2d) 42 (1936).
11. 338 Mo. 459, 92 S. W. (2d) 108 (1936).

beneficiary and thereby become a proper contestant. *Fields v. Luck*[12] decided that where there was a suggestion of death of one of defendants in a will contest and an order of revival and yet the representatives of the deceased defendant were not brought before the court, the judgment setting aside the will was void for lack of necessary parties.

In *Callahan v. Huhlman*,[13] it was held that where the probate court's record filed in a will contest in circuit court showed that the will had been purportedly admitted to probate in vacation without confirmation in term, there was no judgment of the probate court and the circuit court had no jurisdiction as the contest is derivative and in the nature of an appeal. When an earlier and a later will are offered to the probate court at the same time and thereupon the court admits the later will, and at a subsequent time formally rejects the earlier one, the one year period, within which the action to establish the first will in circuit court must be brought, runs from the formal rejection of the earlier will at the subsequent date. This is the holding in *Buchholz v. Cunningham*,[14] which opinion also illustrates the court's approval, by innuendo at least, of the consolidation for purpose of trial of several suits to establish or reject different wills of a single decedent.

State ex rel. *Cowden v. Knight*[15] presents a novel question of procedure with reference to probate. There the will of the testatrix left $1.00 to her brother and her father respectively and the balance of her estate to her husband. The latter predeceased testatrix, so that the gift to him was not saved to his heirs by the anti-lapse statute[16] for the reasons that he was not a "relative" of the testatrix within the provision to prevent lapse, and furthermore was not survived by descendants. His collateral heirs for some reason difficult to understand, presented the will for probate but the probate court declined to take proof of the will. Thereupon these heirs brought mandamus to compel the probate judge to take proof of the will and either grant a certificate of probate or rejection. Thereupon the collateral heirs of testatrix brought an original proceeding in prohibition in the supreme court to prevent the circuit court from further action in the mandamus suit. The provisional rule was made absolute for the reason that it would be useless to probate the will as its

12. 339 Mo. 1140, 100 S. W. (2d) 471 (1936).
13. 339 Mo. 634, 98 S. W. (2d) 704 (1936).
14. 100 S. W. (2d) 446 (Mo. 1936). Other points in this case are noted *supra* note 1.
15. 338 Mo. 584, 92 S. W. (2d) 610 (1936).
16. Mo. Rev. Stat. (1929) § 527.

terms could not be carried out because of the lapse. The decision is not only technically correct but it has a common sense basis. Had the probate court issued a certificate of rejection, an interesting question would have arisen upon appeal. Technically probate should not be denied because the will cannot be given effect, as only the issues of execution, mental capacity, undue influence, fraud and revocation are involved on probate; yet practically, when the will can clearly have no effect, should it be *reversible* error to reject it?

II. Construction of Wills

Two cases involve the supreme court's appellate jurisdiction over decrees construing wills. In *Fleischaker v. Fleischaker*,[17] it was held that in a dispute as to the time of ascertaining the sums to be distributed to various beneficiaries of the estate, the jurisdictional amount was not the sum shown by the original inventory nor the balance on hand at the time of trial, but rather the amount to be gained by plaintiff or to be lost by defendant if relief be granted, or vice versa if relief be denied. As this was not shown by the record to exceed $7,500, the court considered it had no jurisdiction of the appeal. *Peer v. Ashauer*[18] was likewise a case where the supreme court held that there was no jurisdiction to hear an appeal in a will construction suit, though the land to be partitioned was worth $8,000, for the reason that it must be shown that the amount in dispute was over $7,500. Likewise in the same case there was no jurisdiction upon the ground of title to land being involved where the petition alleged that plaintiff and defendant were each seised of one half interest in the land and defendant demurred, admitting the allegation of title.

In *Keller v. Keller*,[19] a devise of property to R. and V., his wife, share and share alike, was held to create a tenancy in common and not be the entireties, or in joint tenancy. *Lunsmann v. Mississippi Valley Trust Co.*[20] involves a question of construction which is probably of interest only to the litigants, prefaced by the court's general statements that the object of construction is to reach the intention of the testator as gathered from the whole will and that technical rules of construction should give way to this intention. The substance of these generalities appears again in *Blumer v. Gillespie*,[21] passing on the recurring problem of whether words, sufficient in themselves

17. 338 Mo. 797, 92 S. W. (2d) 169 (1936).
18. 92 S. W. (2d) 154 (Mo. 1936).
19. 338 Mo. 731, 92 S. W. (2d) 157 (1936).
20. 339 Mo. 669, 98 S. W. (2d) 748 (1936).
21. 338 Mo. 1113, 93 S. W. (2d) 939 (1936).

to create an absolute estate in fee, are affected by subsequent language showing an intention to benefit others. There the testator (a) gave all his property to his wife, and expressed (b) faith that she would protect and educate his son, (c) and the wish that the wife would bequeath to the son upon her death all property inherited from testator, (d) and the idea and wish that the son should have what might remain of the estate upon the wife's death. It was held that the language in (c) and (d) had the effect of cutting down the provision for the widow to a life estate by implication with remainder in the son. It is interesting to notice that while trust cases are cited, the court does not make use of the trust devise but decides the case upon the basis of legal estates.

A devise "to the Macon County, Mo., school funds" was held clear enough to render inadmissible any extrinsic evidence upon the issue of testator's intention in the case of *Burrier v. Jones*.[22] This was held to vest the legal title in the statutory custodian of school funds for the benefit of the persons entitled to the benefits thereof, disapproving of an earlier Missouri case[23] where similar language was held to constitute an ineffective charitable devise because of failure to separate the legal and equitable estates.

Irvine v. Ross[24] involves the construction of the word "heirs" in a will. There the testator by his will created a trust of his property for his daughter who was his sole heir and was given the income of the property while unmarried. It was then provided that if she married, all real estate should be conveyed to the daughter for life, with remainder to her issue but if she died without issue then to testator's heirs. She married and died childless, whereupon her husband brought this suit against testator's collateral heirs, contending that the testator's heirs must be determined at the time of testator's death, when the daughter was the sole heir, and that the sole purpose of the provision was to prevent her from defeating her issue if she had any. The court held however that the whole will showed an intention to benefit those persons who answered to the description of testator's heirs at the time of the daughter's death, if she died without issue.

Brock v. Dorman[25] is another case involving the meaning of "heirs" as used in a will. There the testator devised the land in question to his son for

22. 338 Mo. 679, 92 S. W. (2d) 885 (1936) noted in (1936) 1 Mo. L. REV. 368.
23. Robinson v. Crutcher, 277 Mo. 1, 209 S. W. 104 (1919), criticized in (1921) 21 U. OF MO. BULL. LAW SER. 31.
24. 339 Mo. 692, 98 S. W. (2d) 763 (1936).
25. 339 Mo. 611, 98 S. W. (2d) 672 (1936).

life and after latter's death to the son's heirs. The son and his wife years after testator's death adopted F then 43 years of age. Then the son died and F conveyed the land to plaintiff who brought this suit against the testator's heirs at law who would take upon the son's failure to have heirs. It was held that, while the Rule in Shelley's Case under which the son would have taken a fee had been abolished by statute,[26] still F was entitled as the heir of the son by the adoption. In so holding it was pointed out that the person answering the description of heir at the time of the son's death was entitled to take the remainder, and that even under the old method of adoption by deed F would be the heir of the son.[27] Adoption of adults as well as minors is recognized as before, and the Court refused to be influenced by the argument that the adoption was a subterfuge to defeat the rights of testator's heirs.

In *Laird v. Lust*,[28] testator devised his property to nine of his children share and share alike "and in case any of my children, at my death be dead, and leaving children, or descendants then such children should take the share their parents would have taken, if living." By a subsequent clause it was provided that if any of the children named in the above clause died without issue the part willed to the child or children so dying should be divided equally among the other children named in the preceding clause. In a suit between the devisees to partition, defendants contended that the land was not partitionable because the estate given to the children was merely a life estate in the event that they died without issue. It was held, however, in accordance with the preference for early vesting, as well as the intention of the testator as spelled out from the entire will, that the latter clause was merely a provision for a division of the property in case that some of the named children died without issue before testator's death and that those who survived testator had a vested estate in fee and the land was therefore partitionable.

III. Administration, and the Rights of Heirs

Cronacher v. Runge[29] was a suit brought for admeasurement of dower in the lands of plaintiff's deceased wife. It appeared that plaintiff had once renounced the will but later had contracted to accept it in return for certain considerations. Defendant's children of the wife, asked for possession of cer-

26. Mo. Rev. Stat. (1929) §§ 562, 3110.
27. See Limbaugh, *The Adoption of Children in Missouri* (1937) 2 Mo. L. Rev. 300, 305.
28. 98 S. W. (2d) 768 (Mo. 1936).
29. 98 S. W. (2d) 603 (Mo. 1936).

tain land which the husband claimed as part of his dower right. It was held in effect that the contract superseded the renunciation and should be given effect, as fraud in obtaining it was neither alleged nor proved. It was also held that defendants were entitled to recover possession in the cross action which was deemed to be in the nature of ejectment.

Another case involving election to take dower is *Colvin v. Hutchison*.[30] There the widow, a resident of Illinois, renounced the will by a paper filed in the Illinois court. This was held to constitute also a rejection of the will in Missouri without steps taken in this state. Furthermore the widow was deemed to take common law dower in accordance with the Missouri rule that this was deemed to be intended when not made explicit by the terms of the renunciation. This holding was in spite of the fact that under the Illinois law the presumption under such circumstances was against the taking of a mere common law life interest. The law of the situs of the land prevailed. Accordingly, the widow having since died, her collateral heirs were entitled to no interest in the Missouri lands.

If one takes a foster-child without legal adoption and dies intestate, the claim is frequently made that there was an agreement to adopt. The courts have in some cases enforced such contracts by giving the child the property which he would have taken had the adoption been carried out as agreed.[31] However, the courts insist before taking the property from the regular channels of inheritance that the agreement be definite and furthermore clearly shown. The supreme court showed commendable strictness in this regard by affirming judgment for defendant heirs in *Furman v. St. Louis Union Trust Co.*[32] and reversing judgment for claimant in *Benjamin v. Cronan*,[33] both decisions being placed upon the failure to offer proofs of the necessary kind and character in order to warrant enforcement of such agreements.

Much the same degree of proof is required in order to recover against a decedent's estate upon his alleged contract to devise. Such relief was denied in *Stibal v. Nation*[34] for failure of specific proofs. Otherwise, as the court points out, the safeguards of the Statute of Frauds and the Statute of Wills would have no real effect. The possibility of recovery upon such a contract

30. 338 Mo. 576, 92 S. W. (2d) 667 (1936).
31. See Limbaugh, *The Adoption of Children in Missouri* (1937) 2 Mo. L. REV. 300, 303, 310.
32. 338 Mo. 884, 92 S. W. (2d) 726 (1936).
33. 338 Mo. 1177, 93 S. W. (2d) 975 (1936).
34. 98 S. W. (2d) 724 (Mo. 1936).

is illustrated, however, in *Ver Standig v. St. Louis Union Trust Co.*[35] There the petition of decedent's niece alleging decedent's alleged promise to devise land to plaintiff in return for services performed by plaintiff's husband was held not to be demurrable on account of laches, though filed four years after testator's death. The contention of laches was overruled because plaintiff's husband had made prompt claim to recover judgment for the value of the services rendered and the present petition was filed within a few days after denial of the husband's claim on the ground of the plaintiff's cause of action. The court realistically recognized the two proceedings as "a joint affair." The court refused to pass on the question of whether plaintiff's claim would be superior to the successors in interest of decedent's husband who took against the will, saying that this question depended on the equities of the situation to be disclosed by the proofs.

In re Estate of Thompson v. Coyle and Co.[36] is an interesting and important decision holding that an action commenced in a state or federal court outside of Missouri does not interrupt our non-claim period of claims against estates and it makes no difference that the personal representative voluntarily appeared in the out of state action. It was held in *Wahl v. Murphy*[37] that the filing in probate court of a transcript of a judgment recovered in a suit brought against one in his lifetime and revived against his administrator does not result in a lien upon decedent's lands in plaintiff's favor. The general statute[38] providing for a judgment lien upon land refers only to suits against living persons, and the preference to judgments given under the administration statute[39] is expressly confined to judgments rendered against deceased in his lifetime and later filed in the probate court. When a preferred claim is asserted against the estate of a trustee upon the ground that the deceased trustee intermingled trust funds belonging to plaintiff with his personal estate, it was held in *Benz v. Powell*[40] that no preference should be granted unless both the intermingling is proved and the trust funds are traced into the hands of the trustee's executor.

In *Landwehr v. Moberly*,[41] it was held that the deposit by an executrix of estate funds in a bank did not become a special deposit so as to be entitled

35. 339 Mo. 539, 98 S. W. (2d) 588 (1936).
36. 339 Mo. 410, 97 S. W. (2d) 93 (1936).
37. 99 S. W. (2d) 32 (Mo. 1936).
38. Mo. Rev. Stat. (1929) §§ 1104, 1142, as amended by Laws of Missouri 1935, p. 207.
39. Mo. Rev. Stat. (1929) §§ 148-156, 182.
40. 338 Mo. 1032, 93 S. W. (2d) 877 (1936).
41. 338 Mo. 1106, 93 S. W. (2d) 935 (1936).

to preference upon failure of the bank because of the representations of the bank's cashier that the bank was safe and that the money could be had at any time, nor by reason of the fact that the deposit was for the purpose of carrying out the trust. In *Happy v. Cole County Bank*,[42] a testamentary trustee, who was president of the defendant bank, checked money from the trust account into his individual account and gave his individual check in payment of his own indebtedness to the bank. It was held that the bank was liable to the cestui as its officers knew the source of the funds. The fact that the will might not have been properly executed was held immaterial. Defendant insisted on the statute of limitations as a defense, upon the theory that the trustee could have sued before. This argument was rejected on the ground that the trustee was the wrongdoer and did not represent the plaintiff in the transaction.

Rains v. Moulder[43] is an interesting decision regarding the adjustment of the equities between the grantee of the purchaser at a void administrator's sale and the heirs at law. The heirs of course are considered to have title to the land but the grantee of the purchaser may recover for improvements by virtue of the general statute,[44] and also will be subrogated for so much of the purchase price as went to pay the decedent's debts.

In *Monroe v. Lyons*,[45] the widow and four children of intestate executed an instrument purporting to bargain and sell to one C a one fifth interest in intestate's lands (subject to the widow's dower and certain other interests) reciting the intention to make C an heir along with the other children. C had been brought up by intestate but was never legally adopted. It was held that the transaction must be regarded as a conveyance of the mentioned interest and not as a mere contract that C was to be considered an heir.

In *Parker v. Blakeley*,[46] plaintiff and defendant were the sole heirs of the intestate. The former deeded to defendant his interest in the land formerly owned by decedent, the conveyance reciting nominal consideration and a release of plaintiff's indebtedness to the intestate. In plaintiff's subsequent attempt to repudiate the transaction and cancel the deed, it was held for defendant, as upon these recitals neither constructive nor resulting trusts could arise in the absence of fraud and mistake. The right of beneficiaries

42. 338 Mo. 1025, 93 S. W. (2d) 870 (1936).
43. 338 Mo. 275, 90 S. W. (2d) 81 (1936).
44. Mo. Rev. Stat. (1929) §§ 1384, 1385.
45. 339 Mo. 515, 98 S. W. (2d) 544 (1936).
46. 338 Mo. 1189, 93 S. W. (2d) 981 (1936).

under a will to compromise their interests was recognized in *Brinkmeyer v. Helm*,[47] but as no executed agreement, or executory contract for good consideration was found, the provisions of the will were given effect. The will involved a question of abatement of legacies and the related problem of a charge of pecuniary legacies upon devised lands. At the time of execution of the will testator had sufficient money to satisfy all legacies, but this had been spent before his death. A specific devise of land to his daughter was held to be preferred to pecuniary legacies. Furthermore no charge was imposed on the land to pay the latter, especially as the testator had executed a deed of the land to the daughter, which deed was recited in the will, though it had never been delivered. If the daughter had obtained the realty through the residuary clause, which intermingled realty and personalty, the legacies would probably have been charged upon the land.

In *Krebs v. Bezler*,[48] the testator appointed his widow executrix and gave her a life estate in his lands and chattels with remainder to the children of the couple. The widow, who had signed mortgage notes upon the land as surety in her husband's lifetime, after his death paid the husband's entire personal assets toward discharge of the mortgages and the balance from her own funds. It was held that she was entitled as surety to subrogation of the amount so paid from her individual moneys, though as to the estate funds so used, she was not entitled to reimbursement. As the same parties were interested in both realty and personalty and in the same proportions, the ultimate equities between life-tenant and remaindermen would not be affected by payment from the estate funds. Hence the statute,[49] providing that devises shall take effect subject to encumbrances upon the land, could have no practical effect. Had the will made disposition of the land and the personalty to different persons, or to the same persons in different proportions, there would have been an interesting application of this statute to the situation of life-tenant and remainderman.

When a legatee dies after testator's death but before distribution, there are two successions and the state is entitled to two inheritance taxes upon the sum bequeathed. This was held in *In re Estate of Costello v. King*[50] in spite of the fact that the statute[51] declared that the tax was imposed when the person "actually comes into possession and enjoyment of the property."

47. 100 S. W. (2d) 452 (Mo. 1936).
48. 89 S. W. (2d) 935 (Mo. 1936).
49. Mo. Rev. Stat. (1929) § 523.
50. 338 Mo. 673, 92 S. W. (2d) 723 (1936).
51. Mo. Rev. Stat. (1929) § 570, as amended by Laws of Missouri 1931, p. 130.

This provision was deemed satisfied when the personal representative of the legatee came into possession of the legacy.

In re Estate of Shelton v. McHaney[52] is a precedent for several points regarding the fees of executors and testamentary trustees as well as food for thought regarding the legislative and judicial attitudes toward the whole subject. It was held that the statute[53] plainly gives the personal representatives commissions of 5% on personal property, though the court points out that, in the particular case, this sum may be more or less than the services are worth. It is further held that, while executors may waive these statutory fees, they are not deemed to do so by acting both as executors and as trustees under a will limiting the trustees' fees to 10% of the annual income. Such executors and trustees are entitled to fees in both capacities. Furthermore executors' fees can be claimed upon property turned over in kind by the personal representatives to themselves in their capacity as trustees. However, the court refused to allow as expenses of one of the executors, three fourths of the salary of his law stenographer on the ground that it was not clearly shown that so much of her time went into work of the estate, nor that she had been paid directly by the executor for the estate work. The court intimated that a stenographer or other employee might be lawfully engaged by an administrator or executor for work concerning the estate and that compensation for such services might be allowed as a credit. A word of caution might be spoken in this connection. Much, if not most, of the mechanical work of this nature should be regarded as part of the executorial function, and if others are engaged to perform them the expense should be borne by the representative out of his commissions.[54] The entire law and practice of allowance of commissions and fees in decedent's estates demands thorough examination. Every fair-minded lawyer cognizant with the facts would doubtless admit that the charges are often excessive and that in certain localities and in particular kinds of cases there are abuses of a grievous nature.[55]

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52. 338 Mo. 1000, 93 S. W. (2d) 684 (1936).
53. Mo. Rev. Stat. (1929) § 221.
54. See Overman v. Lanier, 157 N. C. 544, 73 S. E. 192 (1911).
55. In this general connection it may not be amiss to cite an example of the allowance of fees and expenses in an estate administered by a public administrator. File number 41088 of the Probate Court of Jackson County at Kansas City is that of the Estate of William Daley, deceased. From the papers in this file, it appears that the decedent was a beggar who died with $2,220.00 on deposit in a local solvent bank and without other property of value. The public administrator was granted letters. While there is a vague statement in the latter's application for additional compensation that certain persons claimed to be heirs or creditors of the intestate,

In *Hoffmeyer v. Mintert*,[56] the court disposes of several objections by the heirs to the final account of an administrator. The exceptions upon final accounting to the allowance of several claims upon the semi-annual accounting because they were paid prior to allowance were held without merit where the heirs were present at the semi-annual settlement, consented to the allowance, and the allowance was approved after waiver by the administrator of service of the demands. It was further held that taxes might properly be paid without demand upon the administrator and that expenses of administration might be allowed upon final settlement without prior formal allowance. The court however opened up the semi-annual settlement to correct what was apparently admitted to be an error in computation in the administrator's favor.

IV. Survival and Revival of Actions

North v. North[57] is an interesting case, regarding survival of actions. In a settlement of property upon divorce, the husband agreed to pay his wife $500 per month as long as she remained single, and directions for these payments were included in the divorce decree. Several years later the former husband applied for and obtained an order reducing the payments to $300.

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there is no record of who such persons were, nor the nature of their contentions. At any rate no heirs appeared and no claims were filed except for funeral and administration expenses. The only matters upon which the court was asked to pass were applications for allowances of administrator's and attorney's fees and the former's accounts which were unopposed. The only additional reason assigned in the public administrator's application for additional allowances was that he was obliged to supervise the funeral arrangements and other post-mortem affairs of the deceased. The following is a recapitulation of the accounts filed in the estate:

Public administrator—regular commissions	$ 111.00
Public administrator—special allowances	500.00
Services of another in investigating assets, heirs, etc.	75.00
Attorney's fees	300.00
Funeral expenses	800.00
Monument for grave	150.00
Cemetery grave	45.00
Appraisers' fees	27.00
Notary's fees	9.00
Publication of notices	12.06
Surety bond charges	25.00
Court costs	72.20
City and county taxes	38.65
Balance—escheat to state	55.09
TOTAL	$2,220.00

56. 93 S. W. (2d) 894 (Mo. 1936).
57. 339 Mo. 1226, 100 S. W. (2d) 582 (1936).

From this order, the former wife appealed, and pending appeal the husband died. It was held that while alimony was not payable from a husband's estate after his death, still he could bind himself to pay his wife sums after his death. As his agreement was of the latter sort, payments could be enforced against the estate and were not subject to reduction by the court.

The unjust failure of our statutory law to provide for the survival of death actions upon the death of the wrongdoer is illustrated in *Hendricks v. Kauffman*.[58] There the children of deceased obtained judgment against the individual employer of their father. Defendant appealed and died pending appeal, but his representative secured a reversal of the case and a new trial was ordered. Thereupon the representative of the former defendant moved that the action be dismissed because of the non-survival of such claims upon the death of defendant. A dismissal was held proper though it was pointed out that the appellate court might have reversed the case upon condition that the administrator stipulate not to move to dismiss. The opinion, regrettable as it seems, is in general accord with holdings elsewhere as to the point of non-survival of death actions upon the death of the wrongdoer.[59] Such decisions call for legislation to remedy the situation generally, without resort to the stipulation devise.

Vitale v. Duerbeck[60] is a valuable opinion upon the effect of the death of a plaintiff in a personal injury action from the original injuries sued upon. This clearly depends upon the stage of the court proceeding at which the death took place. If it occurred before judgment in the trial court, it is declared that there would be no survival, though a subsequent action could then be brought for wrongful death. If the death happened after judgment, the action does not abate but is merged in the judgment. However, if the death took place pending appeal and prior to submission thereof, there must be suggestion of death and substitution of heirs or representatives in order to give the attorney authority to proceed. After submission to the appellate court, no revivor is necessary. The *Vitale* case, being one in which the death occurred after the filing of defendant's motion for rehearing, was held to fall in the latter class.

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58. 101 S. W. (2d) 84 (Mo. 1936).

59. Clark v. Goodwin, 170 Cal. 527, 150 Pac. 357 (1915), L. R. A. 1916 A 1142, noted in (1915) 4 CAL. L. REV. 52; Wright v. Smith, 136 Kan. 205, 14 P. (2d) 640 (1932); Brown v. Wightman, 47 Utah 31, 151 Pac. 366, L. R. A. 1916 A 1140 (1915). *Cf.* OHIO GENERAL CODE (1931) § 10509-166.

60. 338 Mo. 556, 92 S. W. (2d) 691 (1936).

XIII

WORKMEN'S COMPENSATION

JAMES A. POTTER*

During the year 1936 there were 13 cases decided by the supreme court involving, directly or indirectly, the workmen's compensation law of Missouri. The majority of these decisions announced no new interpretations or rules but merely applied established principles to the facts of each particular case. Consequently no extended discussion of them is necessary.

THE SUPREME COURT IS A COURT OF LIMITED JURISDICTION

The reason for the limited number of cases decided during the year 1936 involving appeals from decisions of the Workmen's Compensation Commission is the limited jurisdiction of our supreme court.

The Missouri Compensation Act provides that appeals may be taken from decisions of the commission to the circuit court, and from that court appeals may be taken as in ordinary civil cases.[1] The ordinary course of appeal from the circuit court is to the various courts of appeal. However, if the amount in controversy exceeds $7500.00, an appeal may be taken to the supreme court direct.[2] In eight of the cases decided by the court in 1936, the basis for jurisdiction was the amount in controversy.[3] Five of these cases were based on claims for compensation for the *death* of an employee, one was a compensation claim for permanent total disability, and two were damage suits seeking more than that amount. Three of the cases decided by the supreme court during the same period were certified to that court by the courts of appeals because of supposed conflict in the opinions of the courts of appeals with prior decisions of those courts or of the supreme court.[4] One

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1. MO. REV. STAT. (1929) 3342.

2. MO. CONST. ART. VI, § 3, amend. of 1884, and MO. REV. STAT. (1929) § 1914, enacted pursuant thereto.

3. Kemmerling v. Koch Erecting Co., 338 Mo. 252, 89 S. W. (2d) 674 (1936); O'Dell v. Lost Trail, Inc., 100 S. W. (2d) 289 (Mo. 1936); Holder v. Elms Hotel Co., 338 Mo. 857, 92 S. W. (2d) 620 (1936); Maddux v. Kansas City Public Service Co., 100 S. W. (2d) 535 (Mo. 1936); Drew v. Missouri Pacific R. R., 100 S. W. (2d) 516 (Mo. 1936); Adams v. Continental Life Ins. Co., 101 S. W. (2d) 75 (Mo. 1936); Wills v. Berberich's Delivery Co., 98 S. W. (2d) 569 (Mo. 1936); Markley v. Kansas City Southern Ry., 338 Mo. 436, 90 S. W. (2d) 409 (1936).

4. Allen v. St. Louis-San Francisco Ry., 338 Mo. 395, 90 S. W. (2d) 1050 (1935); Downey v. Kansas City Gas Co., 338 Mo. 803, 92 S. W. (2d) 580 (1936); State *ex rel* K. C. Bridge Co. v. Mo. Workmen's Compensation Commission, 92 S. W. (2d) 624 (Mo. 1936). The basis for such appeals is found in Section 6 of the amendment of 1884 to article VI of the Missouri constitution.

case involved an original proceeding in mandamus.[5] One was based on a writ of certiorari to the St. Louis Court of Appeals.[6] It is interesting to note that during the year 1936 there were over 35 decisions rendered by the courts of appeals involving the Compensation Act. From these statistics, and from the decisions it should be noted that in the great majority of cases involving the Compensation Law, the courts of appeals are the courts of last resort.[7]

Reiteration of Established Principles

For the most part the decisions were based upon the application of established principles to the particular facts involved. These principles and the cases in which they were reiterated, are as follows:

First. Findings of fact of the commission are binding on appellate courts if they are sustained by sufficient competent evidence.[8] This principle is sometimes stated to be that the findings of fact of the commission, if supported by substantial, competent evidence, have the force and effect of the verdict of a jury, and are conclusive on appeal.[9]

The case of *Adams v. Continental Life Ins. Co.*[10] cites authorities holding that though the commission states only a legal conclusion rather than a finding of fact, its award will not be reversed if its conclusion is supported by sufficient competent evidence.

Second. The weight of the evidence and the credibility of witnesses are questions for the commission, the trier of fact, and are not considered on appeal.[11]

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5. State *ex rel* Weaver v. Mo. Workmen's Compensation Commission, 95 S. W. (2d) 641 (Mo. 1936).
6. State *ex rel* Kroger Gro. & Baking Co. v. Hostetter, 98 S. W. (2d) 683 (Mo. 1936).
7. *Ibid.*
8. Maddux v. K. C. Public Service Co., 100 S. W. (2d) 535 (Mo. 1936); Adams v. Continental Life Ins. Co., 101 S. W. (2d) 75 (Mo. 1936); O'Dell v. Lost Trail, Inc., 100 S. W. (2d) 289 (Mo. 1936).
9. Maddux v. K. C. Public Service Co., 100 S. W. (2d) 535 (Mo. 1936). It should be noted that in these cases no discussion is directed to the meaning of the terms "substantial" or "sufficient." However, in this connection it may be said that the criterion used in these cases is the same as that used when an appellate court is reviewing a case on a demurrer to the evidence in an ordinary civil suit. It must be decided in each case whether there was enough evidence introduced to justify submission of the case to the jury. If the answer is in the affirmative, then the award of the commission must be upheld.
10. 101 S. W. (2d) 75, 82 (Mo. 1936).
11. Maddux v. Kansas City Public Service Co., 100 S. W. (2d) 535 (Mo. 1936); Adams v. Continental Life Ins. Co., 101 S. W. (2d) 75 (Mo. 1936).

Third. If an injury sustained in the course of employment aggravates an already weakened condition or pre-existing disease, and injury or death results, liability for compensation arises.[12]

Fourth. When does an accident occur in the course of one's employent? In *O'Dell v. Lost Trail, Inc.*, division one follows and applies the test laid down in the *McMain Case*[13] on the question of what is a trip in the course of one's employment, as follows:

> "If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the busines errand undone, the travel is then personal, and personal the risk."

A companion question is: What is an act in the course of one's employment? The *O'Dell* case follows the test set out in *Hinkle v. Chicago, B. & Q. R. R.*[14] as follows:[15]

> "The fact that the act was done during the time of the servant's employment is not conclusive, nor is the motive of the servant so. The question is, Was the act done by virtue of the employment and in furtherance of the master's business? . . . 'Whose business was being done and whose general purposes were being promoted?' Maniaci v. Express Company, 226 Mo. 633, 182 S. E. 981."

Fifth. The validity of the Compensation Act was raised in *Holder v. Elms Hotel Co.*[16] In a suit by the husband against the employer for loss of services and companionship of his wife, the employee who sustained an injury in the course of her employment, employer, defendant, set up the Compensation Act as a defense. Plaintiff contended that the Act violates Sections 1,

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12. Wills v. Berberich's Delivery Co., 98 S. W. (2d) 569 (Mo. 1936). A strict application of this principle has given rise to serious objection on the part of the employers. As a result some employers are subjecting each applicant to a rigid physical examination prior to hiring, and if the applicant is found to have any disease or physical imperfection, he is rejected. If this practice becomes general among employers, it will, in time, cause a great amount of unemployment among employees who are capable of doing considerable work. Such a situation might justify a modification of the rule.

13. McMain v. Connor & Sons Const. Co., 337 Mo. 40, 85 S. W. (2d) 43 (1935).

14. 199 S. W. 227 (Mo. 1917).

15. 100 S. W. (2d) 289 (Mo. 1936).

16. 338 Mo. 857, 92 S. W. (2d) 620 (1936).

22 and 23 of article VI of the constitution of Missouri in that it deprives plaintiff of a hearing in a constitutional court. Division two of the court overruled this contention without discussion, merely stating that such contention had been overruled in *DeMay v. Liberty Foundry Co.*[17].

Plaintiff further contended that the Act violates the "due process" clause of the United States Constitution. In overruling that contention the court said:

> "'. . . the Constitution does not forbid the . . . abolition of old ones (rights) recognized by the common law, to attain a permissible legislative object.' . . . A husband has no vested right arising out of a future tort to his wife."[18]

Sixth. The application of the Act is avoided if the injured employee is, at the time of the accident or injury, engaged in interstate commerce, in which case his rights may be governed by federal law. In *Drew v. Missouri Pacific R. R.*[19] in an action under the Federal Act, the court applied the well established test, namely: "... was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?..." Applying this test to the facts, the court found employee was not so engaged, and hence had no cause of action under the Federal Act.

Construction of Various Sections of the Act

The supreme court has uniformly held that the statute should be liberally construed so as to give effect to the intention of the legislature.

Section 3301[20] was the subject of close scrutiny by division two of the court in *Holder v. Elms Hotel Co.*[21] That case was a common law action for damages brought by the husband of an employee who had received an injury in the course of her employment. He sued for loss of services and companionship. The employer set up the Compensation Act as a defense to such action. Section 3301 provides among other things:

"The rights and remedies herein granted to an employee, shall exclude all other rights and remedies of such employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or

17. 327 Mo. 495, 37 S. W. (2d) 640 (1931).
18. Holder v. Elms Hotel Co., 338 Mo. 857, 866, 92 S. W. (2d) 620 (1936).
19. 100 S. W. (2d) 516 (Mo. 1936).
20. Mo. Rev. Stat. (1929).
21. 338 Mo. 857, 92 S. W. (2d) 620 (1936).

otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter."[22]

The court held that the Act was intended to define rights of third parties as well as those of employer and employee, that the release and exclusion clauses of the section are in harmony with such intent, and that they were intended to take away this common law right of the husband.

Section 3305[23] defines certain terms used through the Act. In *Downey v. Kansas City Gas Co.*,[24] the term "accident" as therein defined[25] was considered. Employee's job was installing furnaces, heaters, etc., in the course of which his hands and arms would become covered with soot. In wiping sweat from his face he would get soot in his eyes, causing them to smart and burn. This continued over a period of five or six weeks, resulting in impairment of his vision. Following the *Guillod* case,[26] the court held that the employee had suffered an injury caused by a "series of similar accidental occurrences.... Here we have an unexpected and unforseen event, bearing in mind that the 'event' referred to in the statute may be a result rather than a cause."

In *Maddux v. K. C. Public Service Co*,[27] the term "total disability"[28] came under judicial scrutiny. The court there said:

> "Having in mind the . . . rule of liberal construction, the question presented may be stated thus: What did the Legislature mean by the use of the phrase 'inability to return to any employment' as it appears in subdivision (e) of the statute above referred to? There being nothing of a technical nature involved therein, it is our duty to hold that the Legislature intended that the words should be taken in their 'plain or ordinary and usual sense. Section 655 R. S. Mo. 1929.... When we speak of the 'ability' or 'inability' of a person to obtain and hold employment, we ordinarily have in mind that the person referred to is either able or unable to perform the usual duties of whatever employment may be under consideration, in the manner

22. Mo. Rev. Stat. (1929).
23. *Ibid.*
24. 338 Mo. 803, 92 S. W. (2d) 580 (1936).
25. (b) The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the same time objective symptoms of an injury.
26. Guillod v. K. C. Power & Light Co., 224 Mo. App. 382, 18 S. W. (2d) 97 (1929).
27. 100 S. W. (2d) 535 (Mo. 1936).
28. (e) The term "total disability" as used in this chapter shall mean inability to return to the employment in which the employee was engaged at the time of the accident.

that such duties are customarily performed by the average person engaged in such employment."

In *State* ex rel. *Weaver v. Missouri Workmen's Compensation Commission*,[29] Section 3310, subsection (b),[30] was construed by the court *en banc*. This sub-section provides:

"(b) This chapter shall apply to all injuries received in this state, regardless of where the contract of employment was made, and also to all injuries received outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide."

The court held that the limiting clause, "unless the contract of employment in any case shall otherwise provide", applies to both situations, namely (1) where the injury occurs in Missouri even though the contract was made elsewhere, and (2) where the injury occurs elsewhere under a Missouri contract of employment.

The term "dependent" as used in Section 3319[31] was construed and defined in *Kemmerling v. Koch Erecting Co.*[32] The court said that the question of dependency is one of fact, and for the commission to decide. It pointed out that in some cases, as parent and child, or husband and wife, dependency is presumed from the relationship. But in other cases it is not; in such cases the burden is placed on claimant to prove dependency.

Section 3319 also provides for payment by the employer of the reasonable cost of burial of the deceased employee. In the same case it was held that this section authorized an award of such burial expense only to the person who furnished same by authority of the nearest relative of the deceased. It further appears from that case that such award is proper only when such expense is borne by such individual out of his own funds, and the award will be made if the deceased's money is used.

In *Allen v. St. L.-San Francisco Ry.*,[33] the court had under consideration the question of limitation as provided for in Section 3337.[34] It was there held that the statute does not begin to run against minors so long as they have no duly appointed guardian or curator.

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29. 95 S. W. (2d) 641 (Mo. 1936).
30. Mo. Rev. Stat. (1929).
31. Mo. Rev. Stat. (1929).
32. 338 Mo. 252, 89 S. W. (2d) 674 (1936).
33. 338 Mo. 395, 90 S. W. (2d) 1050 (1935).
34. Mo. Rev. Stat. (1929).

JURISDICTION AS AFFECTED BY LOCUS OF ACCIDENT

The question of jurisdiction of the Missouri Compensation Commission as affected by the locus of the accident and the contract of employment was considered in *State* ex rel. *Weaver v. Missouri Workmen's Compensation Commission*,[35] and *Adams v. Continental Life Ins. Co.*[36]

The former case was before the court on an application for a writ of mandamus to compel the commission to assume jurisdiction of a claim. The deceased was employed by a New York corporation, the contract of employment having been entered into in Illinois. The deceased worked in Missouri and sustained injuries in this state in the course of his employment. His widow and children were residents of Missouri.

The Illinois Act[37] provides that it shall apply to all injuries received outside the state where the contract of employment was entered into in Illinois. The Missouri Act[38] provides that it shall apply to all injuries received in Missouri regardless of where the contract was made. Each Act provides that its remedy shall be in lieu of all others.

The question was—which law should be applied? It was held that this question must be determined by weighing each state's governmental interests, following *Alaska Packers Ass'n v. Industrial Accident Commission of California*,[39] and turning the scale of decision according to their weight. In order to impose the foreign statute upon the courts of the state where the action is brought on the ground of the full faith and credit clause, it is necessary to show, "upon some rational basis, that of the conflicting interests involved, those of the foreign state are superior to those of the forum".

In *Adams v. Continental Life Ins. Co.*,[40] the employee's death occurred in South Dakota. Claim was filed before the Missouri Commission on the ground the deceased was working under a contract entered into in Missouri. This fact was in dispute, and the commission held that it was without jurisdiction. In its decision the supreme court, in upholding the commission, recognizes the rule that if deceased, at the time of his death, was working under a contract made in Missouri, which did not otherwise provide, the

35. 95 S. W. (2d) 641 (Mo. 1936).
36. 101 S. W. (2d) 75 (Mo. 1936).
37. ILL. STAT. ANN. (Smith-Hurd) § 142, c. 48; ILL. REV. STAT. (Cahill, 1933) 1379, § 205, c. 48.
38. MO. REV. STAT. (1929) § 3310.
39. 55 Sup. Ct. 518, 523 (1935).
40. 101 S. W. (2d) 75 (Mo. 1936).

Missouri commission would have the jourisdiction even though the accident occurred in another state.

EVIDENCE

In *Wills v. Berberich's Delivery Company*,[41] the widow filed a claim for the death of her husband. While the deceased was repairing the roof of employer's garage, he fell off and injured his left arm and elbow. At the time of the fall he had a boil on his cheek. The infection spread and he died within a week. The commission allowed $8000.00 compensation.

On appeal the circuit court reversed the award because of the exclusion of competent material evidence. The evidence offered by employer and excluded by the commission was a statement of deceased that he had sustained no injury to his face, and testimony of deceased's physician that deceased had told him the same thing.

It was contended that since the employee was dead and not there to refute said evidence, it was inadmissible. In overruling this contention the court pointed out that such rule does apply when one of the parties to a *contract* is dead; in such cases the law seals the lips of the other party. However, such rule was held to be inapplicable to a compensation case, the court saying, "Evidence of statements made against interest may be shown even where the party who is alleged to have made them is dead".

The testimony of deceased's physician was held to be admissible on the theory that he was not a party to any contract with deceased. In a roundabout way the court recognizes that statements of a patient to a physician during the course of and in aid of treatment are admissible as an exception to the hearsay rule.[42]

Based on the informality of proceedings before the commission (Section 3349) the court points out the distinction between admission of incompetent evidence and the exclusion of competent evidence. The admission of incompetent evidence is not in itself reason to set aside an award if sufficient material competent evidence was introduced to support the award. But the exclusion of competent evidence offered by the losing party is ground for reversal.

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41. 98 S. W. (2d) 569 (Mo. 1936).

42. The court might have given as a further reason for the admissibility of the physician's testimony sub-section (c) of Sec. 3348, Missouri Revised Statutes (1929), which provides:

"The testimony of any physician who examined the employee shall be admissible in evidence in any proceedings for compensation under this chapter."

OCCUPATIONAL DISEASE

Downey v. Kansas City Gas Co.,[43] was a suit for damages sustained by reason of an occupational disease. Employer, defendant, set up the Compensation Act as a defense. It appeared that employee's work was installing furnaces, heaters, etc., that he got soot on his hands and arms, and in wiping sweat from his face, soot got in his eye. This continued over a period of five or six weeks, resulting in injury to his eye. A judgment was recovered by plaintiff.

The court reversed the case and held that plaintiff had suffered an injury under the Compensation Act.[44] It further adopted the definition of an occupational disease to be "a disease that is not only incident to an occupation, but the natural, usual, and ordinary result thereof; and...not...one occasioned by accident or misadventure".[45]

The court held that plaintiff had failed to show facts sufficient to bring his case within this definition, but he did show that his injury was in the nature of an accident.

MISCELLANEOUS

In *Markley v. Kansas City Southern Ry.*,[46] an employee of a rock company sued the railroad for furnishing a defective car, by reason of which he sustained injuries in the course of his employ. One ground of defense advanced by the defendant was that plaintiff could not maintain the suit because his employer had paid him compensation for the injury. The court held that this contention was decided against defendant in *General Box Co. v. Mo. Utilities Co.*[47]

A writ of mandamus was sought in *State* ex rel. *Kansas City Bridge Co. v. Missouri Workmen's Compensation Commission*,[48] to compel the commis-

43. 338 Mo. 803, 92 S. W. (2d) 580 (1936).
44. See discussion of this case, *supra*.
45. Wolff v. Mallinckrodt Chemical Works, 336 Mo. 746, 81 S. W. (2d) 323 (1934).
46. 338 Mo. 436, 90 S. W. (2d) 409 (1936).
47. 331 Mo. 845, 55 S. W. (2d) 442 (1932). In that case the employer brought suit under Sec. 3309, Missouri Revised Statutes (1929), for the death of Clark, an employee, against defendant by reason of whose negligence it was alleged Clark was killed. The court said:
"Our courts have held that, while the Workmen's Compensation Act deprives the injured employee, or his dependents in case of death, of the right to maintain a suit based on negligence against his employer when such act applies, the compensation allowed being exclusive, . . . yet the right of such employee to sue and recover against the negligent third party remains unimpaired by such act. . . ."
48. 92 S. W. (2d) 624 (Mo. 1936).

sion to accept jurisdiction of a claim. Employee drowned in the Mississippi River while working on a bridge. A claim was filed before the Missouri commission but jurisdiction was denied on the ground that the claim was properly under the Federal Act. The employer applied to the St. Louis Court of Appeals for a writ of mandamus to compel the Missouri commission to assume jurisdiction, which writ was denied, but the cause was certified to the supreme court. In the meantime, a claim was filed under the Federal Act.

The court denied the writ on the ground that mandamus issues only of necessity to prevent injustice, and it will not issue if it would be nugatory or unavailing. The court pointed out that there were too many alternatives. If the writ were issued, the claimant might (1) refuse to prosecute his claim, (2) dismiss his claim in both state and federal tribunals, or (3) the federal tribunal might assume jurisdiction exclusively. Furthermore, if the writ were denied, the employer might suffer no injury if claimant dismissed his claim.

In *Downey v. Kansas City Gas Company*,[49] the employer set up the Compensation Act as a defense to a common law action for damages. The court held that in such actions the act is an affirmative defense. The defendant must plead and prove facts bringing the case within the act.

49. 338 Mo. 803, 92 S. W. (2d) 580 (1936).