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Murry Lee Randall

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THE WORK OF THE MISSOURI SUPREME COURT FOR THE YEAR 1947

STATISTICAL SURVEY

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This survey is based on the opinions handed down by the supreme court during the year 1947. Of the 244 majority opinions dealt with by this survey, four represent two separate cases each, and one represents three cases, making a total of 255 cases disposed of in 1947. Ten other cases were decided by division in 1947 and were later decided en banc during 1948, and a rehearing was granted in division for one case which was then re-argued and decided in 1948. Since opinions were not released until the 1948 decisions, those opinions are not considered in this survey. Seven of the opinions were originally written as divisional opinions and later adopted as the opinions of the court en banc. Seven dissenting opinions and seven separate concurring opinions were handed down. There was one supplemental per curiam opinion and six per curiam opinions denying motions. As was expected, due to the fact that much litigation was held up during the war, the total for the year shows a considerable increase over the number of opinions handed down during the war years.[1]

TABLE I

NUMBER OF OPINIONS WRITTEN BY EACH DIVISION

En Banc	42
Division Number One	109
Division Number Two	93
Total	244

Table II is a classification of the opinions handed down during 1947 according to the dominant issue involved. Many of the cases involved more

*Chairman, Board of Student Editors.

1. Totals for the preceding five years are as follows: 1942, 293; 1943, 306; 1944, 251; 1945, 197; 1946, 181.

than one important issue, and in some cases a dominant issue was necessarily more or less arbitrarily selected.

TABLE II

TOPICAL ANALYSIS OF DECISIONS.

Administrative Law and Procedure	2
Adoption	2
Appeal and Error	9
Brokers	3
Commerce	1
Constitutional Law	8
Contempt	1
Contracts	8
Corporations	2
Counties	1
Courts	9
Criminal Law	37
Damages	1
Disbarrment	1
Divorce	4
Elections	1
Eminent Domain	3
Equity	1
Evidence	8
Garnishment	1
Gifts	1
Habeas Corpus	1
Husband and Wife (other than divorce)	3
Injunction	4
Insurance	6
Judges	1
Judgments	4
Landlord and Tenant	1
Licenses	4
Limitations of Actions	2
Mandamus	2
Master and Servant	8
Monopolies	1
Mortgages	1
Municipal Corporations	7
Negligence (automobile)	8
Other Negligence	14
Officers	1
Pleading	2
Practice and Procedure	7

Prohibition	2
Real Property	12
Schools and School Districts	4
Specific Performance	5
Statutes	2
Taxation	11
Tort (other than negligence)	4
Trusts	6
Unemployment Compensation	2
Unfair Competition	1
Wills and Administration	10
Workmen's Compensation	5
Total	244

Table III indicates the disposition of the cases handled by the 244 opinions handed down during 1947. The phrases, so far as is practical for this purpose, are those used by the judges and commissioners in the opinions.

TABLE III

DISPOSITION OF LITIGATION

Alternative Writ of Mandamus Made Preemptory	2
Alternative Writ of Mandamus made Permanent	1
Alternative Writ of Mandamus Quashed	1
Appeal Dismissed	1
Both Appeals Dismissed	1
Cause Transferred to Court of Appeals	9
Cause Remanded for Correction of Award and Otherwise Affirmed	1
Decree affirmed	3
Decree Affirmed in Part and Cause Remanded with Directions	1
Decree Reversed	1
Exceptions Overruled and Plan of Reorganization Approved	1
Fine Imposed on Respondents for Contempt	1
Judgment Affirmed	128
Judgment Affirmed and Cause Remanded for Further Proceedings	1
Judgment Affirmed and Cause Remanded with Directions	1
Judgment Affirmed in Part and Reversed in Part	3
Judgment Affirmed in Part, Reversed in Part, and Cause Remanded	2
Judgment Affirmed in Part and Corrected and Affirmed as Corrected in Part	1
Judgment Affirmed in Part, Reversed in Part, and Cause Remanded with Directions	1

Judgment Affirmed on Condition of Remittitur	1
Judgment Affirmed on Condition of Remittitur; otherwise Reversed and Cause Remanded	1
Judgment and Decree Affirmed	3
Judgment Reversed	8
Judgment Reversed and Cause Remanded	27
Judgment Reversed and Cause Remanded with Directions	16
Judgment Reversed and Defendant Discharged	2
Judgment of Circuit Court Reversed and Award Affirmed	1
Judgment of Circuit Court Reversed	3
Judgment Reversed and Rights of Parties Declared	1
Judgment of Ouster Awarded	1
Motion to Dismiss Appeal Overruled and Judgment Affirmed	1
Opinion of Court of Appeals Quashed; Judgment of Trial Court Affirmed	2
Order Affirmed	1
Order Granting a New Trial Affirmed and Cause Remanded	1
Order Granting a New Trial As to Liability Only Affirmed, and Cause Remanded	1
Order Granting a New Trial Reversed with Directions to Reinstate Verdict	1
Order Reversed and Cause Remanded with Directions	1
Preemptory Writ of Mandamus Granted	1
Preliminary Rule in Prohibition made Permanent	1
Preliminary Rule Made Absolute	1
Preliminary Rule in Prohibition made Absolute as to One Defendant, and Discharged as to Other Defendants	1
Provisional Rule in Prohibition made Absolute	1
Records of Circuit Court Quashed	1
Respondent Disbarred	1
Respondent's Record Quashed	1
Rule Absolute in Prohibition Issued, and Alleged Comtemptors Discharged	1
Rule Made Absolute in Part, Otherwise Discharged	1
Submission Set Aside as Premature and Cause Returned to General Docket	1
Writ of Mandamus Quashed	1
Total	244

Table IV shows, as far as records are now available, the disposition of motions subsequent to the final decision of the Supreme Court. Cases in which rehearings were granted or which were transferred to the court en banc are not within that category.

TABLE IV

MOTIONS SUBSEQUENT TO DECISION.

Motion for Rehearing Denied	101
Motion to Transfer to Court en Banc Denied	26
Motion to Modify Denied	1
Motion to Remand for Partial New Trial Denied	1
Total	129

APPELLATE PRACTICE

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

A total of eight cases which were transferred to the courts of appeal is revealed in the opinions written by the supreme court during the year under review. These decisions demonstrate the fact that, while the constitutional definition separating the appellate jurisdiction of the supreme court and the courts of appeal[1] is comparatively simple, the application of the principles involved in that definition to complicated statements of fact is not always easy.

Appellate review of constitutional questions is lodged in the supreme court, but in *State* ex rel *Heppe v. Zilafro*,[2] where it was contended that a writ of mandamus to compel school district directors to submit a consolidation proposal under the procedure provided for by one section of the statutes and not under the procedure provided for by a later section, it was held that the claim that the calling of a special election under the first section would be violative of the due process clause of the constitution was only a colorable claim of the existence of a constitutional question, the real point at issue involving only a construction of the statute. The court further points out that a litigant may not lodge review proceedings in the supreme court by anticipating an adverse judgment and inserting appropriate averments in the pleadings that the same would violate the due process or the constitutional provisions; and the court also again announced that a school district is not a political subdivision of the state within the meaning of the constitutional provision on appellate jurisdiction. Accordingly the case was transferred to the court of appeals.

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1. MO. CONST. ART V, § 3 (1945).
2. 206 S.W. 2d 496 (Mo. 1947).

In *St. Ferdinand Sewer District v. Turner*[3] where the action was one brought by the sewer district to recover certain delinquent sewer taxes the court reviewed the provisions of earlier constitutions upon the subject of appellate jurisdiction, pointed to the fact that the Constitution of 1945 was regarded in the constitutional convention as one making no substantial change in appellate jurisdiction and again held that a proceeding to collect sewer taxes does not involve construction of the revenue laws of the state in a constitutional sense, and the fact that the sewer district is a public corporation does not confer appellate jurisdiction in the supreme court, pointing to earlier decisions holding that such districts are not political subdivisions of the state within the meaning of the provisions of earlier constitutions. Accordingly the appeal was transferred to the court of appeals.

The court transferred the case of *McGuire v. Hutchison*[4] because the value, in money, of the relief sought was not affirmatively shown by the record, the proceeding being one involving the ownership and right of control over certain patents covered by a trust agreement. But, in *City of St. Louis v. Essex Investment Company*[5] the court retained appellate jurisdiction of a proceeding where several appellants were seeking to recover condemnation awards no one of which satisfied the jurisdictional requirements of a minimum of $7500.00, but which, in the aggregate, involved more than the jurisdictional amount. The court announced that the question was not free from difficulty but retained jurisdiction in reliance upon rules announced in class actions, citing its earlier decisions in *Aufderheide v. Polar Wave Ice & Fuel Company*[6] and *Rombauer v. Compton Heights Christian Church.*[7] The court did not consider what effect a dismissal of the appeals of one or more claimants, but less than all, thereby reducing the aggregate amount below the jurisdictional amount, would have had on its appellate jurisdiction.

In *First National Bank v. Schaake,* [8] a proceeding in equity brought by the executors and trustees under a will for the purpose of having the court make an election as to whether it would be for the best interest of testator's insane widow to renounce the provision of his will or take one half of his estate, the record did not affirmatively show the amount involved, and the court held that although title to real estate was collaterally involved the judgment

3. 203 S.W. 2d 731 (Mo. 1947).
4. 201 S.W. 2d 322 (Mo. 1947).
5. 204 S.W. 2d 726 (Mo. 1947).
6. 319 Mo. 337, 4 S.W. 2d 776 (Mo. 1928).
7. 328 Mo. 1, 40 S.W. 2d 545 (Mo. 1931).
8. 200 S.W. 2d 326 (Mo. 1947).

sought would not directly operate to take title from one and give it to another; hence title to real estate was not involved in the jurisdictional sense. The cause was transferred to the court of appeals. Similarly, the court transferred the case of *Hanna v. Sheetz*,[9] which was a statutory will contest proceeding, because the record did not affirmatively show the jurisdictional amount nor whether or not any real estate passed by the will. The court also transferred *Smith v. Santarelli*,[10] a case involving an easement over real estate, because an easement strictly speaking does not carry any title to the land, but only to a right to subject it to a particular use; and also transferred *Blake v. Shower*,[11] a case involving only leasehold rights, and *Murawski v. Murawski*[12] a proceeding in partition between a divorced husband and wife, again reaffirming earlier decisions holding that the inchoate right of dower does not constitute real estate in the jurisdictional sense.

Questions for Review

In the case of *Oganaso v. Mellow*,[13] the appeal was from an order sustaining plaintiff's motion for a new trial after a verdict for defendant. Upon appellate review defendants contended that the trial court had erred in overruling their motion for directed verdict. That motion was in general terms only and failed to make known to the court the grounds therefor as required by Section 122 of the Code.[14] Notwithstanding the insufficiency of the motion, the court held that defendant's contention that plaintiff failed to make out a case for the jury was a meritorious one and, in accordance with the provisions of Supreme Court Rule 3.27, considered the question thereby presented. This decision again illustrates the modernizing effect of the code adopted in 1943 upon the practice in Missouri.

A different situation was before the court in the case of *In re Duren*,[15] where the decision introduces a new principle in appellate practice which, if followed, will be of far reaching importance. That case reached the court by transfer from the Kansas City Court of Appeals where a judgment sustaining a petition for adoption had been reversed by that court.[16] The appeal was taken by the guardian ad litem who had been appointed to represent the

9. 200 S.W. 2d 338 (Mo. 1947).
10. 199 S.W. 2d 411 (Mo. 1947).
11. 202 S.W. 2d 895 (Mo. 1947).
12. 203 S.W. 2d 714 (Mo. 1947).
13. 201 S.W. 2d 365 (Mo. 1947).
14. Mo. Laws 1943, p. 389; Mo. Rev. Stat. Ann. § 847.122 (Supp. 1947).
15. 200 S.W. 2d 343 (Mo. 1947).
16. 195 S.W. 2d 745 (Mo. 1946).

interests of the child in the adoption proceeding. No point had been made, either in the trial court or in the court of appeals that the written consent of such a guardian was a condition precedent to a valid adoption. The court of appeals, without that point having been raised by either party in the litigation, of its own motion undertook to consider the effect of the failure of the guardian to consent to the proceeding and reversed the judgment below upon the ground that such consent was necessary and the lack of consent rendered the adoption void. It will thus be seen that the court of appeals decided the case upon an issue not presented either in the trial court or in the court of appeals. Obviously, therefore, the court of appeals decided the case without the benefit of argument pro and con upon the single issue on which the decision was based.

When the case reached the supreme court by transfer appellant stood on the original brief filed in the court of appeals which did not raise the consent issue. Respondent, however, filed a new brief in the supreme court challenging the correctness of the decision of the court of appeals upon the consent issue and renewing the argument it had made in the motion for rehearing filed, without avail, in the court of appeals. The supreme court answered in the affirmative the two questions of whether or not (a) the court of appeals had the power to decide an issue not raised *in that court;* and (b) whether or not the supreme court had the power to decide an issue not raised by appellant *in that court.*

In reaching its conclusion, the supreme court did *not* consider the question of whether or not such an appellate review satisfies the requirements of due process of law. The court reviews at some length Rules 1.08, 1.15, 1.28, and 3.27 of the Supreme Court Rules governing appellate review, and Sections 114, 123, 139 and 140 of the 1943 Code of Civil Procedure. Emphasis is placed by the court upon Rule 3.27 which provides that "*Plain* errors affecting substantial rights may be considered. . ." either on motion for new trial or on appeal, although not raised or preserved for review, when the prevention of manifest injustice requires it. The opinion states:

> "We believe the Court of Appeals had the right under that Rule to introduce the 'consent' issue into the case. It was a legal capsheaf based on the court's conclusions of law and fact with respect to the issues actually litigated below. We think we may consider that same issue now, since we have been substituted for the Court of Appeals as the appellate court, and especially when it is remembered that respondents' brief here raises the issue negatively. While Sec. 140 (a) of the Code, supra, doubtless was enacted in part

> to shield appellate litigants from surprise, and to protect them from a disposition of the cause on issues not raised below when the litigation was in a formative stage, still it does permit that in the instances specified above, and the disappointed party may always file a motion for rehearing, as respondents did in this case. We are not attempting to say how broadly Rule 3.27 operates; but only that we think it is applicable here."

When an appellate court undertakes to decide a question upon which it has not heard argument it as effectively denies due process of law as if it has refused to hear any arguments upon the case at all. "He that answereth a matter before he heareth it, it is folly and shame unto him."[17] In the opinion under review it would seem that the court of appeals violated fundamental principles of due process when it undertook to decide the case on the so-called consent issue—an issue upon which neither of the parties had been heard. The supreme court's opinion points to the fact that the losing party on that issue had the opportunity, and exercised it, of presenting his views by motion for rehearing; but it is always true that, when a judicial decision has been reached, the task of overturning it by motion for rehearing is herculean indeed. It would also seem that the question is not one falling within the meaning of the term "plain errors." That the so-called error was not so plain is demonstrated by the fact that the court of appeals reached one conclusion and the supreme court reached the opposite conclusion. No matter how broad Rule 3.27 may be construed to be, there still remains the question of whether or not due process is accorded when an appellate court undertakes, of its own motion, to base its decision upon an issue not presented by the parties and not made the subject of adversary argument. The better practice would seem to be, when such a question presents itself, for the reviewing court to order the parties to appear again before it and present their views upon the issue so discovered by the court before the court undertakes to decide that issue. A decision made *after* argument is more likely to be sound than one made without the benefit of argument. That is strikingly demonstrated in the reported case, where the court of appeals decided the issue without argument and the supreme court decided the same question the other way after having considered the argument presented by the opinion of the court of appeals and answered by the respondent's motion for rehearing and brief.

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17 Proverbs, Chap 18, Ver. 13, quoted in *Ex Parte Nelson*, 251 Mo. 63, 157 S.W. 794, 808 (Mo. 1913).

THE RIGHT OF APPEAL

By Section 125 of the Code of Civil Procedure[18] writs of error were abolished; and in *State* ex rel *McPike v. Hughes*[19] the court, in an opinion carefully considering the prior state of the law and the effect of the Constitution of 1945 upon the question, held the statute to be constitutional and that the appellate courts have no jurisdiction to issue writs of error.

In *Woods v. Cantrell*[20] the trial court undertook to enter an order overruling the motion for new trial more than 90 days after that motion had been filed, and the court held that an appeal taken within ten day after that order but fifteen days after the ninety day period had expired was ineffectual, and the appeal was dismissed. Also, in *Wormington v. City of Monett*[21] the appeal was dismissed because plaintiff died pending appeal from a judgment in his favor and no substitution of parties was made within one year.

In *State ex rel Thompson v. Terte*[22] the court held that while a judgment of dismissal is ordinarily a final judgment and therefore appealable, a judgment of dismissal as to a part only of the defendants but not as to all does not dispose of the action and an appeal from such a judgment of dismissal is premature. The court also holds that the filing of a notice of such an appeal does not divest the trial court of its jurisdiction over the case and that such jurisdiction is retained until the appeal has been perfected by the filing of a transcript in the appellate court.

RECORDS AND BRIEFS

In *Leaman v. Campbell 66 Express Truck Line*[23] the court followed recent decisions and practice holding that where there were reasonable grounds for the delay the failure to lodge the transcript of the record within six months from the time the appeal is taken is not fatal, and that the appellate court has the power to enlarge or extend the time even after that time has expired. It was made to appear that the delay was occasioned by excusable neglect and that the appeal was meritorious. Again, in *Whealen v. St. Louis Soft Ball Association,*[24] which reached the supreme court by transfer from the court of appeals, the original transcript filed in the appellate court did not include the judgment appealed from but the court of appeals had ordered the

18. MO. REV. STAT. ANN. § 847.125 (Supp. 1947).
19. 199 S.W. 2d 405 (Mo. 1947).
20. 201 S.W. 2d 311 (Mo. 1947).
21. 204 S.W. 2d 264 (Mo. 1947).
22. 207 S.W. 2d 487 (Mo. 1947).
23. 199 S.W. 2d 359 (Mo. 1947).
24. 202 S.W. 2d 891 (Mo. 1947).

circuit clerk to send up the judgment so that it could be made a part of the record. That action by the court of appeals was held to be within its discretion and justified; but the opinion admonishes the Bar that the views expressed are not an invitation "to careless practice." The same procedure was followed by the supreme court in *Feigenbaum v. Van Raalt.*[25]

In *Baldwin v. Desgranges,*[26] another case involving the late filing of the transcript, the court points to the provisions of Section 2 of the code that it was enacted to secure the just, speedy and inexpensive determination of every action[27] and ruled: "Only in exceptional circumstances could an action be *justly* disposed of by dismissing a meritorious appeal. The spirit of the new civil code undoubtedly is to dispose of appealed causes on their merits unless delinquency in the procedural steps to appeal have been too grave to condone, and. . . the new rules of this court bespeak the same liberal spirit as to disposition of appealed causes on their merits. . ."

The same leniency is shown in the opinions now under review in cases where appellants have failed to comply with the rules of court in preparing their briefs. In *Brune v. Rathbun*[28] appellant, in violation of court rules, devoted thirty pages of his brief to a copy of the pleadings, agreed statement of facts, judgment of the court and other matters which duly appeared in the transcript. The court denied a motion to dismiss because of that infraction of its rules, stating, "We treat this portion of appellant's brief as surplusage. . ." Similarly, in *Holmes v. McNeil*[29] appellant's brief failed to set out essential facts in the statement, but the court, although observing that the statement was "not free from fault," pointed to the fact that the record was short and that the inconvenience occasioned was not such as to call for a dismissal of the appeal, commenting that the new rules are "as liberal for reaching the merits."

In no opinion written during the year under review has there been a dismissal of appeal or other refusal to consider the merits upon technical grounds. The decisions of the court carry out, to a marked degree, the spirit of reform in matters of practice in Missouri as crystalized by the adoption of its new code of civil procedure, its new constitution, and the rules of court adopted in conformity therewith.

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25. 201 S.W. 2d 283 (Mo. 1947).
26. 199 S.W. 2d 353 (Mo. 1947).
27. Mo. Rev. Stat. Ann. § 847.2 (Supp. 1947).
28. 204 S.W. 2d 705 (Mo. 1947).
29. 204 S.W. 2d 303 (Mo. 1947).

CRIMINAL LAW

HOWARD B. LANG, JR.*

Substantive and procedural questions in the field of criminal law involve matters which generally speaking have been passed upon by the courts on numerous occasions and, therefore, in most instances the law has been fairly well settled. There were, however, during the year 1947 two cases of first impression before the Supreme Court of Missouri.[1]

I. PROCEDURE BEFORE TRIAL

A. *Arrest*

The right of an officer to use force in effecting arrest and the question of the amount of force which can be used has always been a perplexing question. In the case of *State v. Browers*[2] the defendant was charged with felonious assault on an officer and the question involved was whether or not the officer was making a lawful arrest of defendant's brother. If the arrest was unlawful the defendant had a right to aid his brother. The majority opinion held that no felony had been committed and that if anything at all took place a misdemeanor had been committed outside the presence of the officer and that, therefore, the question of whether or not the arrest was legal was one on which the court should have instructed the jury, and should have further instructed that if the arrest was illegal that the defendant had a right to use such force as reasonably necessary to repel the assault on defendant's brother. The principal opinion of the court concluded that an officer has no right to shoot in making an arrest for a misdemeanor, even though the accused is trying to escape.

In a concurring opinion the writer reasoned that the marshal in attempting to make the arrest of the defendant's brother was doing so either for sideswiping an automobile without stopping at the scene, a felony, or for a breach of the peace, which involved a quarrel on a public street which the marshal witnessed himself, and that, therefore, the arrest itself was lawful and in either instance, under the provisions of our statutes, after the arrest had been made if the defendant flee or forcibly resist, then the officer could use all

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1. State v. Wynne, 356 Mo. 1095, 204 S.W. 2d 927 (1947). In this case the court had before it the question of forfeiture of bond where extradition had been refused. State v. Baker, 355 Mo. 1048, 199 S.W. 2d 393 (1947). The court here had for consideration the question of escape "under guard."

2. 356 Mo. 1195, 205 S.W. 2d 721 (1947).

necessary means to effect the arrest.[3] The concurring judge agreed with the result of the majority opinion because he reasoned that the marshal had used more force than reasonably necessary to maintain the arrest after it had once been made, pointing out that the marshal had made no attempt to apprehend the fugitive by pursuit or other means, but had begun firing as soon as the fugitive broke away from him. The majority opinion ruled that there was no right to use deadly force under the circumstances there presented, and the concurring opinion stated that there was a right to use deadly force if other means had been first exhausted.

In the case of *State v. Parker*[4] the rights of a person in his individual capacity as a member of a posse, and the rights of an officer in using deadly force in effecting an arrest are fully discussed. In this case the defendant's conviction of murder in the second degree was affirmed, overruling the defendant's contention that he was justified as a matter of law in using the force to effect the arrest. The evidence was held by the court sufficient to indicate that the defendant in firing on the deceased was actuated by malice rather than by using force reasonably necessary to accomplish the arrest, and that the jury was entitled, under the instructions of the court, to determine this fact.

B. *Indictment and information*

The court on several occasions reaffirmed the long accepted ruling that an information in the language of the statute is sufficient.[5]

The Missouri courts have long accepted the rule that a conviction for a lesser included offense may be had on an information or indictment charging the greater offense. In one case the defendant was convicted of larceny from a person under an information charging robbery.[6] A conviction of burglary alone on a charge of burglary and larceny was sustained[7] and in another case, in accordance with the statute, a conviction for embezzlement under a larceny information was ruled proper.[8]

An information charging murder in the first degree in which it was charged that the defendant "in some way and manner and by some means, instru-

3. See Mo. Rev. Stat. § 3960 (1939).
4. 355 Mo. 916, 199 S.W. 2d 338 (1947).
5. State v. Gorden, 356 Mo. 1010, 204 S.W. 2d 713 (1947); State v. Florian, 355 Mo. 1169, 200 S.W. 2d 64 (1947); State v. Clemons, 356 Mo. 514, 202 S.W. 2d 75 (1947).
6. State v. Gardner, 356 Mo. 1015, 204 S.W. 2d 716 (1947).
7. State v. Higdon, 356 Mo. 1058, 204 S.W. 2d 754 (1947).
8. State v. Ward, 356 Mo. 499, 202 S.W. 2d 46 (1947), noted 13 Mo. L. Rev. 106 (1947).

ments and weapons to this informant unknown . . ." without setting forth the exact method of causing death, was sustained. The court ruled that the state did not need to set out the weapon used by the defendant in making the assault, holding that under our statutes every killing which is wilful, deliberate and premeditated is murder in the first degree and that the information need not charge the manner in which the deceased was killed.[9]

The substitution of an information correctly charging the defendant under the habitual criminal act is proper and the defendant is not entitled to a preliminary hearing because no new offense is charged.[10] The court in like manner ruled that an amendment of an information as to form and not substance is proper and does not entitle the defendant to a preliminary hearing.[11]

The court had before it the sufficiency of an information under Missouri Revised Statutes Section 4409 (1939), which is one of the three sections involving an offense of assault. Section 4409 does not require that the assault be made with malice aforethought. The information alleged that the assault was made with malice aforethought and upon conviction the defendant complained of the information and the instruction thereunder because the words "with malice aforethooght" were inserted therein. The court in overruling the contention ruled that the appellant was helped instead of harmed thereby because the conviction was made more difficult and the unnecessary allegation did not void the information. [12]

C. *Continuances*

In one case the court had before it the question of the time of trial where one of the attorneys for the defendant was a member of the legislature.[13] The court held that since the legislature had recessed for thirty days and the motion for new trial was argued and submitted more than ten days after the beginning of the recess the defendant was not entitled to a continuance. In the same case an issue was raised because of the fact that the defendant's trial was held before the term to which the justice transcript was returnable. The court made the statement "Criminal cases are not returnable to parti-

9. State v. Courtney, 356 Mo. 531, 202 S.W. 2d 72, l.c. 73 (1947).
10. State v. Miller, 202 S.W. 2d 887 (Mo. 1947).
11. State v. Sapp, 356 Mo. 705, 203 S.W. 2d 425 (1947).
12. State v. Null, 355 Mo. 1034, 199 S.W. 2d 639 (1947).
13. State v. Bryant, 356 Mo. 1223, 205 S. W. 2d 732, l.c. 734 (1947). See also State v. Courtney, 356 Mo. 531, 202 S.W. 2d 72 (1947), refusing a continuance where information was substituted for an indictment and simply corrected the form thereof.

cular terms of court, as civil cases were under our former code, so there can be nothing in that portion of defendant's assignment."

D. *Bail*

An interesting and unique question was presented to the court in the case of *State v. Wynne*[14] which involved an appeal from an order forfeiting a reconnaissance on an appeal bond from a second degree murder conviction. The defendant failed to appear for a rehearing on the case and an interlocutory judgment forfeiting the reconnaissance and ordering a writ of scire facias served on the sureties was entered. The defendant was located in the State of Louisiana and the Governor of Louisiana refused to grant extradition upon application of the Governor of the State of Missouri. The trial court had ruled that it had no discretion in remission of the penalty imposed. On the appeal the sureties took the position that they were unable to procure the presence of Mrs. Wynne by an act of law in that the federal state officials in Louisiana refused to aid in the return. This contention was overruled by the court which ruled that a surety cannot take advantage of an act of law preventing the return of the fugitive unless the law be one operative in the state where the obligation was assumed, which of course here would be the State of Missouri.

The court reversed the case because the trial court took the position that it had no discretion on the question of the forfeiture of the bond. There was no question of an abuse of discretion. In this case of first impression the majority opinion of the court ruled that the trial court was in error in refusing to recognize that it had a discretion under the statute of this state on the forfeiture of bond, the last clause of which provides in part ". . .unless remitted by the court for cause shown."[15]

This case was considered of such importance by the court that there was a concurring opinion and a dissenting opinion. The well reasoned dissent takes the position that a bondsman should only be discharged if he is prevented by an act of God, act of law, an act of the obligee or by act of the public enemy from fulfilling the obligation of the bond, and that none of these grounds were present in this case. The dissenting opinion points out that the voluntary act of the principal in leaving the state and refusing to return was the basis for forfeiture of the bond, and that even under these facts, which

14. 356 Mo. 1095, 204 S.W. 2d 927 (1947).
15. See Mo. Rev. Stat. § 3973 (1939).

were admitted to be true by the sureties, the trial court could not have ruled otherwise than it did.

E. *Right to counsel*

In *State v. Weston* [16] the court ruled that the defendant was not reprived of due process of law simply because he went to trial without counsel. The record showed that the defendant originally had employed counsel who was permitted to withdraw from the case; that thereafter, on November 1, the defendant appeared in court without counsel. He was informed by the court that he was able-bodied and could get some money to employ counsel. On December 6, the defendant appeared again in court and stated that he had funds to employ counsel and that he would do so. The case was set for trial for the following January 18, at which time both the State and defendant announced ready for trial, although the defendant appeared again without counsel. The court held under these circumstances that the defendant was not entitled to the appointment of counsel and that he was not deprived of due process by failure of the court to designate an attorney to represent him.

II. Trial

A. *Panel and jury*

In one case an objection was made to the failure to include women in the panel summoned for the trial of the case. The court summarily disposed of this question by stating that there was no showing in the record of any systematic exclusion or attempt to exclude women from the panel.[17]

In another case the court ruled that the trial court did not abuse its discretion in refusing to discharge the jury where a spectator in a manslaughter case involving the operation of an automobile spoke out during the trial and stated that his daughter was also killed at the same time.[18]

During the course of trial the sheriff and his chief deputy testified as witnesses for the State as to a confession made by the defendant. Objection was thereafter made by the defendant as to the sheriff or the chief deputy having custody of the jury. The court immediately swore in two other deputies to take charge of the jury and from then on neither the sheriff nor his chief deputy had any contact with the jury whatsoever. The defendant contended that the case should be remanded because of the prior contact between

16. 202 S.W. 2d 50 (Mo. 1947).
17. State v. Taylor, 356 Mo. 1216, 205 S.W. 2d 734 (1947).
18. State v. Bolle, 201 S.W. 2d 158 (Mo. 1941).

the sheriff, his deputy and the jury. This contention was overruled, the court pointing out that as soon as the matter was called to the trial court's attention prompt steps were taken to correct the objection.[19]

B. *Arraignment*

The court reaffirmed the well settled rule that the withdrawal of a plea of guilty after it has been entered is a matter within the discretion of the trial court. The court, however, remarked that wherever the matter is questionable the trial court should permit the withdrawal of such a plea and entry of a plea of not guilty. In this instance the record was devoid of any evidence to show that there were any unkept promises or false representations made by the prosecutor, and it was clear that both the defendant and his counsel knew that the court was not bound by the recommendations of the prosecuting attorney, recommending a parole.[20]

C. *Evidence*

1. Presumptions

The court again ruled that a defendant is presumed to intend the natural consequences of his act. In one instance the court ruled that a defendant, by firing a pistol at the deceased or in his direction, was presumed to have intended the natural and probable consequences fo the act and his conviction for murder in the second degree was affirmed.[21] A similar ruling was had in connection with the use of a large rock in striking the victim.[22]

In another instance a husband was convicted of felonious assault with a deadly weapon. The evidence revealed that his wife had used a stick or a club on the victim during the course of the struggle between the defendant and the victim. The court ruled that the wife in using the club was presumed to be under the compulsion of her husband in using the club and, therefore, attributed her act to the defendant.[23]

2. Circumstantial evidence

In a conviction under the habitual criminal act for the crime of first degree murder where the evidence was purely circumstantial, the court reaffirmed the well established principle that ". . . the circumstances, to warrant a conviction, must be consistent with each other, must tend to prove guilt

19. State v. Cochran, 356 Mo. 778, 203 S.W. 2d 707 (1944).
20. State v. Reynolds, 355 Mo. 1013, 199 S.W. 2d 399 (1947).
21. State v. Littlejohn, 356 Mo. 1052, 204 S.W. 2d 750 (1947).
22. *Supra,* note 17.
23. State v. Henderson, 356 Mo. 1072, 204 S.W. 2d 774 (1947).

and not only must be consistent with the hypothesis of the defendant's guilt, but must be inconsistent with every other reasonable hypothesis, including the hypotheses of his innocence."[24] In this particular instance the court found that the facts did not meet the test and the conviction was reversed and the defendant discharged. On the other hand, in another case a burglary conviction was upheld on circumstantial evidence which was held to meet the test above set forth.[25]

3. Confessions

In the case of *State v. Gorden*[26] the State offered the confession of the defendant before establishing the corpus delicti by other testimony. The basis for the admission was that the corpus delicti would later be established by other testimony. No other testimony was offered and the court, following a long line of decisions, ruled that the confession alone was not enough to establish the corpus delicti and was not admissible in evidence unless the corpus delicti was otherwise proved.

Again the court had before it the admissibility of a confession obtained after the defendant had been held without charge more than twenty hours, in violation of the so-called twenty hour rule.[27] The court ruled that the confession was not invalidated simply because the man had been illegally held, reaffirming the principle that the test of the admissibility of the confession was whether or not it was voluntary in fact.

In *State v. Cochran*[28] upon preliminary examination before the court outside the hearing of the jury the defendant challenged the voluntary nature of the confession. The trial court ruled that under the facts the question of whether or not the confession was voluntary was for the jury. The ruling was sustained. In the same case the chief of police, who was outside the door, was permitted to testify as to an admission of guilt made to a psychiatrist who was examining the defendant.

4. Cross-examination

The question of the extent of the cross-examination of the defendant was before the court in two cases. In both it was held that the cross-exam-

24. State v. Brown, 356 Mo. 1037, 204 S.W. 2d 729, 1.c. 732 (1747).

25. State v. Williams, 356 Mo. 1048, 204 S.W. 2d 748 (1947). (See also State v. Murphy, 356 Mo. 110, 201 S.W. 2d 280 (1947).

26. 356 Mo. 1010, 204 S.W. 2d 713 (1947).

27. Mo. Rev. Stat. § 4346 (1939). See also the case of State v. Ellis, 354 Mo. 998, 193 S.W. 2d 31 (1946); and State v. Sanford, 354 Mo. 1012, 193 S.W. 2d 35 (1946), where the admissibility of a confession taken after twenty hours was fully discussed.

28. *Supra,* note 19.

ination was proper. The court remarked that the statute limiting cross-examination of defendants to matters referred to in the examination in chief ". . .does not limit the cross-examination to a mere categorical review of the matters testified to in the direct examination, but it may extend to any matter referred to or wthin the fair purview of such examination."[29]

5. Hearsay

An interesting case involving the question of hearsay evidence was before the court. The prosecuting witness in an incest prosecution had made a written statement to the officers and the prosecuting attorney setting forth the facts of the crime. She refused to testify at the trial, claiming her constitutional privilege against self incrimination. The State adopted a rather novel procedure of offering in evidence the statement made by the prosecuting witness as proof of the offense charged. The supreme court very properly remarked that this statement was hearsay and that the defendant had no opportunity to either confront the witness used against him or cross-examine this witness. The conviction was reversed.[30]

The defendant's attempt to show that he himself had applied to the sheriff and prosecuting attorney for protection from the deceased was held inadmissible as self serving in a homicide case.[31]

6. Proof of other offenses

The question of proof of other offenses has always been a perplexing one for both the State and the defense. In two cases before the court it was ruled that proof of the offense in issue was such as would permit proof of other offenses at different times committed by the defendant. In one instance the charge was manslaughter and one of the asserted defenses was that the shooting was accidental. The court, while recognizing that the general rule excludes proof of other crimes, ruled that an exception was made where proof of the other crimes tended to establish the absence of mistake or accident.[32] In another case the court reaffirmed the recognized exception as to the proof of other crimes where the crime involved was a sex crime and stated that

29. State v. Shilkett, 356 Mo. 1081, 204 S.W. 2d 920, l.c. 924 (1947); State v. Howard, 205 S.W. 2d 530 (Mo. 1947); Mo. REV. STAT. § 4081 (1939).

30. State v. Gorden, 356 Mo. 1010, 204 S.W. 2d 713 (1947). See also State v. Cochran, 356 Mo. 778, 203 S.W. 2d 707 (1947), where the defendant himself offered in evidence a letter from his deceased wife in which she indicated that the defendant was losing his mind. This was ruled out as hearsay.

31. State v. Cavener, 356 Mo. 602, 202 S.W. 2d 869 (1947).

32. *Supra,* note 29.

similar offenses may under certain circumstances be admissible in evidence, particularly if they show a course of conduct related to the offense on trial or with the prosecuting witness.[33]

The defendant could not complain of reference to murder by the defendant of his wife some days after the murder of the victim on whose case he was being tried, where the defendant himself first brought the matter of the wife's murder into the case.[34]

7. Impeachment

In *State v. Hayes* [35] the State attempted to attack defendant's reputation before he testified as a witness. The court, in conformity with well accepted precedent, ruled tnat the defendant is not subject to impeachment as a witness until he has testified or has offered evidence as to his reputation.

Defendant's general reputation for peace and quietude can best be proved, the court ruled, by showing in the negative that the witness had never heard any discussion charging the defendant with turbulence.[36] In this same case the court ruled that specific acts of violence are not admissible in proving the victim's reputation as to turbulence and violence.

8. Prior threats

The defendant in the case of *State v. Meidle*[37] contended on appeal from a conviction of second degree murder that the shooting was accidental. The victim and another were trespassing and hunting on the defendant's property. The State was permitted to prove prior threats made by the defendant, not to the victim, but toward other trespassers on defendant's land. Defendant had on other occasions made the statement that he was never in a position to fire at trespassers before. This testimony was admitted on the theory that it tended to prove a criminal purpose or intent, rather than accident.

9. Opinion evidence as to sanity

The court ruled that a defendant who offered testimony of three physicians who treated and examined him after he was charged and in support of his defense of insanity, waived the right to object to testimony on such

33. State v. Hayes, 356 Mo. 1033, 204 S.W. 2d 723 (1947).
34. *Supra,* note 19.
35. *Supra,* note 33.
36. *Supra,* note 31. In this same case the court ruled that proof of the lodge and church affiliation of the victim was not admissable in proving reputation, ruling that it also was prejudicial.
37. 202 S.W. 2d 79 (Mo. 1947).

issue by two other physicians who also examined him for the same condition. The defendant had contended that the information given to these doctors was privileged, but the court ruled that he had waived the privilege. In the same case the court permitted the State in putting a hypothetical question to its expert witness to hypothesize the question based on its theory of the case and ruled that the defendant's objection to the question was not good because it failed to point out what necessary facts had been omitted or what facts were stated improperly.[38]

III. Instructions

In a number of cases the question of subjects upon which the trial court must instruct, whether requested to do so or not, was before the court. There were no new principles of law established in any of these cases, however. Briefly, the court ruled that a trial court must instruct on self-defense where there is any evidence thereof in a felonious wounding;[39] that where there is any evidence at all to justify the submission of manslaughter the court must give such an instruction;[40] that the court need not instruct on the voluntary nature of a confession unless such an instruction is requested.[41]

In one case the court reversed the trial court on an instruction which told the jury that although they might believe from the evidence that the deceased when intoxicated was a bad and quarrelsome man, such fact alone would not excuse accused for killing the deceased, on the theory that such an instruction constitutes a comment on the evidence. This is in line with previous cases which have condemned a similar type of instruction.[42]

In another case an information was filed under Missouri Revised Statutes Section 4410 (1939), which is the section covering assault involving maiming, wounding and disfiguring. The court's instruction was given under Section 4409 which section covers an assault with intent to do great bodily harm. The court ruled that the instruction broadened the information and was too broad.[43]

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38. *Supra,* note 11. In connection with the waiver of the privilege as to examination by a physician, see also State v. Cochran, 356 Mo. 778, 203 S.W. 2d 707 (1947), where the court ruled that an accused who puts his sanity in issue waives the privilege existing between physician and patient.

39. State v. Browers, *supra,* note 2.

40. *Supra,* note 21.

41. *Supra,* note 7.

42. State v. Manning, 356 Mo. 477, 202 S.W. 2d 18 (1947); State v. Rozell, 225 S.W. 931 (Mo. 1920); State v. Archie, 301 Mo. 392, 256 S.W. 803 (1923); State v. Welch, 311 Mo. 476, 278 S.W. 755 (1925).

43. State v. Watson, 356 Mo. 590, 202 S.W. 2d 784 (1947).

IV. Specific Offenses

In only one case was there a unique question presented to our court regarding an offense itself. For the first time the court was called to rule upon a question of the meaning of the words "being out under guard" and "custody of an officer" in connection with an escape from a state penitentiary farm. In this case the prisoner was about 440 yards away from the guard at the time he escaped. The sole question in the case was whether or not at that time he was out under guard or in the custody of the officers. In construing Missouri Revised Statutes Section 4307 (1939)[44] the court ruled that he was in custody, even though the guard was some yards away. The court said: "Custody refers not only to the actual corporeal and forcible detention of a prisoner, but also to measures whereby one person exercises any control over the person of another which confines such other person within certain limits. To be under guard it was not essential that the guard be near enough to appellant to actually touch him."[45]

V. Defenses

A defense which was raised in one case is worthy of note here. In the case of *State v. Sapp*[46] the defense was insanity. It was there very fervently and ably urged that the defendant was entitled to an acquittal if the evidence showed that at the time the defendant committed robbery he was acting under an irresistible impulse to so do. The court in this case refused to depart from the time honored precedent established in our state which holds that the defense of insanity is available only if the defendant was unable to distinguish right from wrong and know the natural consequences of his act, thus overruling defendant's contention.

VI. Second Offenders

The so-called habitual criminal act[47] which provides for the maximum punishment for the offense involved if the offender has been convicted before was also before the court in two cases. In *State v. Hannon*[48] the defendant was charged with burglary and larceny under the habitual criminal

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44. "If any person confined in the penitentiary for any term less than life shall escape from such prison, or, being out under guard, shall escape from the custody of officers, he shall be liable to the punishment imposed for breaking prison."

45. State v. Baker, 355 Mo. 1048, 199 S.W. 2d 393, l.c. 396 (1947).

46. *Supra,* note 11.

47. Mo. Rev. Stat. § 4854 (1939).

48. 204 S.W. 2d 915 (Mo. 1947). See also State v. Ward, 356 Mo. 499, 202 S.W. 2d 46 (1947).

act. In that case the sheriff was permitted to testify as to an admission by the defendant concerning his conviction for the prior offense. The court ruled that this was not in conflict with the general rule prohibiting the proof of other offenses in a trial for a specific offense, stating that it was proper to admit this evidence to identify the defendant as the person convicted of the prior offense. In the same case the court reaffirmed the accepted rule that where the prior convictions are not admitted, the court must instruct in the alternative permitting the jury to return the verdict finding the defendant guilty of the principal offense alone or of the principal offense and also as an habitual criminal.

The court approved the proof of defendant's prior convictions by use of certified copies of records from the Missouri state penitentiary showing the defendant's six prior convictions. The court in so holding overruled the defendant's contention that the best evidence would be testimony by the record clerk.[49]

VII. Verdict

In one case the complaint was made by the appellant as to the action of the trial court regarding an instruction to the jury directing the correction of the judgment or verdict.[50] The jury returned a verdict assessing the defendant's punishment at two years in the penitentiary "with clemency." The trial court informed the jury that their verdict meant two years in the state penitentiary and instructed them to return to the jury room and return a verdict omitting the quoted words. The supreme court affirmed the trial court's action in this regard, pointing out that it is the duty of the trial court to see that verdicts are in proper form.

EVIDENCE

Jackson A. Wright*

The decisions of the Supreme Court of Missouri during 1947 on evidence law were, for the most part, based on well established rules and laws of evidence set forth in previous years. This summary is primarily for the purpose of touching upon points which might be considered interesting to the readers, and to note cases in which various types of evidence were discussed by the court.

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49. *Supra*, note 10.
50. State v. Wood, 355 Mo. 1008, 199 S.W. 2d 396 (1947).

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JUDICIAL NOTICE

In *Lane v. St. Louis Trust Company*,[1] the court held that it could not take judicial notice of the laws of Germany. This was a suit to prevent one Wackwitz from taking a trust fund. One of the allegations was that he had forfeited his rights to the fund by virtue of the laws of Germany. There was no pleading or proof of the laws of Germany. In such case, the court states that in the absence of proof, it must apply the law of Missouri.

In *State v. Wynne*,[2] the court took judicial notice of the proceedings before the Governor of the State of Missouri in the absence of objections.

The court, in *Odom v. Langston*,[3] held that a trial court may take judicial notice of the opinion of the supreme court in prior cases involving the same parties and the same issues.

In *King v. Priest*,[4] which was a declaratory judgment action by members of the St. Louis police force regarding their right to join unions, the court took judicial knowledge of the organization, purposes and ordinary functions and operations of labor unions, and stated that it was common knowledge that the most common methods used by unions to accomplish their purposes are threats to strike, strikes, collective bargaining agreements, closed shop agreements and picketing. The court further took judicial notice of the co-operation between labor unions and of the control ordinarily exercised by national organizations over local unions.

INFERENCES

In *Nash v. Normandy State Bank*,[5] the court states the rule that inferences of fact ordinarily do not run backwards. In this particular case, a statement, "Yes, I know that . . . I heard that," made in June was held not to be sufficient to raise the inference that the witness had such knowledge on April 11.

Baumgartner v. Kansas City,[6] again brought before the court the question of the failure of one party to produce a witness creating an unfavorable inference against such party. This was an action against the city by the plaintiff for injuries sustained when a coal hole cover, inbedded in the sidewalk, tilted when the plaintiff stepped on it. The court held that the

1. 356 Mo. 76, 201 S. W. 2d 288 (1947).
2. 356 Mo. 1095, 204 S. W. 2d 927 (1947).
3. 356 Mo. 1140, 205 S. W. 2d 518 (1947).
4. 206 S. W. 2d 547 (Mo. 1947).
5. 201 S. W. 2d 299 (Mo. 1947).
6. 204 S. W. 2d 689 (Mo. 1947).

city's failure to put on the stand its inspector, who had inspected the cover before the accident when it was reported that the cover was broken, authorized the inference that the inspector's testimony would have been unfavorable to the city, where the inspector was still an employee of the city and well and available as a witness.

Relevancy, Materiality and Competency

In *Hoover v. Wright*,[7] the court again held that a lay witness cannot give his opinion as to the insanity of an individual unless he relates the acts and conduct on the part of the individual which are inconsistent with sanity.

(a) *Competency in General*

State v. Perkins[8] is probably the most interesting case dealing with evidence which was decided by the supreme court during 1947. This was a prosecution of the defendant for rape. The state introduced a phonographic recording of the defendant's confession, which was alleged to be error. The court states that this is a question of first impression in the state. It was held admissible. The court stating that, where the proper basis is established, such type of evidence is of inestimable value to the triers of fact in reaching accurate conclusions. It was shown in this case that there were no threats or coercion; that the defendant knew that they were making the recording; and that it was fully explained to the defendant that the recording could be used against him. The defendant, among other things, alleged the phonographic recording to be "an ingenious novelty." The court states that such evidence has been used in other jurisdictions; that it is the same principal as taking motion pictures, and quotes at length from a California case, *People v. Hayes*,[9] "If after a preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done, and the other requirements relative to the admissibility of a confession are present, i.e., it was freely and voluntarily made without hope of immunity or promise of reward, then, not only should the preliminary foundation and the sound moving picture go to the jury, *but, in keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice*

7. 202 S. W. 2d 83 (Mo. 1947).
8. 335 Mo. 851, 198 S. W. 2d 704 (1946) (*rehearing denied* Jan. 13, 1947); noted 12 Mo. Law Rev. 353 (1947).
9. 21 Cal. App. 2d 320, 71 P. 2d 321, 322 (1937).

is to be commended as of inestimable value to triers of fact in reaching accurate conclusions." (italics the court's.) The Missouri court concludes that a proper foundation having been laid, the evidence was admissible in this case. The court stated, however, that no complaint was made in this case of the method of reproducing the voice. This limitation would seem to be taken care of in the requirements of a proper basis for the admission of such types of testimony.

In *Johnson v. Minihan*,[10] the disclosure of a settlement between the defendant and one of plaintiff's witnesses for damages to the witness's automobile as result of a collision with the defendant's truck, while otherwise incompetent, was held admissible as an incident to the plaintiff's right to have the witness, on re-direct examination, explain the circumstances under which he signed a statement which was used on cross examination to discredit the witness. The court says that evidence, admissible for one purpose, cannot be excluded because it is inadmissible for another, although the opposite party is entitled to have an instruction limiting the use of the testimony.

State v. Hayes[11] was a prosecution for statutory rape. During the state's evidence, a witness was permitted to testify regarding the defendant having had women in his room on numerous occasions. The state claimed such evidence to be admissible to impeach the witness. It was objected to on the ground that it was an attack upon the defendant's character when the defendant's character had not been put in issue. The court held that until the defendant offered evidence concerning the reputation of the defendant, the state could not attack it. It further held that the offered evidence was not admissible, since it was not competent to show reputation. The court followed the general rule that evidence of specific acts is not competent to show reputation, but the testimony must be with regard to the general reputation. The evidence was also held inadmissible in a statutory rape prosecution of previous illicit relations. The court stating that it was not admisible to show intent, malice or motive, since such showings were not needed.

The defendant was convicted of manslaughter in *State v. Shilkett*[12] and appealed. The defendant had shot one McDaniels, and his defense was that it was an accident. The state was permitted to show that the defendant

10. 355 Mo. 1208, 200 S. W. 2d 334 (1947).
11. 356 Mo. 1033, 204 S. W. 2d 723 (1947).
12. 356 Mo. 1081, 204 S. W. 2d 920 (1947).

had shot the pistol on two other occasions the same morning. The defendant alleged such evidence to be error, on the ground that it was allowing the proof of the commission to separate and distinct crimes. The court held it admissible to establish the absence of the mistake or accident in the firing of the gun. The defendant relied upon an accident and this was admissible to show that different inferences could be drawn from the actions of the defendant other than an accident.

Chapman v. Breeze[13] presented a question of waiver of time for payment under an option contract. The court held that evidence of both antecedent and subsequent words, acts, and conduct of the optionor were admissible to show *waivers*. However, the court reiterates that the antecedent words, acts and conduct could not be used to vary the terms of the written contract.

Bank records showing credits, withdrawals and balances were held material and competent evidence in *Adams v. Moberg*,[14] in a specific performance of an oral contract for the conveyance of real estate action. Such evidence was objected to, but the court says that it is material to corroborate oral testimony, although standing alone such bank records were meaningless.

In *Callahan v. Connecticut General Life Insurance Co.*,[15] which was an action on an insurance policy, the plaintiff offered certified copies of the death certificate as evidence. The death certificate stated that the insured died as the result of an accident. The doctor who executed the death certificate testified that he was not present when the insured was injured. The court held that the entire certificate was not admissible. Such admission was restricted to statements of fact within the knowledge of the person making the certificate.

(b) *Parol Evidence Rule*

Peters v. Jamison's Estate[16] was a controversy arising from an application for an order of partial distribution and authority to deduct certain amounts in a settlement in the probate court. The executors of the estate applied to the court for an order allowing them to take credit and deduct from the respondent's distributive share the amount of a claim paid by the estate on a written guaranty signed by the deceased, guaranteeing a brokerage account standing in the name of the respondent. Testimony was offered

13. 355 Mo. 873, 198 S. W. 2d 717 (1946).
14. 356 Mo. 1175, 205 S. W. 2d 553 (1947).
15. 207 S. W. 2d 279 (Mo. 1947).
16. 202 S. W. 2d 879 (Mo. 1947).

regarding conversations and discussions between the deceased and her sister, which were objected to. The court held that the testimony was material and admissible upon the question of establishing who was primarily liable on the contract with the brokerage firm, and that it did not violate the parol evidence rule, since the written contracts were not between the two parties to the conversations.

(c) *Best Evidence Rule*

The best evidence rule was mentioned in two cases, *State v. Miller*[17] and *Crampton v. Osborn.*[18] In the *Miller* case, certified copies of a transcript of the official records of the Missouri State Penitentiary, showing convictions and commitments, were held to be admissible against the objections of not the best evidence. The objection that the official having charge of the records was not shown to be unavailable for testimony was likewise overruled.

(d) *Cross Examination*

The supreme court in a number of cases again affirmed the rule that the scope of cross examination is ordinarily within the discretion of the trial court. In *Gildehaus v. Jones,*[19] it again stated this rule, but states that cross examination as to collateral matters cannot be used for impeachment purposes. They held, however, that cross examination as to prior marriages, although not a material issue in the case as such, tended to tie in with other testimony which was directly material, thus was not error.

State v. Skillett [20] likewise presented a question of the limitation of cross examination. The defendant complained of limitation by the trial court of the cross examination of a witness as to collateral matters for the purpose of attacking the credibility of such witness. The court held it was in the sound discretion of the trial court and that it was not shown that the defendant was prejudiced or that the trial court abused its discretion. The limit of cross examination was reviewed in *State v. Howard*[21] and *State v. Hannon.*[22]

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17. 202 S. W. 2d 887 (Mo. 1947).
18. 356 Mo. 125, 201 S. W. 2d 336 (1947).
19. 356 Mo. 8, 200 S. W. 2d 523 (1947).
20. *Supra,* n. 12.
21. 205 S. W. 2d 530 (Mo. 1947).
22. 204 S. W. 2d 915 (Mo. 1947).

(e) *Hypothetical Question*

Hypothetical questions were reviewed in two cases, *Golden v. National Utilities Company*[23] and *McGaugh v. City of Fulton.*[24] In the *Golden* case, it was held that an expert's answer to a hypothetical question, stating that gas escaping from a defective service line outside a house had entered the basement, causing the explosion when a match was lighted, was sufficient to make a case for the jury on the question of causal connection and that this statement, being in answer to a hypothetical question, was not inadmissible because the hypothetical question did not contain all insignificant facts in the record. In *McGaugh v. City of Fulton,* which was another gas explosion case, the plaintiff alleged error, among other things, in excluding hypothetical questions asked by plaintiff of plaintiff's expert witness. The court held that the question contained elements which were not based upon an assumption of fact from which negligence could be inferred, so the objection was properly sustained. This was true especially since the plaintiff did not ask the defendant to point out the defendant's objections to the question, or offer to amend the question to eliminate the defendant's objections.

(f) *Reputation*

In *State v. Hayes,*[25] the rule was again stated by the court, as above mentioned, that evidence of specific acts is not competent to show reputation.

WITNESSES

In *Golden v. National Utilities Company, supra,* the court held that expert witnesses giving conflicting opinions on the same set of facts make an issue for the jury regarding the credibility of such expert witnesses. In *Holmes v. McNeil,*[26] the plaintiff sued for damages arising from an automobile accident. The plaintiff had testified in his deposition that the defendant was "slumped" over the steering wheel. The defendant claims that the plaintiff is bound by this, that it established the defendant's defense of loss of consciousness or control due to an outside cause. The plaintiff testified that when he stated "slumped" that he meant "bent" over the wheel, and not slumped as though unconscious. The court held that a litigant is not bound by his witness's adverse testimony ". . . where the testimony is con-

23. 356 Mo. 84, 201 S. W. 2d 292 (1947).
24. 356 Mo. 1122, 205 S. W. 2d 547 (1947).
25. *Supra,* n. 11.
26. 356 Mo. 846, 204 S. W. 2d 303 (1947).

tradicted either expressly or by inference, by other evidence or circumtance, as where the circumstances or the evidence of other witnesses would warrant the trier of facts in disregarding the testimony or drawing a contrary inference."

ADMISSIONS

In *Campbell v. Webb*,[27] the original petition which was subsequently amended, was held competent as an admission by the plaintiff. However, the court stated that it was not conclusive, and the plaintiff was not bound thereby. Likewise, in *Holmes v. Egy*,[28] the court pointed out that the plaintiff is not conclusively bound by her statements or admissions in her deposition, taken before the trial, which are inconsistent with her testimony at the trial.

PRIVILEGE

State v. Sapp[29] was a prosecution for robbery, with a defense of insanity. The defendant was held to have waived the defense of privilege as to testimony of two doctors when the defendant himself introduced evidence by three other doctors as to his mental condition, all doctors having examined him for the same purpose. The court states, "Appellant could not be permitted to call as witnesses only those doctors whom he desired to call, and then claim the right to object as to other doctors who treated and examined him for the same condition." In doing this, the court followed the general rule that privilege is a personal matter and can be waived, and held that the defendant had so waived his privilege in this case.

HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.*

In 1947 the decisions of the supreme court did not involve any radical examination of the basis of the humanitarian doctrine. On the whole the 1947 decisions seemed to be genuine attempts to administer the doctrine as a doctrine based upon fault; that is, a doctrine of negligence and proximate cause based upon real dereliction of legal duty. There was no extension of the use or operation of the doctrine except possibly in the case of *Kenefick v. Terminal Railroad Ass'n of St. Louis*,[1] where the widow of an employee

27. 356 Mo. 466, 202 S. W. 2d 35 (1947).
28. 202 S. W. 29 87 (Mo. App. 1947).
29. 356 Mo. 705, 203 S. W. 2d 425 (1947).

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1. 207 S. W. 2d 294 (Mo. 1948).

killed in Illinois brought a suit under the Federal Employers' Liability Act in Missouri, and submitted the case under the humanitarian doctrine. This submission was not disapproved. For a discussion of the use of the humanitarian doctrine in such cases see the note in the *Missouri Law Review*.[2] It is questionable whether the same result would be reached in an Illinois court, though the opinion is logically acceptable.

The vexing question of how to draft a defense instruction submitting primary negligence as the sole cause in a case under the humanitarian doctrine, was left in an unsettled condition. It could not be said at the end of 1947 whether the court *en banc* would finally hold that a defendant's sole cause instruction must negative the existence of defendant's humanitarian negligence or not. Only a categorical decision of the court *en banc* can settle this question.

Another year passed without presentation to the court of the crucial question, concerning the very nature of the humanitarian doctrine, which will have to be settled eventually. The question is this:

> When two equally oblivious and inattentive vehicle operators collide and are personally injured under circumstances where each might have avoided the collision after the imminent peril of collision arose, can each recover damages from the other for personal injuries sustained?

That case is likely to reach the court at any time. When it is decided, the true nature of the Missouri humanitarian rule should become apparent. Of course, the common law, last clear chance doctrine will not be affected.

Division Number 1

Fisher v. Ozark Milk Service[3] involved an automobile collision at a street intersection. The action was filed by a guest of one of the operators, and was submitted to the jury upon (1) humanitarian negligence, after discoverable peril arose, in failing to swerve, slacken or stop, and upon (2) primary negligence of defendant in failing to provide its vehicle with two sets of adequate brakes in good working order as required by ordinance. The court, in an interesting opinion, held that, under the facts, the two theories of submission were mutually inconsistent and that the submission of both was error. This case is a plain warning that, except under unusual circumstances, humanitarian negligence based on failure to stop or slacken

2. Parrish, *Comments* 9 Mo. LAW REV. 264-274 (1944).
3. 56 Mo. 95, 201 S. W. 2d 305 (1947).

and primary negligence based on defective brakes, should not be submitted simultaneously.

Sollenberger v. Kansas City Public Service Co.[4] was an action under the penalty section of the death act based upon the death of plaintiff's husband. His death resulted from the collision, occurring at night, at a street intersection between an automobile driven by the deceased and defendant's motor bus. The case was submitted upon the humanitarian doctrine in failing to stop, to turn to the right, or to warn. The submission was sustained upon all three grounds. In passing on the submissibility of the case, the court used the deductive mathematical method to reconstruct the relative movements of the vehicles involved.

Teague v. Plaza Express Co.[5] involved one of a series of much litigated actions resulting from a collision between an automobile (with guests) and a truck at a highway intersection.[6]

This case was an action by a guest. It is notable for its approval of the use of the word "immediate" in the defendant's definition of "imminent peril."

In a guest case, the court held, it is improper to require as a predicate to liability that the plaintiff guest was seen, or could have been seen in imminent peril. It is enough that, without actual or constructive sight of the plaintiff guest the defendant driver knew or should have known, from reasonable appearances, that the host driver was oblivious of impending collision and all the occupants of his car were in peril, because of the driver's obliviousness. This is a matter that should be carefully noted in the drafting of defense instructions where a guest sues one other than his host under the humanitarian doctrine.

Spalding v. Robertson[7] arose out of the striking and killing of a pedestrian at night by a motorist driving along a highway. The question of liability was not in issue. The case is interesting for its discussion (not settlement) of the proper manner to instruct on damages in a death action submitted under the humanitarian doctrine.

Flint v. Chicago, Burlington & Quincy Railroad Co.[8] was an action for damages for the death of the plaintiff's thirteen year old son who was

4. 356 Mo. 454, 202 S. W. 2d 25 (1947).
5. 356 Mo. 1186, 205 S. W. 2d 563 (1947).
6. White v. Teague, 177 S. W. 2d 517 and 353 Mo. 247, 182 S. W. 2d 288 (1944); White v. Plaza Express Co., 188 S. W. 2d 847 (Mo. App. 1945); Teague v. Plaza Express Co., 354 Mo. 582, 190 S. W. 2d 254 (1945).
7. 206 S. W. 2d 517 (Mo. 1947).
8. 207 S. W. 2d 474 (Mo. 1948).

killed in a collision between a truck in which he was riding and defendant's passenger train at a private crossing in the country during daytime.

The truck approached the railroad crossing up an incline beginning about twenty to twenty-five feet from the track. As the truck approached the track, it gave every appearance of stopping and came almost to a stop at the foot of the incline about twenty-five feet from the track.

The case was submitted on primary negligence in failing to warn and on humanitarian negligence in failing to stop or to slacken speed of the train.

The court held, consistently with prior decisions, that the duty to act under the humanitarian doctrine did not commence until it was reasonably apparent by the acceleration of the speed of the truck that the driver intended to drive the truck into the path of the train. By deductive mathematical calculations the court arrived at the conclusion that a case was not made under the humanitarian doctrine in failing to slacken or to warn.

Since failure to warn was not submitted by the plaintiff, the court did not consider the question of whether a case of humanitarian negligence in failing to warn was made. Under prior decisions in close cases of this character, the plaintiff would have had a much better chance to establish humanitarian negligence in failing to warn.

Division Number 2

Wright v. Osborn[9] was a suit for damages by the parents of an eight year old boy who was struck by defendant's automobile and killed while crossing an open, straight, level, dry concrete highway at noon on a clear day. The only surviving eye witness was the defendant driver who stated that he didn't see the deceased until he hit him. The case was submitted solely upon the humanitarian doctrine in failing to slacken, turn aside or warn the deceased.

This case is particularly interesting as an example of a submissible humanitarian case, based upon the killing of a pedestrian by a motor vehicle, in which the driver of the motor vehicle is the only eye witness.

The failure to warn must have been predicated upon the obliviousness of deceased to the approach of the motor vehicle. Apparently obliviousness is inferred from the few known facts about the actions of the deceased. Since this point matter was not discussed, the question may be raised in a subsequent case.

9. 356 Mo. 382, 201 S. W. 2d 935 (1947).

In *Crawford v. Byers Transportation Co.*,[10] an action based upon an intersectional motor vehicle collision was submitted solely on the humanitarian doctrine. The jury returned a verdict for the defendant. Two instructions were held not reversible error. One defined "imminent peril," and the other limited the duty of defendant to act to the time after plaintiff was in peril and defendant's driver *"saw and realized,* or by the exercise of the highest degree of care *could have seen and realized,"* that plaintiff was in imminent peril. The instruction defining imminent peril received approval of the court but the other did not. The approved definition of imminent peril is as follows:

> "By 'position of imminent peril,' as used in the instructions of the court, is not meant a place wherein there is just a possibility of an injury occurring; it means a place and position wherein there is certain danger."[11]

Jants v. St. Louis Public Service Co.[12] was a damage action arising out of the death of a motorcycle rider whose vehicle was struck by defendant's stream-liner street car crossing at a right angle the street on which the motorcyclist was riding. The collision occurred at night. The case was submitted solely on the humanitarian doctrine in failing to stop or to slacken the speed of the street car. The defendant had a jury verdict. The defendant's "sole cause" instruction was approved.

The instruction did not require a finding that the defendant was not guilty of the humanitarian negligence submitted as suggested in *Long v. Mild.*[13]

The decision meets some criticism lately directed toward the court's treatment of the "sole cause" concept by the Bar.[14] Modified approval was given to the second defense instruction, submitting the converse of the plaintiff's instruction on the duty of the motorman under the humanitarian doctrine. The court's remark concerning the latter instruction that the instruction "is good against the objection urged at the trial" will make the wary hesitant to use it.

Kenefick v. Terminal Railroad Ass'n of St. Louis[15] was a suit under the Federal Employers' Liability Act for the wrongful death of plaintiff's

10. 201 S. W. 2d 971 (Mo. 1947). See, also 186 S. W. 2d (Mo. App. 1945).
11. 201 S. W. 2d at 974.
12. 356 Mo. 985, 204 S. W. 2d 698 (1947).
13. 347 Mo. 1002, 149 S. W. 2d 853 (1941).
14. Ball, *The Vanished Sole Cause Instruction,* 13 Mo. BAR J. 50 (April, 1942); Spaun, *Sole Cause Negligence Instructions,* 13 Mo. BAR J. 19 (Feb. 1942).
15. *Supra* note 1.

husband who was killed when struck by a passenger train while walking across the tracks on which the train was approaching. In approving a defense sole cause instruction, the court said:

> "One condition to a defendant's verdict in a sole cause situation is defendant's freedom of causative negligence and this instruction expressly so conditioned a defendant's verdict."

This statement should be contrasted with the holding in *Jants v. St. Louis Public Service Co.*,[16] where the court approved the sole cause instruction which did not require a finding of freedom from "causative negligence." Logically speaking it is the lack of causation rather than freedom from negligence which relieves the defendant of liability. But the court has held that a sole cause instruction which does not require finding of freedom from humanitarian negligence is misleading. This question remains unsettled. Until the court *en banc* reconciles the divisions, it is the safer practice to require a finding in a sole cause instruction that the defendant was not guilty of humanitarian negligence as submitted in the plaintiff's instruction.

The striking and killing of the plantiff occurred in Venice, Illinois. The case was submitted under the Missouri humanitarian doctrine. Since the plaintiff lost below and appealed, it was not necessary to settle the question of applicability of the Missouri doctrine. However, the court considered the case as if the doctrine were applicable to Illinois casualties, a novel but by no means a theoretically unsound assumption.

INSURANCE

ROBERT E. SEILER*

In 1947, the supreme court decided seven cases dealing primarily with insurance questions: One case involved an oral contract of insurance, two involved coverage questions concerning an employer's non-ownership automobile liability policy, one case involved arbitration, one involved breach of warranty, one involved a question of doing business in the state, and another a question as to accidental means.

The case on the oral contract of insurance is *Rassieur v. Mutual Benefit Life Insurance Company*,[1] an unsuccessful action to collect on an alleged oral contract of life insurance for $50.000.00. The court affirmed the general Mis-

16. *Supra* note 12.

*Attorney, Joplin, LL.B., University of Missouri, 1935.

1. 356 Mo. 48, 201 S. W. 2d 173 (1947).

souri rule that a soliciting agent is not authorized to enter into oral contracts of insurance. The court points out that, in any event, the prospective insured knew that whatever he and the agent agreed upon was subject to the approval of the insurance company.

The first coverage case is *Forir v. Toman*,[2] a garnishment proceeding to collect a $7,500.00 judgment for personal injuries. The court holds that the mere fact that the premium for a liability policy issued to the employer is based on the renumeration of all the employees does not mean that all such employees are protected by the policy. The court also holds that where one person is definitely named as the insured in such a rider that ambiguities as to the coverage afforded such person do not make the policy ambiguous as to the person covered by the policy and do not extend the coverage to some other person not mentioned.

The other coverage case is *Linenschmidt v. Continental Casualty Company*,[3] where the court holds that an employee named in the schedule of employees on which the premium was based in an automobile liability policy with an "employers' non-ownership liability" endorsement is not covered personally for an accident involving the employee's own automobile, when not on business for the named insured. The court also holds that since the employee was not personally covered that neither waiver nor estoppel could operate against the insurance company so as to create coverage for the employee.

The arbitration case is *Orr v. Farmers Mutual Hail Insurance Company of Missouri*,[4] an action to collect on hail insurance on a cotton crop. The court decided that the arbitration award, relied upon as a defense by the insurance company, was void as a matter of law. The arbitrator who dominated the arbitration drew pay at the same time from the defendant as well as pay from both parties for being an arbitrator, did not inspect the loss until three weeks after the hail storm (the ground having overflowed in the meantime) and was unable to explain how he judged that the hail did not injure the crop.

The breach of warranty case is *Packard Manufacturing Company v. Indiana Lumbermens' Mutual Insurance Company*,[5] where the court, en banc, held that the insured failed to make a submissible case in an action to

2. 202 S. W. 2d 32 (Mo. 1947).
3. 356 Mo. 914, 204 S. W. 2d 295 (1947).
4. 356 Mo. 372, 201 S. W. 2d 952 (1947).
5. 356 Mo. 687, 203 S. W. 2d 415 (1947).

collect on fire policies where it was undisputed that there were eleven gallons of gasoline in the building for five or six weeks before the fire. The court holds that the policy provisions that the policy ". . . shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises. . . gasoline. . ." is a warranty which will be enforced, regardless of whether the violation thereof actually served to contribute to the fire or whether the insured had knowledge of the violations thereof. One judge concurred in the result. Two judges dissented.

The question of whether or not the insurance company was doing business within the state so as to be subject to service of process is involved in the case of *Cindrich v: Indiana Travelers Assurance Company*.[6] The court held that in doing the following the defendant foreign insurance company did not "directly or indirectly issue policies, take risks, or transact business in this state" so as to be subject to service of process on the Superintendent of Insurance under Section 6008, Missouri Revised Statutes of 1939: (1) The re-insurance by the defendant, in Indiana, of Missouri contracts issued by an insurance company authorized to do business in Missouri, (2) the sending to the assured in Missouri, from Indiana, of the certificate of insurance and premium notices from time to time, (3) the payment by the insured, from Missouri, of premiums through the mail, (4) the sending of applications from Indiana to various Missouri residents, (5) the return of same by mail and the acceptance by defendant in Indiana of said applications, and (6) the mailing of policies back to Missouri.

The accidental means case is *Callahan v. Connecticut General Life Insurance Company*,[7] an action to collect double indemnity for death resulting from accidental means—frozen feet, resulting in tetanus. The court reaffirms its position that there is a distinction between cause and result so far as the term "accidental means" is concerned; that there must be something unforeseen, unusual, unexpected which produces the injury, not merely an unusual result. However, it was a jury question whether under the circumstances in the case the freezing and death were caused by accidental means. Since the freezing was not necessarily an accident, the insurer was entitled to have the jury consider whether or not the deceased's acts were willful and voluntary, including the question of intoxication.

6. 356 Mo. 1064, 204 S. W. 2d 765 (1947).
7. 207 S. W. 2d 279 (Mo. 1947).

The court also holds in this case that the vexatious delay and penalty statute, Section 6040, Missouri Revised Statutes of 1939, is not unconstitutional as imposing an undue burden upon interstate commerce.

PROPERTY

WILLARD L. ECKHARDT*

No attempt has been made to brief and discuss all of the 1947 property cases decided by the Missouri Supreme Court. Many of the cases apply well-established principles of property law, and the issues are primarily issues of pleading or proof. In rereading the 1947 property cases I noted with some satisfaction that most of the cases which called for analysis and comment, because they were cases of first impression or because they overruled or modified earlier Missouri decisions, already have been discussed by the student editors of the Missouri Law Review. The large number of exceptionally able students, many of them veterans, has made it possible to make available to the Bar notes on recent cases and comments on current legal problems soon after a case appears in the advance sheets. Reference is made to these studies in the material which follows.

FUTURE INTERESTS

The most interesting and important property case in 1947 was *Brown v. Bibb*,[1] a case involving the problem of virtual representation of unborn contingent remaindermen in a suit to revive a deed of trust released of record, to be subrogated thereto, and for foreclosure thereof. The case was argued before Division Two, and the opinion of Bohling, C., holding that there had not been virtual representation, was adopted by that division. The case was transferred to the court *en banc* and reargued. The majority of the court *en banc* concurred in an opinion by Clark, J., holding that there had been virtual representation. Ellison, J., dissented in opinion. Hyde, J., dissented in a separate opinion, in part written by himself and in part adopting the opinion of Bohling, C. This indicates that probably no other case in recent years has received more searching analysis and more careful consideration.

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1. 201 S. W. 2d 370 (Mo. 1947).

The facts, somewhat simplified and reduced to hypothetical form were as follows. In 1874 *A* duly mortgaged Blackacre to *E*. Later that year *A* duly quitclaimed Blackacre to his wife, *W*, "and her bodily heirs" by *A*. [This fee tail limitation gave a life estate to *W*, a contingent remainder in fee to the heirs of her body by *A* (subject to the condition precedent of being born and surviving *W*), and left a reversion in fee in *A*, all subject to the prior mortgage.] In 1877 *A* wrongfully appropriated certain funds from *X*, paid the mortgage note, and *E* released the mortgage of record. *A* and *W* had a child, *C*. *A* died in 1888. In 1890 *X* brought the suit in question to revive the mortgage, to be subrogated thereto, and for foreclosure thereof. The style of *X*'s petition was: "*X*, plaintiff vs. *W*, and *C*, defendants." The petition, after mentioning *W*, alleged: "That the other defendant herein is the only bodily heir of *W*." The decree found that *C* was "the only heir of *W*." The land was sold to *D* pursuant to the decree.[2] The sheriff's deed recited that the interests sold were "all right, title, interest and estate" of *W* and *C*. The debt was $290, and the land sold for $415.55; the record does not indicate what disposition was made of the surplus, if any. *C* died in 1934, *W* still living. [*C* did not satisfy the condition precedent of survival and never qualified as contingent remainderman.] *C* left issue, *P*. *W* died in 1943, survived by her grandchild, *P*, issue of her deceased child. [*P* was the only person who ultimately qualified as contingent remainderman, and is now entitled to possession of the land in fee unless his interest was foreclosed in the 1890 foreclosure suit and sale thereunder.] *P* brings a quiet title and ejectment action against *D*. The trial court gave judgment for *D*. This judgment was affirmed by a divided court in the principal case.

Probably the most lucid discussion of the problem of virtual representation is found in the three volume treatise by Professor Simes,[3] a work indispensable to the property lawyer. It is elementary that a mortgage foreclosure by suit should bind only those who are made parties. On the other hand, if an unborn and unascertained contingent remainderman who took his interest subject to the mortgage is a necessary party to foreclosure, then the mortgagee has lost much he bargained for. In the principal case

2. Actually the land was sold to the life tenant, *W*, but the court in the principal case held that she purchased as would a stranger, and not for the owners of any future interests.

3. 3 SIMES, FUTURE INTERESTS § § 670-687 (1936). § 681, Mortgage Foreclosure, deals with the immediate problem in the principal case.

fifty-six years elapsed between the time the mortgagee was entitled to foreclose and the time the identity of the contingent remainderman could be ascertained. The mortgagee cannot be put off so long. The difficulty generally is resolved by appointing a guardian ad litem to represent unborn persons in the suit, or by the doctrine of virtual representation, the contingent remainderman being "represented" by actual parties in the same class, with identical interests, and who would be affected in the same way by the decree.[4]

The first basic issue in the principal case was as follows: was there such a community of interest between *C*, *W*'s child, and *P*, *W*'s grandchild, that *C* in the 1890 mortgage foreclosure suit could represent *P* who was as yet unborn and unascertained? The majority of the court, through Clark, J., answered this question in the affirmative, taking the position that both the life tenant, *W*, and her child, *C*, a potential bodily heir, represented the unborn grandchild, *P*. Ellison, J., dissenting, took the position that *W* and *C* both had interests hostile to *P*, *W* in that she might bid in the land for a low price at the foreclosure sale, and *C* in that his interests in any surplus after satisfying the mortgage debt were hostile to *P*.[5] Hyde, J., and Bohling, C., do not discuss this problem. On this issue, my own opinion is that insofar as the mortgage revival and foreclosure were concerned, either *W* or *C* could have represented *P*, but that insofar as disposition of any surplus after foreclosure was concerned, *W* could not have represented *P*, and *C* could have represented *P* only if the principal or balance after paying the life tenant a commuted lump sum were impounded to await the event.

Granted that *P* could have been represented by *W* or *C*, or both, the second and great issue was whether *P* was represented in the 1890 suit, under the pleadings and decree. The majority through Clark, J., take the position that it was apparent from the 1890 petition stating the limitation in *A*'s conveyance to *W* and her bodily heirs, that *C* might not ever be entitled and that an as yet unborn person might be entitled, and that it would have added nothing to expressly allege such a possibility, or that the interest of

4. Virtual representation of unascertained persons by reason of community of interest is to be distinguished from a class action where potential parties are so numerous that it would be impracticable to join all of them. See Missouri Laws 1943, p. 362, § 19, Mo. Rev. Stat. Ann. § 847.19 (Supp. 1947).

5. Ellison, J., at pp. 377-378 discusses the "first estate of inheritance" doctrine. To the effect that this doctrine is not pertinent, see 3 Simes, Future Interests § 672, n. 7, and § 681, n. 63-66 (1936). Simes would limit the application of the doctrine to the common law fee tail, which does not exist in Missouri.

such unborn person was represented by a living party. Both dissenting opinions rely on and quote from Freeman,[6] as follows:

> "But in order to bind the interests of persons not in esse the proceedings must be adapted to that purpose. If no mention is made of such interests, and the pleadings and judgment are founded upon the theory that the persons in being before the court are the only persons having any estates or interests in the property, then no interests are affected except those vested in the parties before the Court. Whenever it is sought to bind the interests of persons not then in being, the judgment must be one which 'provides for and protects such interests by substituting the fund derived from the sale of this land in place of the land, and preserving it to the extent necessary to satisfy such interests as they arise.'"

Both dissenting opinions also cite caveats from a comment by a great Missouri lawyer and scholar, the late Earl F. Nelson.[7] On the second issue, my own opinion is that the doctrine of virtual representation should not apply when it is not invoked, and therefore should not be applied in this case as to the 1890 suit.

Regardless of the decision in the principal case that the unborn contingent remainderman could be represented and was in fact represented under the pleadings and decree, the decision does not indicate that the pleadings in the 1890 suit represented good practice. It took a later adjudi-

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6. FREEMAN, COTENANCY AND PARTITION § 482, p. 641 (2d ed. 1886). Compare 3 SIMES, FUTURE INTERESTS § 675 (1936): "The doctrine that unborn members of a class are not necessary parties where there are living members to represent them may be qualified by the proposition that in the suit the identity of interest between the born and the unborn members of the class should be indicated, and the fact that members who are joined are representing, not only their own interests, but also those of unborn members of the class, should be made clear."

7. Nelson, *Rule of Representation* 2 Mo. BAR J. 11-12 (March, 1931), who made the following observations:

"In that case [White v. Campbell, 316 Mo. 949, 292 S. W. 51 (1927)] counsel were very careful to see that the petition specifically invoked the rule as to possible unborn contingent remaindermen. This was done by alleging that the living contingent remaindermen, who were parties to the suit, were made such in their own right and as representatives of any unborn persons who might become on birth contingent remaindermen. If representation is sought of contingent interests by joining as a party to the suit the holder of the first estate of inheritance, similar appropriate allegations as to such party representing contingent interests would be made by the careful pleader."

"In Jackson v. Miller [288 Mo. 232, 232 S. W. 104 (1921)] such allegations were made in the petition. Such allegations are probably unnecessary, but as indicated above, the careful pleader will so frame his petition, by incorporating therein such allegations, so as to prevent any such question arising."

"Nevertheless prudent counsel will join all persons in being who may possibly succeed to contingent interests in order that no possible question of the binding effect of the judgment may arise."

cation by the supreme court to determine that title was *good* and to make it *marketable.* It is submitted that title was unmarketable from 1890 to 1947. It is submitted further that the holding in the principal case does not make title marketable as to other cases where the abstract of title shows an action similar to but not identical with the 1890 suit here in question. It is believed that in such a case an attorney should not pass the title, but should require a suit to quiet title. Prudent counsel will properly invoke virtual representation by specific allegations in the pleadings, not only to insure that the resulting title is a good one, but also is a marketable one.

St. Louis Union Trust Company v. Kelley[8] involved a testamentary trust, which provided for a contingent future interest which might not vest for a period of lives in being and thirty years. The court held that the future interest was void under the Rule against Perpetuities, and that consequently the whole limitation was void under the rule of *Lockridge v. Mace.*[9] The principal case has been ably analyzed in the recent number of the *Missouri Law Review.*[10]

Tax Titles

Moore v. Brigman[11] is one of the infrequent cases in which a tax title without benefit of adverse possession was held to be valid. In 1939 a parcel was offered for sale for the third time under the Jones-Munger Tax Law of 1933. Delinquent taxes, interest, and charges amounted to $108.98. The defendant bid $155. The value of the property was variously estimated from $200 to $800, and had been rented for $6 a month. The court took the view that the $800 estimate was very substantially in excess of the reasonable value of the land. The court stated the principle as follows: "The Jones-Munger Tax Law contemplates a sale for a consideration sufficient to pay the delinquent taxes, interest and charges, and a sale for an unconscionably inadequate sum, which sum does not pay the delinquent taxes, interest and charges, is a fraud upon the State, as well as upon the taxpayer." The court concluded that although the consideration was inadequate, it was not unconscionably so, and was not so grossly inadequate as to constitute a fraud.

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8. 199 S. W. 2d 344 (Mo. 1947).
9. 109 Mo. 162, 18 S. W. 1145 (1891).
10. Brandom, *Recent Cases* 13 Mo. Law Rev. 239-241 (1948).
11. 198 S. W. 2d 857 (Mo. 1947).

A second problem in the principal case was raised by the fact that Missouri Revised Statutes § 11132 (1939) provides that the purchaser at a tax sale shall "immediately" pay the amount of his bid to the collector. In this case the collector could not execute the deed at once because of the congestion of business in his office. The purchaser paid his bid as soon as the collector had prepared the deed, nineteen days later. The court held that "immediately" meant "with reasonable promptness," and that an inconsiderable delay would not invalidate the sale, especially where the delay was caused by the collector's inability to execute the deed at once.

It was further argued that the deed was void because it did not recite the first and second sales, but contained only the recital: "Whereas, said real estate . . . was by said collector offered *the third time* for sale . . ." [emphasis added]. The court said: "The cases, cited by plaintiff, holding tax deeds void where statutory requirements essential to a valid sale were not stated in the deed (or were stated by mere conclusions) were cases decided prior to the Jones-Munger Tax Law. A collector's deed in which the statutory requirements essential to a valid sale under the Jones-Munger Tax Law were stated by conclusions was held valid in Burris v. Bowers, 352 Mo. 1152, 181 S.W. 2d 520 [1944]. The recitation, 'said real estate . . . was by said collector offered the third time for sale,' definitely implies the two prior offerings."[12]

Tax Liens

St. Louis Provident Association v. Gruner [13] definitively settles a question which vexed the state for many years—whether the annual real estate tax became a lien by relation back at the date of the assessment, June 1 under the Missouri Constitution of 1875, or a lien at the time the amount of the tax was ascertained some months later. *Blossom v. Van Court*[14] had settled the question as between vendor and purchaser, with the holding that the vendor was liable on his covenant against encumbrances as to taxes assessed prior to the conveyance, the amount of which was determined after the conveyance. But the question had not been settled where a non-exempt vendor conveyed the land to a tax-exempt purchaser. The principal case holds that the lien attaches as of the assessment date, June 1, and that the lien is not apportionable. The opinion is short, but a very exhaustive analysis

12. On the general subject of tax titles, consult Gill, Missouri Tax Titles (1938).
13. 199 S. W. 2d 409 (Mo. 1947).
14. 34 Mo. 390 (1864).

of the principal case and earlier authorities will be found in a recent number of the *Missouri Law Review*.[15]

Statute of Frauds

In *Vanderhoff v. Lawrence*[16] it was held that, where a tenancy from year to year arises by virtue of occupancy and payment of rent under an oral lease of farm lands which is unenforceable under the Statute of Frauds, no notice is required to terminate the tenancy at the end of the period stipulated in the unenforceable oral lease. The case is fully discussed in a recent number of the *Missouri Law Review*.[17]

Easements

State ex rel. *State Highway Commission v. James*[18] holds that the State Highway Commission has the power to condemn the right of access to highways, under the Missouri Constitution of 1945, Art. IV, Sec. 29. The limited-access highway is a relatively new development, and presents a multitude of legal problems many of which are as yet unanswered in any jurisdiction. The best discussion of these problems is in a leading article in a recent issue of the *Missouri Law Review* by Wilkie Cunnyngham, Assistant Attorney, Missouri State Highway Department.[19]

In *Evans v. Roth*,[20] a case of first impression, the court held that property owners showing special damage could bring suit in equity to enjoin violation of a zoning ordinance without having exhausted the remedies available under the statute and ordinances, where the statute and ordinances did not provide a plain, complete, and adequate remedy. The case and its ramifications are fully discussed in a recent number of the *Missouri Law Review*.[21]

Majors v. Bush[22] was an action to enjoin defendant from using a lane over plaintiff's land. The evidence indicated that prior to 1924 defendant

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15. Aulgur, *Recent Cases* 12 Mo. Law Rev. 228-230 (1947). Presumably the rule of the principal case will apply under the provisions of the 1945 Constitution, the significant date being January 1 instead of June 1.
16. 206 S. W. 2d 569 (Mo. 1947), affirming Vanderhoff v. Lawrence, 201 S. W. 2d 509 (Mo. App. 1947).
17. Russell, *Recent Cases* 13 Mo. Law Rev. 324-327 (1948).
18. 205 S. W. 2d 534 (Mo. 1947).
19. Cunnynham, *The Limited-Access Highway from a Lawyer's Viewpoint* 13 Mo. Law Rev. 19-44 (1948).
20. 201 S. W. 2d 357 (Mo. 1947), *reversing* Evans v. Booth, 197 S. W. 2d 718 (Mo. App. 1946).
21. Icenogle, *Recent Cases* 13 Mo. Law Rev. 124-127 (1948).
22. 200 S. W. 2d 892 (Mo. 1947).

used a lane on *X*'s land, and plaintiff's predecessor in title used an adjoining lane on his own land, the two lanes being separated by a hedge. In 1924 the defendant and the plaintiff's predecessor in title agreed to remove the hedge between the lanes, grade a roadway, and maintain it for their mutual benefit. The parties did remove the hedge and graded the roadway, each paying half the expense, and thereafter defendant did some work in maintaining the roadway. There was considerable conflict in the evidence as to the exact agreement as to the rights, if any, in the combined lane; it would seem to be clear that there was no express oral grant of an easement of way, but there was an "understanding" that defendant would use the lane. The defendant used the lane continuously, without any friction, until 1942 when plaintiff purchased the "servient" land; thereafter disputes finally resulted in this suit for an injunction. The plaintiff's theory was that the defendant had a revocable license only, and that defendant's user for some twenty years had been permissive and not adverse. The defense was that there had been an oral contract to grant an easment, and that the contract had been executed by the parties in pulling out the hedge, and grading and maintaining the roadway [thus taking the contract out of the statute of frauds]; and in addition that she had acquired an easement by adverse user. Judgment for the defendant by the trial court was affirmed. The court held that on either theory the defendant had an easement.

The decision is sound if the parties originally intended a permanent easement, but failed to evidence their intention with a proper writing. But that is precisely the point where the testimony was least clear. Many cases hold that such an "executed license" is irrevocable by reason of estoppel arising from the licensor's "fraud."[23] On the other hand if the parties intended only a revocable license, no amount of expenditure by the licensee will give him an easement.[24] Judge Charles E. Clark would limit the "executed license" cases to those where the duration of the privilege had been made clear:

> "Instead of the picture of a licensor prevented by the courts from taking advantage of his own fraud, it is suggested that a truer picture is that of the kind, neighborly individual who finds himself outwitted, under this rule of law, by a clever land-grabber. It is a rule of good sense, sound morality, and hence good law that one ought not to expect something for nothing. It is to be noticed that

23. Rerick v. Kern, 14 Serg. & R. 267, 16 Am. Dec. 497 (Pa. 1826), is the leading case.

24. St. Louis National Stock Yards v. Wiggins Ferry Co., 112 Ill. 384, 54 Am. Rep. 243 (1884), where the licensee spent some $12,000.00.

here the ungracious neighbor who refuses to yield to the blandishments of anyone is the one who best protects his property. Surely the law ought not to penalize one for acts of neighborliness."[25]

With reference to the alternative theory, adverse user, if the parties in the principal case did not agree to a permanent easement, the defendant's user under the license was permissive, and would not ripen into an easement by user no matter how long continued under the license. In the principal case, if the original agreement was not for a permanent right, adverse user did not commence until 1942 or later when the license was revoked.

Eureka Real Estate & Investment Co. v. Southern Real Estate and Financial Co.[26] was a case involving the termination of an easement by abandonment. In 1900 a street railway company condemned a right of way through a tract of land. Tracks were built, together with poles and a power line, over the right of way, and a street railway was operated. On a date not stated the Union Electric Company erected poles and lines on the land in controversy pursuant to an oral agreement with or license from the street railway company. In 1941 the street railway company abandoned service over this portion of the line, removing the tracks, but leaving the poles and power line to supply power to a part of the line over which service had not been discontinued. The court, after pointing out that an easement may be terminated by abandonment, held that an easement might be abandoned in part and retained in part, and that in this case the street railway company still had an easement to maintain a power line. The court further held that the Union Electric Company had acquired no right whatsoever to maintain its lines by reason of the license from the street railway company, this use not being within the scope of the easement originally condemned.

Adverse Possession

In *Johnson & Co. v. Mueller*[27] a vendor sued for specific performance of his contract. The contract called for an abstract showing merchantable title, but the abstract furnished showed a break in title. The vendor attempted to close this break by proving in the suit for specific performance that he had acquired a good title by adverse possession. The court quite properly affirmed a judgment for the purchaser on the ground that the

25. Clark, Real Covenants and Other Interests Which "Run With Land" 61 (2d ed. 1947).
26. 200 S. W. 2d 328 (Mo. 1947).
27. 205 S. W. 2d 521 (Mo. 1947).

vendor had not furnished an abstract showing marketable title. The principal case is discussed in a recend number of the *Missouri Law Review*.[28]

A related problem is whether recorded affidavits of adverse possession may be used to establish a marketable title of record. This problem is fully discussed in a recent number of the *Missouri Law Review*.[29] The use of affidavits under Missouri Revised Statutes § 1008 (1939), the thirty-one year statute of limitations, is discussed briefly in a recent comment in the *Missouri Law Review*.[30] This comment is the most thorough study to date of the thirty-one year statute of limitations. There seems to be in some quarters a belief that there is some magic in the thirty-one year period. Mr. Hawkins comes to the conclusion that there are few cases where one needs to rely on the thirty-one year statute, and that most cases can be handled more satisfactorily under the ten or the twenty-four year statutes.

DEEDS

Woods v. Payne[31] is a case of first impression. The signature on a deed for land owned by a married woman was written by her husband, with her implied, if not express, authorization and approval. She acknowledged the deed before a notary public. The court held that the conveyance was effective. Earlier Missouri cases lend support for the rule, but were much more limited in their application.[32]

CONCURRENT OWNERSHIP

Clevidence v. Mercantile Home Bank & Trust Co.[33] was concerned with whether certain checking accounts, savings accounts, building and loan certificate, and bonds were held by a husband and wife as joint tenants with right of survivorship. The real parties in interest were the surviving husband and the wife's legatees, and consequently it was not necessary to determine whether the husband and wife were joint tenants or tenants by the entirety, because the incident of survivorship is the same in both types

28. Brandom, *Recent Cases* 13 Mo. LAW REV. 337-339 (1948). See also Brandom, *Recent Cases* 13 Mo. LAW REV. 246-248 (1948), discussing Leath v. Weaver, 202 S. W. 2d 125 (Mo. App. 1947).

29. Brandom, *Recent Cases* 13 Mo. LAW REV. 337-339 (1948).

30. Hawkins, *The Thirty-One Year Statute of Limitations* 13 Mo. LAW REV. 83-88 (1948).

31. 206 S. W. 2d 335 Mo. (1947).

32. State v. Carlisle, 57 Mo. 102 (1874), name of witness signed to written statement by another, at witness' request, he being too weak to sign.

Radley v. Meek, 178 Mo. App. 238, 165 S. W. 1192 (1914), one person may authorize another to sign his name to contract (dictum).

33. 199 S. W. 2d 1 (Mo. 1947).

of concurrent ownership. The statutory presumption of joint tenancy in the bank accounts was raised by Missouri Revised Statutes §7996 (1939), the accounts being in the name of "husband or wife" and the ledger sheets or signature cards or both being stamped "either of them or the survivor in case of the death of either." There was insufficient evidence to overcome the presumption of joint tenancy. The building and loan certificate was made to "Husband and/or Wife or the survivor of either;" there was affirmative evidence that the parties intended joint tenancy and the court so held.

A more difficult and interesting problem was presented by the bonds. They were purchased with wife's funds, and were not in the joint names of husband and wife. The husband's claim was based principally on the fact that at the time of the wife's death they were in a joint safe deposit box, for which husband and wife had signed a "Joint Deposit Agreement" included in the rental contract. The joint deposit agreement provided that it was agreed between the husband and wife that all property placed in the box shall belong "to said lessees jointly, as joint tenants with the right of survivorship." On the basis of this agreement the trial court found a joint tenancy and awarded the bonds to the surviving husband. The supreme court reversed the trial court on this point. Without deciding whether the joint deposit agreement raised a presumption of joint tenancy, the court holds that any such presumption was rebutted here by the facts that the bonds were purchased with the wife's separate funds and were not in their joint names. There was "no evidence indicating that Mrs. Forster intended to or did create a present joint ownership of these bonds merely by depositing them in the joint box." While the court does not examine the problem at length, it is clear from the decision that such a joint deposit agreement does not *ipso facto* create a joint tenancy.

MORTGAGES

Lewis v. Gray[34] involved two principal points: first, whether a purchaser's interest under a contract for the sale of land could be mortgaged; and second, whether such mortgage was entitled to be recorded, and hence gave constructive notice, at least where such mortgage was in the chain of title. In 1941 vendor and purchaser entered into a written contract for the sale of land, under which the purchaser was to have possession, and the

34. 201 S. W. 2d 148 Mo. (1947).

vendor was to give the purchaser a deed when half the purchase price had been paid, the balance to be secured by a purchase money mortgage. This contract was not recorded. In 1944 the purchaser executed a note to one Lewis, secured by a deed of trust on his interest under the contract. The deed of trust was duly recorded. Four months later the purchaser assigned the contract to one Gray who later claimed to have no actual knowledge of the deed of trust, although the evidence was conflicting on this point. The principal problem was whether the assignee, Gray, took subject to the lien of the deed of trust. The vendor's security interest under its contract was not disputed.

The court held that after the execution of the contract, the purchaser had equitable title to the land, an interest which he could mortgage. The soundness of this doctrine is beyond dispute. The "equitable mortgage" resulting therefrom is equitable only because the mortgagor's interest is equitable, and is to be distinguished from the various "equitable mortgages" which equity creates, *e.g.*, the deed absolute on its face held to be a mortgage, or the parol transaction not satisfying the statute of frauds held to create a mortgage, *et cetera.* The chief difficulty in the principal case was the following statement in an earlier Missouri case:[35] "The equitable title of the vendee under a contract of sale arises, if at all, through performance, or an unconditional tender of performance, on his part." The question in that case was whether the purchaser could require the vendor to convey legal title, and the words "equitable title" were not the most apt where the court meant "the right to a deed conveying legal title." In the principal case the court properly confines the quoted statement to the facts in that case.

The court further held that a mortgage of an equitable title was entitled to be recorded. The chain of title was as follows: vendor to purchaser; purchaser to assignee. The recorded equitable mortgage was after the purchaser got equitable title and before he assigned, and consequently the mortgage was in the chain of title and the assignee had notice of it by reason of the record.

35. Wright v. Lewis, 323 Mo. 404, 410, 19 S. W. 2d 287, 289 (1929).

TAXATION

PAUL G. OCHTERBECK*

During the year 1947, the cases decided by the Supreme Court of Missouri in the field of taxation covered many different phases of this subject. These cases are discussed under the following topics: I—Assessments—Increase in Valuation; II—Compromise of Disputed Claim for Sales Tax; III—Drainage and Sewer Taxes; IV—Estate and Inheritance Taxes; V—Exemption From Taxation; VI—Injunctive Relief; VII—Lien of Taxes; VIII—Municipal Taxes; IX—"Involuntary" Payment of Tax; X—School Taxes; XI—Tax Sales and Titles; XII—Unemployment Compensation Taxes.

I. ASSESSMENTS—INCREASE IN VALUATION

In *State* ex rel. *Lindell Tower Apartments v. Guise*[1] and *State* ex rel. *Daniel Boone Apartments v. Guise*,[2] the taxpayers were each given an insufficient notice of an increase in the assessed valuation of their real estate; however, by appearing and contesting the increase, the taxpayers were held to have waived the insufficiency of the notice of increase.

II. COMPROMISE OF DISPUTED CLAIM FOR SALES TAX

In *State* ex rel. *St. Louis Shipbuilding & Steel Co. v. Smith*,[3] the taxpayer failed to make sales tax returns on the ground that the transactions were in interstate commerce and exempt, with the result that an arbitrary assessment was made. The taxpayer to avoid litigation offered to pay the tax and 6% interest instead of the 3% per month interest due under the statute. The State Auditor accepted this offer. After certain interstate sales were held exempt from sales tax, the taxpayer claimed that the State Auditor had no authority to compromise the claim for interest and that the taxes should be refunded. The court held that while the amount of the tax could not be compromised under section 51 of Article IV of the Constitution of 1875,[4] still the State Auditor had authority to compromise the interest penalty, and that therefore the compromise was valid and the tax not recoverable.

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1. 206 S. W. 2d 320 (Mo. 1947).
2. 206 S. W. 2d 324 (Mo. 1947).
3. 356 Mo. 25, 201 S. W. 2d 153 (1947).
4. When this section was readopted as section 39 (5) of Article III of the Constitution of 1945, the words *"without consideration"* were added. This addition may permit the amount of the tax to be compromised.

III. Drainage and Sewer Taxes

In *St. Ferdinand Sewer Dist. of St. Louis County v. Turner*,[5] a sewer district was held not covered by the term "other political subdivision" and the collection of delinquent sewer taxes was held not to involve "construction of revenue laws" within constitutional provision fixing the jurisdiction of the supreme court.

IV. Estate and Inheritance Taxes

In *Priedeman v. Jamison*,[6] a will directing that all inheritance, succession and estate taxes, assessed against testator's estate or any legatee or devise named in will, be paid by executors, so that legatees and devisees should receive legacies and devises in full, free of all taxes, was held not to prevent the executors from recovering the allocable portion of the federal estate tax from the beneficiary of an insurance policy under the provisions of section 826(c) of the Internal Revenue Code. This section provides for such recovery unless the decedent directs otherwise in his will. The foregoing testamentary provision was held not broad enough to include the beneficiary of a life insurance policy. In *St. Louis Union Trust Co. v. Poe*,[7] a widow's dower in the real and personal estate of her husband was held properly included in his "gross estate" for federal estate tax purposes and the whole federal estate tax properly paid out of the personal estate by the executors. The question of whether the devisees of the real estate could be made to bear their proportion of the federal estate tax was held not a proper matter for determination by exceptions to the final settlement.

In the case of In re *Gartside's Estate*,[8] the court determined the rule to be followed in Missouri in assessing inheritance taxes where there is a compromise settlement of a will contest suit. The court held that an heir who brings a will contest is claiming the property in his own right under the statutes of descent and distribution; that when such heir takes property under a compromise agreement in settlement of will contest, the legatee renounces so much of the legacy and contestant takes the property as heir and not as assignee of the legatee; and that the amount of inheritance tax must be determined on the basis of actual distribution of property pursuant to the compromise agreement even though the will as a result of compromise agreement was admitted to probate.

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5. 356 Mo. 804, 203 S. W. 2d 731 (1947).
6. 356 Mo. 627, 202 S. W. 2d 900 (1947).
7. 356 Mo. 276, 201 S. W. 2d 441 (1947).
8. 207 S. W. 2d 273 (Mo. 1947).

See the case of In re *Burroughs' Estate,*[9] discussed under subdivision "V" hereof on the question of a devise to build a Masonic Temple as being exempt from inheritance taxes.

V. Exemption From Taxation

In the case of In re *Burroughs' Estate,*[10] property was devised to a trustee for the purpose of erecting a Masonic Temple in Mexico, Missouri, to be used exclusively by Masonic bodies for Masonic purposes only and in which no commercialism was involved. This was held exempt from inheritance tax as a devise to charity. The court carefully pointed out that where a portion of a building sought to be exempted from inheritance tax on the ground that it was devised to charity is leased for commercial purposes, such property is not exempt, even though the proceeds are used for charitable purposes.

In *St. Louis Provident Ass'n v. Gruner,*[11] the court held that under the statute prior to 1945 constitution, the state's tax lien on realty attached on first day of June of each year for entire tax due during the following year, and hence a tax exempt charitable corporation which purchased a lot on February 26, 1944, was liable for all taxes due in 1944 on the June 1, 1943 assessment without right of apportionment.

In the case of *Chamber of Commerce v. Unemployment Compensation Commission,*[12] the court held that even though many of the activities of the Chamber of Commerce were devoted to purely charitable purposes, still it was not exempt from the Unemployment Compensation Law on ground that it was operated exclusively for "charitable purposes" or "educational purposes" where it had power under its charter and did in fact promote trade and commerce in the community.

In the case of *Chesed Shel Emeth Society v. Unemployment Compensation Commission,*[13] a non-profit cemetery corporation was held not exempt from unemployment taxes. Cemeteries were expressly held not exempt from unemployment taxes and the fact that the corporation was also engaged in religious and charitable activities was held to make no difference.

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9. 206 S. W. 2d 340 (Mo. 1947).
10. 206 S. W. 2d 340 (Mo. 1947).
11. 355 Mo. 1030, 199 S. W. 2d 409 (1947).
12. 356 Mo. 323, 201 S. W. 2d 771 (1947).
13. 356 Mo. 726, 203 S. W. 2d 454 (1947).

VI. Injunctive Relief

In the case of *Baxter v. Land Const. Co.*,[14] the court held that an injunction suit or suit in equity will not lie where a taxpayer has an adequate statutory remedy; that under the statute providing for hearing after notice of property owners' objections by board of park commissioners responsible for letting street improvement contracts and providing judicial review of its determination, taxpayer had an adequate remedy; and that an injunction suit to test the board's proceedings would not lie.

In the case of *Kellams v. Compton*,[15] injunctive relief was denied after carefully reviewing a school bond election. See discussion of this case under subdivision "X" hereof.

VII. Lien of Taxes

In the case of *Collector of Revenue v. Parcels of Land*,[16] the court reaffirmed its decision in *Spitcaufsky v. Hatten*,[17] that the priority and parity provisions for tax liens provided by the Land Tax Collection Act[18] applying to Jackson County are to be construed as operating prospectively only.

In *St. Louis Provident Ass'n v. Gruner*,[19] the court held that under the statute prior to the 1945 Constitution, the state's tax lien attached on the first day of June of each year. This same rule was followed in *St. Louis Union Trust Co. v. Poe*.[20]

VIII. Municipal Taxes

A. *Inspection fees.* In the case of *Kansas City v. School District of Kansas City*,[21] the court held that regulatory ordinances of a city availing itself of the privilege of local self-government requiring fees for the inspection of boilers, smoke-stacks, fuel-burning facilities and elevators in so far as applicable to inspections of the facilities of public school buildings were not invalid as an unconstitutional usurpation of the powers of the General Assembly.

B. *Earnings tax.* In the case of *Carter Carburetor Corporation v. City of St. Louis*,[22] the court held that the City of St. Louis "earnings tax" of

14. 206 S. W. 2d 325 (Mo. 1947).
15. 206 S. W. 2d 498 (Mo. 1947).
16. 356 Mo. 1133, 205 S. W. 2d 568 (1947).
17. 353 Mo. 94, 182 S. W. 2d 86 (1944).
18. Missouri Laws (1943), p. 1029.
19. 355 Mo. 1030, 199 S. W. 2d 409 (1947).
20. 356 Mo. 276, 201 S. W. 2d 441 (1947).
21. 356 Mo. 364, 201 S. W. 2d 930 (1947).
22. 356 Mo. 646, 203 S. W. 2d 438 (1947).

one-fourth of one per cent on gross salaries, wages and commissions and on profits, covering not only residents but nonresidents, with respect to activities in St. Louis, imposed for general revenue purposes, was not a "license tax" under police power, but a species of "income tax" or "excise tax"; and that this tax was not within city's power, regardless of whether imposition of pure revenue tax on nonresidents working within city is in itself invalid, and notwithstanding charter provision authorizing taxes for all general and special purposes "on all subjects or objects of taxation." Since the decision in this case, the legislature has authorized the City of St. Louis to collect a similar earnings tax of one-half of one per cent.[23]

C. *Tax on bank stock.* In the case of *First Nat. Bank of St. Joseph (Missouri Valley Trust Co., Intervener) v. Buchanan County,*[24] the court held that the ordinance adopted by St. Joseph April 29, 1946, levying ad valorem tax on shares of stock of all banks in city, was valid and operative for 1946, since statutes expressly repealing the power of first-class cities to levy such tax and the constitutional provision giving the state exclusive power to tax intangible personal property, including income of banks, did not become operative before July 1, 1946, when liability for city tax for 1946 was already fixed and hence could not be extinguished by the legislature and was expressly continued by provision in schedule of the 1945 Constitution; and that the statute imposing a state tax on income of banks was inoperative as to national banks in St. Louis during the tax year 1946, since the stock of such banks was subject to an ad valorem tax levied by city for 1946 and the power of the state to tax national banks is expressly limited to one of the four methods authorized by statute.

D. *Bridge tolls.* In the case of *City of St. Louis v. Cavanaugh,*[25] the court held that an ordinance of the city of St. Louis requiring payment of bridge tolls was valid, and enforcement of the ordinance against taxpayer did not deny him due process, notwithstanding that original ordinances for submitting propositions of bond issues to the people recited that the bridge should "at all times be and forever remain" a free bridge, and that the bridge was operated for many years as a free bridge. The power of the City of St. Louis to repeal ordinances providing for a free bridge across the Mississippi river was held incidental to power to enact them, and

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23. Missouri Laws (1947) Vol. 2, p. ; Mo. REV. STAT. ANN. § 7780.4—§ 7780.12.

24. 356 Mo. 1204, 205 S. W. 2d 726 (1947).

25. 207 S. W. 2d 449 (Mo. 1947).

aldermen could not bind their successors in office with reference to matter of tolls, nor did taxpayer have vested right to have the original ordinances remain in force.

IX. "Involuntary" Payment of Tax

In the case of *State* ex rel. *S. S. Kresge Co. v. Howard*,[26] the court held that where a foreign corporation that was doing business in Missouri had amended its charter so as to continue in business for a longer period than authorized under the original charter and had again paid a domestication tax which was illegally exacted because, under the new corporation code, a foreign corporation is entitled to have a charter amendment extending its corporate life filed and authority to do business continued without being required to pay another domestication tax, and the corporation was faced with forfeiture of its right to continue in business in the state and with other penalties unless the domestication tax was paid, the payment was "involuntary," entitling the corporation to refund by state.

X. School Taxes

In the case of *Linn Consol. High School Dist. v. Pointer's Creek Public School Dist.*,[27] the court held that the statute requiring a common school district to maintain an eight month's grade school, and the statute requiring such district to pay tuition of its children who have finished the grades and attend high school in another district, are mandatory to the extent that the district can comply by levying the rate of taxes permitted by the Constitution; and that the difference between a debt incurred by school district by voluntary contract and one imposed by mandatory terms of a statute is that the former is void if beyond revenue actually provided for the year, while the latter is valid if within the revenue which could have been provided.

In the case of *Kellams v. Compton*,[28] the court held that where a school bond election was held and the board certified that 1,739 ballots were cast, 1,147 ballots for loan, 569 ballots against loan, and 23 void ballots, the void ballots were not to be considered; that the bond issue received the necessary statutory and constitutional two-thirds majority; and that where the official notice of a school bond election stated that the purpose of the election was to authorize the board of directors to incur indebtedness and

26. 208 S. W. 2d 247 (Mo. 1947).
27. 356 Mo. 798, 203 S. W. 2d 721 (1947).
28. 206 S. W. 2d 498 (Mo. 1947).

to issue bonds for the purpose of erecting and constructing athletic field bleachers, constructing and erecting a sixteen-room high school building and a four-room elementary school, the notice followed substantially statutory language and projects were not so unrelated and incongruous as to constitute logrolling and fraud on voters.

XI. Tax Sales and Titles

In *Moore v. Brigman*,[29] the court held that a tax sale of realty worth $200 to $800 at third offering thereof for $155, which was more than enough to pay delinquent taxes, interest and charges, was not a "froud" upon the state and consideration was not so grossly inadequate as to constitute conclusive evidence of fraud, warranting setting tax sale aside, in absence of evidence of irregularity, mistake, fraud or unfairness.

In *Kelley v. Waymeyer*,[30] a tax deed was held not invalid or defective because the advertisement for the sale did not show whether it was for a first, second, or third offer, nor state the name of the owner of the land.

In *Kansas City v. Tiernan*,[31] the court held that where the city bid in property at a city tax sale and the city treasurer issued to the city a tax deed, but taxes for which sale was made were transferred to back tax records and carried as delinquent taxes, city did not acquire title by such deed and property was not exempt from taxation; and that where the city secured a condemnation judgment December 1, 1928, under which the last installment of assessments to pay compensation was due June 30, 1939, a special execution issued June 2, 1942, was not timely so that a sheriff's deed executed pursuant to a sheriff's sale under such special execution was void as a muniment of title in hands of the city as against claim of a purchaser of property at a city tax sale.

XII. Unemployment Compensation Taxes

A. *Finality of Assessment.* In the case of *Henry v. Manzella*,[32] the court held that a taxpayer who did not avail himself of statutory opportunity to determine the amount of unemployment compensation taxes due by trial before the Unemployment Compensation Commission, with review by circuit court and further review in appellate court, could not try the administrative proceeding on its merits by a motion to quash execution based on judgment for the tax.

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29. 355 Mo. 889, 198 S. W. 2d 857 (1947).
30. 356 Mo. 1043, 204 S. W. 2d 744 (1947).
31. 356 Mo. 138, 202 S. W. 2d 20 (1947).
32. 356 Mo. 305, 201 S. W. 2d 457 (1947).

B. *Successor Employing Units.* In the case of *Bucklin Coal Mining Co. v. Unemployment Compensation Commission,*[33] the court held that where the owner of all stock in a coal mining company organized another company wholly owned and controlled by himself and caused all assets of first company to be transferred to new company which continued predecessor's business, new company was a successor employing unit against whom delinquent contributions to unemployment compensation fund due from predecessor should be assessed and whose rate of contributions should be determined by predecessor's employment experience.

In the case of *Leibson v. Henry,*[34] the court held that where the directors of a corporation, after forfeiture of corporate license for failure of corporation to file annual registration report and anti-trust affidavit, acted beyond their powers as statutory trustees in that they continued to operate corporation's business instead of winding up corporation's affairs, the directors were personally liable for unemployment contributions which had been assessed against corporation during continuance of operation of the business after forfeiture of the corporate license.

C. *Corporation and Individual as One Employing Unit.* In the case of *Waring v. Henry,*[35] the court held that the evidence sustained the finding of the Unemployment Compensation Commission that the corporation which operated a bus line and another bus line which was wholly owned, operated and controlled by the majority stockholder in the corporation should be treated as a single employer, within affiliate clause of Unemployment Compensation Law.

D. *Exemptions.* See discussion under "V" hereof relating to cemetery corporation and chamber of commerce which unsuccessfully claimed that they were exempt from Unemployment taxes.

TORTS

GLENN A. MCCLEARY*

The increase in the work of the court during the year is seen in the number of decisions involving liability for tort. There seemed to be a larger number of interesting situations to be decided under familiar doctrines in

33. 356 Mo. 313, 201 S. W. 2d 463 (1947).
34. 356 Mo. 953, 204 S. W. 2d 310 (1947).
35. 356 Mo. 749, 203 S. W. 2d 470 (1947).

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this field of the law. For adequacy of treatment the cases involving the humanitarian doctrine are discussed elsewhere in this issue by Mr. Becker.

I. Negligence

A. *Duties of persons in certain relations*

1. Suppliers of gas and electricity

The defendant, in *Golden v. National Utilities Co.*,[1] furnished artificial gas to the general public in Brookfield and was charged with permitting some of such gas to leak from its service pipe leading from the main in the street to the plaintiff's basement, so that gas accumulated therein and exploded, thereby causing the death of plaintiff's wife when she went to the basement to light the gas water heater. The petition charged general negligence. The defendant contended on appeal that no submissible case was made for the jury because the record disclosed no actual or constructive notice to the defendant of the escape of its gas. The evidence showed that the gas pipes had been laid more than forty years, were wrought iron and subject to corrosion and rust. A previous tenant of the premises had made three complaints about the low gas pressure, these complaints extending over a period of approximately seven months, the last complaint being about eight months prior to the explosion in question. At the time of the last complaint the service representative of the defendant dug up six or eight feet of the approximately forty-five feet of the service pipe, the portion excavated being between the street and the curbing in front of the house. It was found to be "stopped up, corroded, rusted out," and, being unfit for use, was removed and replaced with new pipe. There was a leak in that pipe. The service representative did not know of the condition of the remainder of the service pipe, but testified that there was no reason to believe it was in any better condition than the portion removed. However, the remainder of the service pipe extending on in to the house was neither excavated for examination nor checked for leaks. After the explosion in question, an excavation of another portion of the service pipe between the side-walk and the curbing, and only eight or ten inches nearer the house than the portion excavated earlier, developed that there was a large hole, an inch and a half in size, in that portion of the service pipe. That hole was only 41 feet from the house and was sufficient to let all gas out of the service pipe. Some time later the entire service pipe extending on into the

1. 356 Mo. 84, 201 S. W. 2d 292 (1947).

basement of the house was excavated, and was found to be rusty and cracked open at a point only twenty-one feet from the house. The soil around the pipe along the entire service line to the basement wall was a bluish gray, indicating escaped gas. The evidence also disclosed that the basement wall had cracks therein. The court ruled that the facts constituted sufficient notice not only of a dangerous condition, but that gas might seep into the plaintiff's nearby basement and be caused to explode. While the defendant was not an insurer, it was carrying in its pipe near to and in to the residence a commodity which was known to be highly dangerous, because of its well-known tendency to escape from the mains and percolate through the earth into cavities or openings, and there burn or explode. The defendant under these facts is charged with a very high degree of care in the transmission and control thereof commensurate with the dangerous character of the commodity it handles, and should be constantly vigilant to keep the gas confined in its pipes. "There was a duty," held the court, "on appellant (the defendant below) to find out whether gas was escaping from other parts of the service pipes, but instead of making further examination appellant was content to excavate and replace only six or eight feet of the service line."

On an appeal from a judgment for the plaintiff for the death of the plaintiff's husband as a result of coming into contact with high voltage electric current on the platform of a substation of the emloyer of the husband, the defendant contended, in *Atherton v. Kansas City Power & Light Co.*,[2] that it owed the deceased no duty to warn and therefore was not negligent. In holding an electric utility to the highest degree of care and foresight, the court pointed out that "Electricity is the most dangerous and deadly agency known to man, subtle and invisible, and ordinarily incapable of being detected by the unskilled in electricity." While the substation was located on property of the employer of the deceased and the employer exercised control over it, the defendant was also interested in its operation as its business was generating and selling electric energy for profit. It had the duty of rendering adequate service to all patrons, and in making inspections was promoting its own business. The defendant had inspected the substation two days before the accident and had made recommendations to the deceased, a man inexperienced in electrical substation construction. At the time of his death, the deceased as production manager for his employer and having general supervision over the substation was complying at the

2. 356 Mo. 505, 202 S. W. 2d 59 (1947).

defendant's suggestion with the defendant's recommendations for the maintenance of the substation. There was evidence that he was on the platform at the time of his death because of the recommendations. The deceased had been warned to open the pole top switch and lock it, which was done, but he had not been warned that the pulling of this switch did not disconnect the electric energy from moving over the circuit through the lightning arresters. Evidently the deceased being inexperienced with substation construction proceeded on the theory that the substation had been de-energized upon his disconnecting the pole top switch and that it was safe to work at that place. He came in contact with the lightning arresters or wires leading thereto containing 13,200 volts of electric power. There was substantial evidence that the defendant's inspector had not warned the deceased about the dangers connected with the lightning arresters. It was held that the plaintiff made a submissible case of negligence on these facts.

2. Railroads and other carriers

In *Maxie v. Gulf, M. & O. R. R.*,[3] the action was under the Federal Employers' Liability Act for personal injuries received by the plaintiff who was employed by the defendant in repairing and rebuilding its freight cars at one of its shops, when four boxcar doors, standing behind him, fell upon him. From a judgment for the plaintiff the defendant appealed, one of the grounds for the appeal being the refusal of the trial court of the defendant's motion for a directed verdict based on the alleged failure of the plaintiff to prove facts sufficient to bring his case under the Federal Employers' Liability Act. The act, as amended in 1939, provides that "any employee of a carrier, any part of whose duties as such employee shall be the *furtherance of* interstate or foreign commerce; or shall, in any way directly or *closely and substantially, affect such commerce* as above set forth *shall,* for the purposes of this chapter, *be considered as being* employed by such carrier *in such commerce* and shall be considered as entitled to the benefits of this chapter." (italics the court's.) The trial court instructed the jury, as a matter of law, that at the time plaintiff was injured he "was engaged in interstate commerce or was engaged in the performance of duties in furtherance of interstate commerce." It was admitted that the defendant was engaged in interstate commerce at the time the plaintiff was injured, that the plaintiff was an employee of the defendant when injured, and that he was working at his usual place in the railroad yard and was working on one

3. 356 Mo. 633, 202 S. W. 2d 904 (1947).

of defendant's freight cars. The defendant contended that the freight car was not in interstate commerce at the time when plaintiff was working on it, since it was "dead in the yards." The evidence showed that the defendant maintained two repair tracks at its shop in Mobile, Alabama. Upon one of these repair tracks the defendant ordinarily placed freight cars requiring "running repairs." The cars on this track were put in, repaired and gotten out on the same day and so "kept running." On the other repair track, the defendant placed other cars requiring from light to heavy repairs. These cars were usually empty and remained on the repair track until they were repaired, the cars usually remaining three to six days on this track. If complete rebuilding was required, it might take as much as one or two weeks. On the track where the plaintiff worked, few cars, if any, were repaired in less than three days and often a week or more was required to complete the repairs. Most of the cars on which the plaintiff worked were empty. The car upon which the plaintiff was working at the time of the injury had left East St. Louis, Illinois, September 17, and moved interstate to Mobile, Alabama. During part of the trip it was loaded. It reached the defendant's shops October 16, and was given heavy repairs and re-painted. The work was completed by October 23, the day of the accident, and the car was ready to be moved out. On October 28, the same car, loaded with freight, was delivered to the Southern Railroad for shipment to a point in Tennessee. It further appeared from the evidence that freight cars, which had been used by defendant in interstate commerce, were regularly repaired in these shops, and that many of such cars, after receiving heavy repairs on the repair track where the plaintiff was employed, were put back into use in interstate commerce. In affirming the judgment for the plaintiff, the court held on this evidence that the plaintiff was engaged in "furtherance of interstate commerce" within the meaning of the Act, and that while it was not shown that the freight car upon which the plaintiff was working, nor that any other particular car upon which plaintiff worked, was expressly destined to or set apart for interstate rather than intrastate commerce, yet the facts showed that in the regular course of defendant's business, the cars had been so used and the repaired cars would be and were being so used in interstate commerce.

Interesting questions are presented in *Floyd v. Thompson*,[4] where the action was by an infant for the wrongful death of his father as a result

4. 356 Mo. 250, 201 S. W. 2d 390 (1947).

of alleged violation of the Federal Safety Appliance Act. The defendant, as trustee for the St. Louis-San Francisco Ry., had a judgment in the trial court and the plaintiff appealed. Plaintiff's decedent and the decedent's brother were partners engaged in the business of salvaging scrap metal which they shipped by rail. The defendant had "spotted" two coal cars for loading with scrap on a spur track which had a grade of about three per cent. On the day of the fatality, the brothers and their employees were unloading "junk" automobile motors, weighing an average of about 350 pounds, from the elevated bed of a dump truck into one of the cars. The bed of the dump truck had been so elevated and extended that the "tail end" would stick over into the car. The brake ends of the two cars were together. It was contemplated that the brothers or their employees would move and reset the cars when necessary for loading. As loading progressed and the end of one of the cars had been filled with scrap motors, it became necessary to move the cars. As the deceased and one of the employees undertook to manipulate the brakes, the cars starting moving. No scotches had been placed on the rails at the point where the cars were to be stopped. Due to a failure of the brakes on one of the cars to hold, the "tail end" of the elevated truck was struck by one of the cars, causing a scrap motor to roll from the elevated bed of the dump truck toward the deceased, obliging the men to leave their positions between the two cars, and causing the deceased to fall or to be knocked under the wheels of one of the cars. Since the deceased was not an employee of the defendant interstate carrier, one of the questions was whether the Federal Safety Appliance Act may be the basis of an action for death or personal injury in this case. The court interpreted the Act as applicable on the ground that, while not actually an employee of the defendant carrier, the deceased was within the class of persons entitled to the protection of that Act in its requirement that cars must be equipped with efficient hand brakes. The defendant had conceded that the deceased under his contractual relations with the defendant had occasion to manipulate the brakes of the car when loading. Another question was whether the defense of contributory negligence was available in an action based on the Federal Safety Appliance Act. The Act itself contains no bar to that defense. The Federal Employers' Liability Act does contain a provision affecting the defense of contributory negligence, but that Act is applicable only to employees of common carriers while engaged in interstate commerce. Therefore, whether the defense of contributory negligence was available, where the action is based on the Federal Safety Appliance Act,

was to be determined in accordance with applicable state law. Under Missouri law violation of the Act on the part of the defendant constituted negligence per se but the defense of contributory negligence was available. In view of the incline of the track, the positions assumed by the deceased about the cars, the inexperience of the deceased and the employee in the use of the type of brakes with which the cars were equipped, the court properly left to the jury the question as to whether the deceased used ordinary care of his own safety in releasing or causing the hand brake to be released, without taking precautions of scotching the car wheels or moving the bed of the dump truck away from the car. The judgment for the defendant was affirmed.

Another decision involving liability under the Federal Safety Appliance Act to one not an employee of the railroad is *Rush v. Thompson.*[5] The action against the defendant, trustee for the St. Louis-San Francisco Railway Co., was for personal injuries allegedly caused by use of a railroad car with inefficient hand brakes in violation of the Act. On appeal from a judgment for the plaintiff, one of the contentions made by the defendant was that there was no liability under the Act because the defendant was not acting as a common carrier, the car not being used upon the defendant's line at the time of the accident. The evidence showed that the plaintiff, an employee of the Quarter-master's Department of the United States Army on the Government reservation at Fort Leonard Wood, Missouri, was injured while unloading coal on the switch track, known as the coal spur, from a hopper bottom railroad car onto a conveyor, over which the car had been spotted, when it was struck by another car. The Government had constructed and owned the railroad track with its switch and spurs. This line connected with the defendant railroad some distance away from the Fort. The Government had no engines or rolling stock or crews or inspectors or repairmen to operate thereover. By a contract with the Government, the defendant agreed to maintain and operate the facilities and trackage with their own equipment and crews for the purpose of furnishing government freight and passenger or troop service between the junction and Fort Leonard Wood, including switching at the latter point, but the railroad "shall not perform any common carrier service over said railroad tracks of Government." The defendant had the exclusive right to operate all freight, passenger and switching services to be rendered over the tracks and had covenanted to be re-

5. 356 Mo. 568, 202 S. W. 2d 800 (1947).

sponsible for the inspection and maintenance and repair of all the rolling stock moving over said tracks, agreeing to save the Government harmless from all claims for injuries resulting from any act or omission of defendant in the operation and maintenance by the defendant of the facilities. While the plaintiff was attempting to complete the emptying of one of the coal cars, other men started the next car rolling toward the conveyor for unloading. This was a Wabash car loaded with coal, the shipment having originated in Illinois and destined to Fort Leonard Wood, and was standing about 100 feet from the conveyor. Due to defective hand brakes, the Wabash car could not be stopped before it collided with the car in which the plaintiff was working, causing the plaintiff to fall and the resulting injuries. The court held that the defendant was, under these facts, a common carrier within the Safety Appliance Act; also that liability could not be defeated by reason of its contract with the Government. "The Government's track became a part of defendant's line of railroad; i.e., a railroad engaged in interstate commerce, facilitating the rendition of common carrier service by defendant to the Government and to the general public having occasion to use defendant's services in the transaction of business with the Government; and Wabash car No. 34174 was a car used on defendant's 'line' in said service at the time of plaintiff's injury." The defendant had also contended that the primary purpose of the Safety Appliance Act was for the protection of employees and travelers upon the railroads and not for the protection of persons like the plaintiff, a Government employee engaged in unloading coal. That portion of the title of the Act material to the case reads: "An act to promote the safety of employees and travelers upon railroads . . . , and for other purposes." The court interpreted the Act as extending its provisions beyond the protection of "employees and travelers upon railroads" to persons like the plaintiff, for "efficient hand brakes promote the safety of those who have to move coal cars on spur tracks for the purpose of unloading them as well as the safety of the employees of the railroad."

In *Hampton v. Wabash R. R.*,[6] the administratrix of her husband's estate brought an action under the Federal Employers' Liability Act against the defendant for the death of the husband who was killed by one of the defendant's trains. At the time of his death he was in charge of a gang of men, engaged in raising, ballasting, lining up, and straightening the railroad

6. 356 Mo. 999, 204 S. W. 2d 708 (1947).

track. The track would be raised by jacks, ballast would be shoveled under the ties, and then the deceased with other men working under him would tamp the ballast with eight air hammers before replacing the track. The work was being done in a deep cut on a long curve, the banks of the cut being covered with trees, brush, and shrubbery which tended further to reduce the extent of visibility around the curve to a limit of about 200 feet. Under the defendant's rules, enginemen were to sound the whistle when approaching curves, and when the view was restricted by weather or other unusual conditions enginemen were to sound the whistle at frequent intervals to warn trackmen and others. There was evidence that it was also the practice to sound the whistle all the way around curves in cuts for the protection of the men that might be working on the curve. Because of this long established practice, section men expected and relied upon such warnings. The issue of negligence submitted by the plaintiff was the failure to sound a warning upon going into the curve, and while going around the curve into the cut. Without a whistle the approach of a train could not be heard by the men working at the hammers operated by compressed air, and there was conflicting evidence whether a whistle, if given could have been heard by men working at the hammer. The evidence was undisputed that no whistle was sounded after a warning for a highway crossing was begun about a quarter of a mile before the curve began, and the custom of whistling around curves was not observed, although a "slow board" had been placed at the side of the track about one mile from the place where the deceased was working and train orders had been issued giving notice that men were working on the track in the cut where the extent of visibility of the train crew was greatly reduced. The ten men at the hammers, including plaintiff's husband, were killed by one of the defendant's trains going 75 miles per hour. The court held that these facts constituted substantial evidence of negligence so as to warrant a recovery under the Act.[7]

7. Other cases involving the liability of railroads which do not raise issue of sufficient importance to be set forth at length. In Meierotto v. Thompson, 356 Mo. 32, 201 S. W. 2d 161 (1947), a fireman was not precluded from recovering under the Federal Employers' Liability Act for the loss of an eye which was injured during an attempted repair of a pipe on an engine, on the ground that there was no violation of the Boiler Inspection Act, because the engine had been allegedly taken out of service and was not in use, where entire freight train was placed on sidetrack primarily to permit another train to pass over the main line of track, the attempted repair being made during such wait, and the jury was authorized to find under the evidence that the disconnected pipe rendered the locomotive unsafe to operate without peril to life and limb so as to make the Act applicable. Hold v. Terminal R. R. Ass'n of St. Louis, 356 Mo. 412, 201 S. W. 2d 958 (1947), was an action for death of switchman

3. Automobiles

Most of the cases involving liability arising from automobile collisions decided in the period under review were submitted on humanitarian negligence and are discussed elsewhere in this issue.[8] Three cases in which liability was predicated on primary negligence turned on whether there was sufficient evidence to go to the jury as raised by defendant's motion for a directed verdict. *Schoen v. Plaza Express Co.*[9] was an action by the administratrix for the wrongful death of plaintiff's decedent in an automobile-truck collision on the theory that the defendants failed to keep the truck "as close to the righthand side of the highway as practicable." The circumstances of the collision were not definitely stated by any eyewitness. Plaintiff's decedent was traveling southwardly and the tractor-trailer northwardly. Circumstantial evidence that the automobile which the deceased was driving collided at an angle with the left side of the tractor-trailer combination, and that the automobile and loosened parts of both vehicles were found on the automobile driver's right hand side of the highway, with the automobile door on the other side of the highway, was held insufficient to make a prima facie case for the jury on the issue of alleged negligent operation of the truck too far from its righthand side of the highway. There was no direct evidence given for the plaintiff as to the movement and the relative positions of the tractor-trailer truck and the automobile upon the highway immediately

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who was run over by cars while crossing the tracks to line up another switch. Whether railroad was negligent in that switch foreman should have waited until the switchman reached the switch stand and originated a signal for movement of the trains, and to see that the switchman was in no danger before giving a signal for movement of the train, and whether the switchman was contributorily negligent in assuming that a movement of cars would not be made until he had inspected the switch and had given the signal to move the train, where a train was passing on a nearby track at great speed accompanied with an appreciable amount of noise, were for the jury. Cooper v. Kansas City Public Service Co., 356 Mo. 482, 202 S. W. 2d 42 (1947), involved the sufficiency of the evidence to sustain an instruction to find for the plaintiff, in an action for the wrongful death of the plaintiff's wife when a passenger on defendant's bus, if the bus door was closed on the sleeve or other part of her outer coat while she was exercising ordinary care while getting off of the bus, and the bus started before she could get away therefrom, pulling her along the side of the bus while it was moving and knocking her under the front wheel and running over her. Rose v. St. Louis Public Service Co., 205 S. W. 2d 559 (Mo. 1947), was an action to recover for personal injuries, alleged to have been sustained when plaintiff was allegedly thrown from one of defendant's busses by an unusual motion of the bus as it was coming to a stop to let plaintiff and others off. There was sufficient evidence to sustain an instruction given on behalf of the defendant to the effect that the bus had come to a stop at the time the plaintiff attempted to alight therefrom, that the plaintiff fell as she stepped from the stopped bus, and that she was thrown from the door of the bus by a lurching or jerking of said bus.

8. See *Humanitarian Doctrine*, by Mr. Becker.

9. 206 S. W. 2d 536 (Mo. 1947).

preceding and at the time of the collision. Consequently the facts were insufficient to enable the jury to determine by a reasoning process that the defendants' truck was being negligently driven under the circumstances as specifically alleged. To theorize that the defendants' truck was being negligently driven too far over to the defendant driver's left would be but speculation without a substantial basis of fact.

In the first of two separate cases with the same entitling, *Holmes v. McNeil*,[10] plaintiff's action for personal injuries received in an automobile accident resulted in an adverse judgment when the trial court directed verdicts for the defendant. In the second case, *Holmes v. McNeill*[11] the husband of the plaintiff in the former action sought to recover damages for the loss of the services of his wife and for expenses incurred for nursing and medical attention arising out of the same accident. At the close of the plaintiff's case the court directed a verdict for the defendants. From a judgment sustaining the plaintiff's motion for a new trial, the defendants appealed. The evidence in both cases was that, when the automobile swerved across the street and collided with an electric light pole, the driver was bent over the steering wheel groping on the floor with his left hand and that his right eye at least was open. The court held that this did not necessarily establish the defendants' theory that the accident was due to the unexpected loss of control of the driver's reflex action so as to justify a directed verdict for the driver and the owner of the car who was riding in the rear seat; on the contrary the jury could infer that he was consciously reaching for something on the floor with his left hand and giving his interest and attention to some other matter than operating the automobile.

4. Lessor-lessee relationship

In *Whealen v. St. Louis Soft Ball Ass'n., Inc.*,[12] the plaintiff, a member of a soft ball team in the Municipal Soft Ball Association in St. Louis, was injured while playing in a ball game in that city and while, in the regular course of the game, he was attempting to retrieve the ball across the left field line into foul territory. He tripped on a piece of wire and fell on some broken glass. The park where the game was played was owned by the City of St. Louis and leased to the defendant under a reservation in the lease permitting the Municipal Soft Ball Association to have the use of

10. 356 Mo. 846, 204 S. W. 2d 303 (1947).
11. 356 Mo. 763, 203 S. W. 2d 665 (1947).
12. 356 Mo. 622, 202 S. W. 2d 891 (1947).

the park on the night in question for the play-off of the championship series. Plaintiff's team was playing under the auspices of the Association in that series. On the nights reserved for the games of the Association the defendant had nothing to do with the park; the Association sold the tickets, retained the proceeds, paid the park employees, the defendant having no control or right of control and receiving no benefits whatever. The plaintiff contended that by the lease it was the defendant's duty to keep the field in a reasonably safe condition, even when the park had been taken over and was being used by the Municipal Soft Ball Association as on the night in question. The court held that the plaintiff did not have the status of an invitee of the defendant and was not owed a duty as such, since the sole right of control of the park at the time and in the playing of the game wherein the plaintiff was injured was, pursuant to the reservation in the lease from the city to the defendant, not in the defendant. As owner the city reserved to itself the use by itself and certain others at times so specifically reserved and, pursuant to such reservation of control and by separate arrangements with the city, the Municipal Soft Ball Association had control and sole right of control of the park at the time and in the playing of the game.

5. Municipal Corporations

McGaugh v. City of Fulton[13] was an action for personal injuries resulting from an explosion when the plaintiff entered his basement with a lighted cigarette in his mouth. His theory was that the explosion was of sewer or natural gas or a combination of both sewer and natural gas. He charged negligence on the part of the city in the construction, maintenance and operation of its municipally owned gas and sewer systems so as to permit gas to escape into the plaintiff's basement. Negligence was alleged in the installation of its pipes, in failing to find and repair a break in the natural gas main about 400 feet from the plaintiff's residence, and in the construction and maintenance of its sewer in the street with an unvented dead end almost in front of the plaintiff's residence. There was evidence that holes in the manhole covers for a distance of approximately 800 feet had been covered with asphalt paving for some time. The natural gas line ran in the parkway in front of plaintiff's residence but did not intersect the sewer lines, the two lines parallelling one another for some distance up the street. No one had previously detected an odor of gas in the basement, and once or twice during the ten day period of plaintiff's occupancy prior to the

13. 356 Mo. 1122, 205 S. W. 2d 547 (1947).

explosion the family washing had been done in the basement, using a coal oil stove. The superintendent of the gas department testified that shortly after the explosion he found a combustible gas in the uncapped cleanout pipe into the sewer in the basement and there was a trace of sewer gas. Two city employees testified that the uncapped cleanout pipe in the basement drain would permit gas to enter the basement. Fifty-eight days after the explosion a complete break in the gas main was found in the street approximately 500 feet from plaintiff's residence. There was no evidence that the house connected with the natural gas main. When the case was submitted to the jury the plaintiff proffered instructions hypothesizing the city's negligence in connection with its sewer system but did not proffer an instruction hypothesizing negligence concerning natural gas. On the appeal, however, the plaintiff claims his evidence demonstrated negligence on the part of the city in connection with both its sewer and natural gas systems. The trial court sustained the city's motion for judgment in accordance with its previous motion for a directed verdict, after a jury had been unable to agree upon a verdict, on the specific grounds that the plaintiff's evidence against the city failed to establish any causal connection between the alleged negligence of the city and the explosion and injuries. On appeal the court held that there was no evidence, either direct or circumstantial, from which a jury could reasonably find the city negligent as to its natural gas system or that any negligent conduct respecting natural gas contributed to cause the explosion and injuries complained of. There was no evidence of a break in the gas line and the escape of gas prior to the explosion, as was found in other cases involving explosions of a similar nature, nor was there any showing of the probable course of natural gas from this or any other broken main discovered after the explosion to the sewer and to the plaintiff's basement. The court found also that, "even assuming negligence in respect to the unvented manhole covers and the proof of 'combustible gas,' there is no evidence from which causal connection between the negligence and the explosion could be found without resorting to mere conjecture and speculation." The trial court was held not to have been in error in sustaining the motion for a directed verdict, nevertheless the judgment was reversed and the cause remanded "since it appears that the plaintiff may be able upon another trial to adduce evidence, hypothetical or otherwise, demonstrating causal connection." Judge Ellison concurred in result, but believed the plaintiff had made a prima facie case.

In *Baumgartner v. Kansas City*,[14] a coalhole cover, imbedded in the sidewalk, tilted when the plaintiff stepped upon it and he fell astride the cover with one leg in the coalhole, resulting in serious injuries. The city contended that there was no substantial evidence that the defect in the coalhole cover, if there was a defect, existed for a sufficient length of time prior to plaintiff's injuries to charge the city with notice, actual or constructive, and, therefore, there was no evidence upon which to base the submission to the jury in the instruction that the city knew of the defect in time to have remedied it prior to the injuries. The plaintiff's theory was that the coalhole cover was "too small, ill fitting and loose" and that the city had timely notice thereof. The evidence established that the coalhole cover had been broken twenty four days before the accident, when a truck driver had dropped a barrel of beer on the cover, and that the truck driver forthwith had procured another lid for the coalhole. Defendant's witnesses testified that they had received a complaint on that day of the cover being broken, that a city employee had made an inspection and had reported that the cover had been repaired by a private party. The evidence also established that "dirt, sidewalk sweepings, and stuff of that character" had accumulated around the edge and the shoulder or flange of the rim of the coalhole to such an extent that difficulty was experienced in replacing or fitting the cover in the hole immediately after plaintiff's injury. A yard clerk and foreman in the Public Works Department of the city testified, from the hundreds of coal or manholes he had seen and inspected, that if the cover had been closely fitted, so that there was no play in it, the dirt and sidewalk sweepings could not get in and under the cover so as to make it work up, and that in permitting dirt and sidewalk sweepings to accumulate under the cover it was permitted to tilt. In affirming a judgment for the plaintiff the court held this defect was discoverable upon an inspection of the surface of the sidewalk and was not latent under the evidence, and that twenty-four days notice to the city of the broken coalhole cover afforded a reasonable opportunity for correcting such a situation on a much used sidewalk.

6. Employer-employee relationship

In *Porter v. Thompson*,[15] the action was for the alleged wrongful death of plaintiff's husband who had been killed by a private watchman for the Missouri Pacific Railroad Company, for which the defendant was trustee.

14. 204 S. W. 2d 689 (Mo. 1947).
15. 206 S. W. 2d 509 (Mo. 1947).

The plaintiff had joined the watchman and the defendant. At the close of the plaintiff's case the trial court had directed a verdict for the defendant and the jury returned a verdict against the watchman. The facts showed that the watchman was stationed at the defendant's freight house and the adjacent yards. During working hours he had gone to a restaurant which was about three blocks from these yards. He had been a frequent visitor there because of his infatuation for a woman who worked in the restaurant. He shot the plaintiff's husband in the back as he was seated at the bar in the restaurant. The theory of the plaintiff's action against the defendant was that the watchman was a man of vicious propensities, violent temper, quarrelsome, and an unfit person to have such position as a private watchman armed with a pistol. The evidence showed that, in his frequent visits to the restaurant during hours while on duty for the defendant, he was always armed with a pistol carried in a scabbard; that he was somewhat careless with the pistol, frequently placing it on the bar; that he would walk about in the restaurant looking like he was mad; that he had been a deputy sheriff in Arkansas and boasted of having killed two persons in Arkansas; that three or four months prior to the shooting of the plaintiff's husband and, while on duty and on the defendant's premises, he had drawn a gun on a janitor of a car loading company and had threatened to blow out his brains. The last incident had been reported to the boss of the person threatened, the latter guessing that the boss had reported it to the defendant. The police had been notified of the watchman's conduct in the restaurant on previous occasions, but the defendant was not. On one occasion the supervisory officer of the watchman was in the restaurant with the watchman, but on that occasion there was no out of order conduct on the part of the watchman. It was also shown that he did not have a private watchman's license from the police commissioners of St. Louis to act as a private watchman, and to act without a license was in violation of a city ordinance. However, it appeared that to secure a license as a private watchman the applicant had to be a resident of St. Louis for three years. It does not appear in the decision how long it had been since the watchman had come from Arkansas, but it is implied that it had not been a sufficient period to qualify for a private watchman's license in St. Louis. After the shooting the watchman was adjudged insane. The court ruled that the evidence did not make a submissible case under the rule of *superior respondeat*, as the watchman was not acting within the scope of his employment at the time of the shooting in the restaurant, nor was

a submissible case made out on the theory that the defendant was negligent in employing a watchman of vicious propensities. The burden was on the plaintiff to show that the defendant knew or should have known of the watchman's vicious propensities to make the defendant liable on the theory of negligence.

Graczak v. City of St. Louis[16] was an action by a blacksmith who was employed by the city for injuries resulting from his helper's failure to give the proper signal of intention to operate a heavy steam hammer which struck the blacksmith's hand. The plaintiff recovered a judgment in the trial court and defendant appealed. Plaintiff's theory was that the defendant breached its nondelegable duty to provide plaintiff with a reasonably safe place to work in that the helper, also an employee of the city, failed to heed and to give the customary signals and warnings. The defendant's theory was that the helper's negligence was merely incidental to the work itself, an operative detail, and had no direct relation to the safety of the place of work. The case was tried on the theory that they were fellow servants. In reversing the judgment for the plaintiff, the court followed the well established doctrine that "where an appliance is reasonably safe to operate, and its operation necessarily rests upon the care, intelligence, and fidelity of the fellow servants of the person injured, the master will not be held responsible for an accident the nature of which indicates that it must have been due to the manner in which the appliance was operated by one of those workmen." Furthermore, that the master's duty to provide a safe place to work is not deemed to have been violated where the unsafety is caused solely by the acts of coservants in failing to warn each other as to the existence of dangerous conditions which have already supervened. In the instant case the steam hammer was in proper condition and there was no question as to the competency of the helper. The plaintiff's injury did not result from any fault of plan, or construction, or defect, or lack of repair, or want of safety in the defendant's place of work or of the machinery used therein, or in the manner ordinarily used; instead, the injury was attributable to a danger incidental to the performance of the duties of a competent fellow employee in an operative detail of the work in which they were engaged at the time.[17]

16. 356 Mo. 536, 202 S. W. 2d 775 (1947).

17. In Ackerman v. Thompson, 356 Mo. 558, 202 S. W. 2d 795 (1947), a railroad employee who had worked continuously for more than 10 years as a fireman, engineer and brakeman until his discharge, was within the service letter statute so as to require railroad to furnish a service letter, notwithstanding he was not called for

7. Employer of independent contractor

One of the recognized exceptions to the general rule, that an employer of an independent contractor is not liable for the negligence of the contractor, is where the work which the contractor is to do involves a risk of bodily harm to others unless special precautions are taken. Another exception, somewhat overlapping, it where the contractor is to do work which is inherently dangerous to others if unskillfully or carelessly done, and involves a grave risk of bodily harm. In *Stubblefield v. Federal Reserve Bank of St. Louis,*[18] the owner of a building had employed an independent contractor to make alterations and additions to its building. The general contractor employed a subcontractor to remove and reset cornice stones, weighing from 300 to 500 pounds each, on the roof of the building 100 feet above the city street. As the stones were moved the evidence showed that wooden wedges used in the work would fall to the street below unless the workmen held on to them. One of these wedges, 8⅞ inches long and weighing about three and one-half ounces, fell approximately 100 feet from near the top of the defendant's building, striking the plaintiff on the head and shoulder. The court held the owner of the building and the general contractor liable for these injuries, caused by the subcontractor's alleged negligence in failing to erect a barrier over the sidewalk, due to the inherent danger to the passing public on the sidewalk, a danger that could reasonably be anticipated by defendants as being likely to result in injury, if proper precautions were not taken. The giving of instructions which absolved them of liability if the injuries were due solely to the negligence of the subcontractor was reversible error.

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work daily during the last two years, where he held himself available for work when needed and did extra work when called. $5,000 actual damages and $4,000 punitive damages held not excessive. There was substantial evidence of actual malice and legal malice in refusing to give the service letter, thus authorizing an award of punitive damages and damages for mental suffering where the employee was unable to find a position for a long period with another railroad because of such refusal. The court said, "There can be no doubt but that mental pain and suffering is a proximate result of a wrong which affects a man's economic security and prevents him from earning a living for himself and family." In Oganaso v. Mellow, 356 Mo. 228, 201 S. W. 2d 356 (1947), on an appeal by defendants from an order sustaining the plaintiff's motion for a new trial, after verdict for defendant, the acts of a molder employed by foundry company in negligently moving his automobile, which he did not use in his work, so that an independent contractor repairing the foundry building was injured when the ladder on which he was working was knocked over by the bumper of the automobile, were held not to be within the scope of the molder's employment. Neither did the fact that the foundry's maintenance man or molder's foreman told the molder to remove his automobile, so that it would not interfere with repair work of the plaintiff, render the foundry company liable, the foreman or maintenance man having no duties relating to the building or parking of automobiles and thus acting outside the scope of their employment.

B. *Res ipsa loquitur*

One of the questions, in *Stubblefield v. Federal Reserve Bank of St. Louis*,[19] was whether the plaintiff was entitled to submit her cause to the jury upon the mere circumstance of the falling of a wooden wedge and under the facts stated in the previous paragraph, when in her petition she pleaded specific negligence and in addition proved it at the trial. The specific negligence alleged, and proved, was "that defendants failed to erect any barrier, guard or covering over said sidewalk or failed to give notice or warning to persons using said sidewalk that there was danger in walking thereon from falling building and repair materials." The court recognized that had the plaintiff pleaded and relied upon the mere circumstance of the fall of the wedge she would have presented the typical *res ipsa loquitur* situation. However, by pleading and proving, in addition to the fall of the wedge, the failure to erect a barrier over the sidewalk and the failure to warn of the attendant danger, the plaintiff was not entitled to submit her case on that doctrine. The trial court's refusal of her instruction hypothesizing the defendant's liability upon a finding of the inferences permissible under the *res ipsa loquitur* doctrine was upheld.

One of the grounds of appeal, in *Maxie v. Gulf, M. & O. R. R.*,[20] was the submission of the case to the jury under the doctrine *res ipsa loquitur* when the petition pleaded and charged the defendant with specific acts of negligence. The plaintiff was injured when, in his work as an employee of the defendant in repairing freight cars in the defendant's yard, four boxcar doors, which were standing behind him and propped against a post, fell upon him. The plaintiff's petition charged the defendant with negligent failure to *warn*, negligent failure safely to *secure* the doors, and negligent failure to *place* the doors in the usual rack. The court held that the attending facts and circumstances showed an occurrence which in the ordinary course of things does not happen if the one in the exclusive possession and control exercises proper care, and were sufficient to make a case for the jury under the doctrine *res ipsa loquitur* had the plaintiff pleaded general negligence, but he was foreclosed from submitting his cause under that doctrine by the specific allegations of his petition. However, since plaintiff made a case for the jury under the doctrine, the court remanded the cause

18. 356 Mo. 1018, 204 S. W. 2d 718 (1947).
19. 356 Mo. 1018, 204 S. W. 2d 718 (1947).
20. 356 Mo. 633, 202 S. W. 2d 904 (1947).

so that the plaintiff may amend his petition, pleading general negligence only, if advised to do so.[21]

C. *Defenses in negligence cases*

In an action for injuries sustained in a fall down an open elevator shaft from the lobby floor level to the bottom of the shaft, judgment, in *O'Dell v. Dean*,[22] was for the defendant. The cause was submitted on alleged negligence in failing to keep the first floor lobby and elevator reasonably lighted, in failing to provide any guards, locks, railings or other device in and about the elevator shaft and door, and in failing to warn plaintiff of the danger. On appeal, plaintiff assigned error on the admission of evidence and the giving of instructions by the defendant, but the defendant contended that the errors, if any, were wholly immaterial because plaintiff was contributorily negligent as a matter of law, and if no case was made for the jury the errors complained of were immaterial. In reviewing the evidence favorable to the plaintiff, the court ruled that the plaintiff was guilty of contributory negligence as a matter of law, on a showing that he stood before a known open door of a known elevator shaft, looked into the dark shaft where he could not and did not see anything, and then stepped into the shaft without knowing that the elevator was there. The elevator was in an office and business building owned and operated by the defendant. Parts of the building were rented to different tenants, the defendant retaining possession and control of the first floor lobby which was used by the various tenants and their employees. The defendant further exercised control of the elevator and furnished each tenant with a key to the building. The employer of the plaintiff was one of the tenants and had furnished the plaintiff with a duplicate key, the defendant making no objection to tenants furnishing employees with duplicate keys. The elevator was regularly operated by defendant's employees from 7 a.m. to 6 p.m. The operator of the elevator and janitor left the building at 6 p.m. and locked the outside door to the lobby. The elevator cage was left at street level, the lights in the cage were turned off and the door into the shaft was closed. The defendant knew it was quite customary for those carrying keys to go into the building in the evening and holidays and to operate the elevator. The plaintiff also knew that anyone with a key to the building used the elevator at will. The elevator cage could be operated when the lobby door was open and the door

21. This case is noted in 13 Mo. L. Rev. 110 (1948).
22. 356 Mo. 861, 204 S. W. 2d 248 (1947).

could be opened whether or not the elevator cage was at the floor level. The plaintiff had operated the elevator on several occasions, knew the door was apparently worn and that if one slammed the elevator door too hard it would bounce back open, probably halfway or sometimes three-fourths of the way open. A small light located within the elevator cage could be turned on or off from within the cage. The plaintiff knew where the switch was located and had turned it on and off. There never had been any light in the elevator shaft. Probably from a street light outside, the plaintiff testified that there was enough light in the front part of the lobby that he could see the outline of the elevator door. He admitted that there was so little light in the elevator shaft that he could not see a thing. The court distinguished this case from cases where the elevator approach was dimly lighted, or where there was substantial evidence which would have led an ordinarily prudent person to suppose the elevator cage was present, or where there were any facts to justify such a person in thinking the cage was present when it was not. No custom or practice justifying reliance on the presence of the elevator was shown. The plaintiff did testify that he had never before found the elevator door open when the elevator was not there, but he did not assign this as a reason for being satisfied or thinking that the elevator was there on this occasion.

One of the grounds for appeal from a judgment for the plaintiff, in *Rhineberger v. Thompson*,[23] was the contributory negligence of the plaintiff as a matter of law in not exercising the highest degree of care for his own safety while driving his automobile over the crossing of the defendant (trustee and receiver for the Missouri Pacific R. R.) where, in the collision between defendant's train and the plaintiff's automobile, the plaintiff sustained serious injuries. The evidence showed that the defendant's right-of-way to the northward of the crossing curved to the westward and passes the crossing in a continuation of the curve, the east rail being higher than the west one and making the crossing somewhat uneven. The defendant's trains, coming southwardly, pass through a deep cut the banks of which gradually lessen in height until the earth flattens out at the crossing. There was evidence tending to show that the cut absorbs sound waves and that a train coming from the north could not be heard until it was practically on the crossing. At a point 22½ feet east of the east rail at the crossing on a clear day, the sight distance up the track to the right (north) was 537 feet. At

23. 356 Mo. 520, 202 S. W. 2d 64 (1947).

the time of the collision plaintiff testified it was "deep dusk" and at this point he could see but 150 to 200 feet up the track to the northward. The plaintiff was quite familiar with the crossing, having driven over it 800 to 1000 times. The defendant had constructed an automatic signaling device, having a combination of "wig-wag," red light and bell signals, to warn travelers of the approach of trains. At 7:15 p.m. on the day of the accident, plaintiff testified that he had stopped 22½ feet east of the east rail at the crossing and looked both to the north and to the south but did not see anything coming, that he looked at the automatic signaling device but it was not working in any respect, that he started up his car to go across and just as he got his car in low gear and had moved a very few feet he heard a train whistle; that he then looked up the track and saw the train coming 100 feet up the track; that he thought the only thing to do was to back up, but before he could place the car in reverse and let out the clutch the train struck the front fender of his car; that before the whistle was sounded, the plaintiff had heard nothing like a noise of an approaching train; and that he saw no headlight on the locomotive. The court held that on this evidence the trial court did not err in submitting the issues of the plaintiff's negligence to the jury. The circumstance of the silent, unlit and motionless signaling device impliedly assured the highway traveler that the crossing could be made in safety. The court pointed out that, "While one in the exercise of due care would not rely solely upon the performance of defendant of the duty assumed in erecting the signaling device and would use his own senses, yet, a person, although exercising due care, doubtless would feel more secure and would be less vigilant that if defendant's implied assurance that the crossing could be made in safety had not existed."

In the case of *Atherton v. Kansas City Power & Light Co.*,[24] the facts of which are set forth under Gas and Electricity, *infra,* the jury could find that the deceased had taken all precautions within the defendant's warning, and that the dangers attending the high voltage passing over the lightning arrester circuit was not known or obvious to him. Since he was on his employer's property for its proper maintenance and, having followed instructions, if he believed the substation was fully de-energized the court did not think it could as a matter of law hold the deceased contributorily negligent to relieve the defendant of its negligence.[25]

24. 356 Mo. 505, 204 S. W. 2d 59 (1947).

25. Whether contributory negligence is available as a defense to an action based upon the Federal Safey Appliance Act, where the person killed was not an employee of the defendant carrier, see Floyd v. Thompson, 356 Mo. 250, 201 S. W. 2d

In *Durmeier v. St. Louis County Bus Co.*,[26] the action was for personal injuries sustained by the plaintiff bus passenger in a collision of the bus with an automobile going in the same direction, when the bus came to a sudden abrupt stop, throwing him against an object and injuring his back. The plaintiff submitted his case to the jury by an instruction on the *res ipsa loquitur* doctrine authorizing the jury to infer negligence from these circumstances. The trial court gave the following sole cause instruction: "You are instructed that if you find and believe from the evidence that the operator of the motorbus was not guilty of any negligence in the operation of said bus, as such negligence is defined and set out in other instructions; and if you further find and believe that the driver of the automobile mentioned in the evidence suddenly and without warning swerved or turned said automobile into and against or immediately in front of said motorbus at a time when the operator of the bus could not in the exercise of the highest degree of care have avoided a collision; and if you further find that in swerving or turning said automobile in the manner set out herein, the driver of said automobile was guilty of negligence, and that such negligence, if any, was the sole, direct and proximate cause of the collision and injuries and damages (if any) to plaintiff, then your verdict must be in favor of the defendant." The plaintiff contended that the instruction excluded from the jury's consideration negligence on the part of the bus driver, such as keeping a lookout, failing to stop, excessive speed and failure to sound a warning, because such facts were not negatived. The court pointed out the unreasonableness of requiring a defendant to negative in its instruction all of the charges of negligence (six in number) relied upon by the plaintiff in his argument, whereas in submitting his case on the *res ipsa loquitur* doctrine the plaintiff himself specified no acts of negligence.

On appeal, in *Hampton v. Wabash R. R.*,[27] the main facts of which establishing defendant's negligence are set forth under Railroads, *infra*, the defendant contended that it was entitled to a directed verdict on the ground the casualty was a result of the deceased's primary and sole negligence in violating an order requiring him not to operate the compressor unless he

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390 (1947), discussed *infra* under the title, Railroads. Flint v. Chicago, B. & Q. R.R., 207 S. W. 2d 474 (Mo. 1947), involved the question of whether a 13 year old boy was contributorily negligent as a matter of law when struck by train while riding in a truck with a man who was employed to operate the truck and who was making the trip for the special purpose connected with his work.

26. 203 S. W. 2d 445 (Mo. 1947).

27. 356 Mo. 999, 204 S. W. 2d 708 (1947).

had a watchman on the bank. The evidence failed to show that there was a lookout man on the bank at the time of the accident. The court held that the violation of a rule or order of the employer in this case merely concurred with the negligence of the engineer of the fast passenger train in not sounding a warning whistle and was not the sole proximate cause of the accident so as to bar recovery under the Federal Employers' Liability Act. The mere placing of the watchman on the bank would not have insured the safety of the men at work on the track, as he must first discover the approaching train in time to warn the men, then transmit the warning in time for them to reach a place of safety. The giving of this instruction to the deceased did not thereby relieve the defendant of its duty to warn by whistle as prescribed by its rules and by custom and practice, a duty which it owed whether a watchman was stationed on top of the bank or not. Contributory negligence under the Act enters only into the consideration in mitigation of damages.[28]

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28. For the cases involving the defense of sole cause which were predicated on the humanitarian doctrine, see *Humanitarian Doctrine,* p. by Mr. Becker. Other cases in which the sole cause issue was not of sufficient importance to be set forth more fully. Bolino v. Illinois Terminal R.R., 355 Mo. 1236, 200 S. W. 2d 352 (1947) was an action by an administrator (the father) for benefit of father and mother under the Federal Employers' Liability Act for the death of an employee of the defendant when a pushcar, being towed by a motor car, became derailed. The defendant's appeal from a judgment for the plaintiff was based on the trial court's refusal to give a sole cause instruction to the effect that the derailment of the pushcar was caused by the negligent loading of the pushcar by the deceased as to permit equipment to roll off the front end of the pushcar and onto the rail. The court ruled that the evidence was not sufficient to support a sole cause instruction. In Melber v. Yourtee, 203 S. W. 2d 727 (Mo. 1947), the plaintiff was allegedly injured while riding in an automobile with her husband, when it was struck by an automobile driven by the defendant as the latter was making a left turn into a street intersection. The theories of the defense were contributory negligence of the plaintiff, in permitting without protest the car in which she was riding as a passenger to be driven on the street at a place not as close to the right hand side thereof as was practicable, and sole negligence on the part of the plaintiff's husband. The trial court after advising the jury that it was the duty of one driving an automobile on the public highway to drive as close to the right hand side as is practicable, gave the following instruction:

> "if you find and believe that the plaintiff's husband was driving and operating a motor vehicle on Grand Avenue at or near intersection with Magnolia avenue and that plaintiff was a passenger in said automobile and on the 7th day of October, 1945, the said automobile was involved in a collision with the defendant's automobile and if you further find and believe from the evidence that at the time of said collision the automobile in which plaintiff was riding was being operated at a place on said Grand Avenue that was not as close to the right hand side of said Grand Avenue was not practicable and while the negligence of plaintiff's husband is not attributable to plaintiff, yet if you further find and believe from the evidence that plaintiff saw and observed that said automobile was not being driven as close to right hand side of Grand Avenue as was practicable, if so, and if you further find and believe from the evidence that the

D. *Burden of Proof*

In these annual surveys the writer has repeatedly called attention to the efforts of the court to provide a standardized instruction on the burden of proof in the negligence cases.[29] In spite of steady condemnation of a burden of proof instruction which requires the plaintiff to sustain his case *to the reasonable satisfaction of the jury,* or which directs the jury to find for the defendant if the evidence touching the charge of negligence against the defendant does not preponderate in favor of the plaintiff, *or is evenly balanced,* lawyers and trial judges continue to use these phrases. (italics the court's.) In *Leaman v. Campbell 66 Express Truck Lines, Inc.,*[30] the court again cautions against the use of these phrases on the ground that an attempt to state too many technical rules, or to go into degrees of preponderance of the evidence is almost certain to get the matter so complicated that a jury of laymen will have no idea as to what is meant.

In *Quigley v. St. Louis Public Service Co.,*[31] plaintiff on appeal complained of an instruction which told the jury "that the burden of proof is on the plaintiff to prove by a greater weight or the preponderance of the evidence" that defendant was negligent on the ground that the word "credible" was omitted before the word "evidence." The court ruled that this omission placed no additional burden on the plaintiff, and that the plaintiff's complaint being of nondirection, not misdirection, she should have requested a clarifying instruction if desired. The court had informed the jury that they were the sole judges of the credibility of the witnesses and the weight of their testimony, hence they would understand.[32]

II. Malicious Prosecution

Malicious prosecution was alleged by the plaintiffs, in *Ripley v. Bank of Skidmore,*[33] where a persistent effort on the part of the defendant had

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driving of said automobile at a place on said Grand Avenue that was not as close to the right hand side thereof as was practicable, if so, and the acquiescence therein by plaintiff was the sole cause of the collision in question, then the court instructs you that the plaintiff is not entitled to recover and your verdict should be for the defendant."

In reversing a judgment for the defendant, the court held that there was no development of the facts sufficient to base a sole cause claim on the negligence of the plaintiff's husband, or on the part of the plaintiff in failing to protest the place her husband was driving at the time of the accident. The negligence of the husband was not submitted and the negligence of the plaintiff was not actually submitted but assumed only.

29. See annual surveys in the MISSOURI LAW REVIEW beginning in 1937.
30. 355 Mo. 939, 199 S. W. 2d 359 (1947).
31. 201 S. W. 2d 169 (Mo. 1947).
32. Also see Gildehaus v Jones, 356 Mo. 8, 200 S. W 2d 523 (1947).
33. 355 Mo. 897, 198 S. W. 2d 861 (1947).

been made to collect an alleged claim on a note by means of a series of proceedings ultimately directed against plaintiffs' 80-acre farm. The plaintiffs charged the defendants with a design or scheme to use these proceedings maliciously and without probable cause for the purpose of extorting money or land from the plaintiffs. The series of suits was commenced with the bank's filing a suit on a note against John A. Ripley. Ripley had signed the note without receiving any consideration. Summons was attempted to be served while he was in his last illness and insane, and the bank took a default judgment which was void. Shortly thereafter, Ripley died, leaving Alice Ripley, his widow, and other plaintiffs as his heirs who inherited the 80-acre farm. Some time after Ripley's death, the bank filed a claim against his estate on the void default judgment, and later obtained an order for the sale of the farm to satisfy the claim. The plaintiffs by a writ of error coram nobis succeeded in having the default judgment set aside, the court of appeals holding it was void *ab initio*. The bank instituted a mandamus suit which was decided against the bank. Then the bank filed suit against the administrator de bonis non of the estate, seeking to recover on the note and default judgment, and lost. The bank continued to press its claim, through the order of sale it had obtained in the probate court, and had the farm sold. It was purchased by an officer and agent of the bank. The officer then brought a quiet title suit against the plaintiffs. He lost his case on appeal and his deed to the farm from the administrator was canceled. He then sought to recover from the administrator the money he had paid for the farm and an order to sell it to satisfy the lien. Ultimately he lost this suit. The plaintiffs were subjected to continuous litigation for eleven years. In this action for malicious prosecution the plaintiff's petition had been dismissed for failure to state a claim and plaintiffs appealed. The defendants contended that the judgment obtained in the first proceeding by the bank against Ripley, even though a default judgment, was conclusive evidence that the various proceedings were initiated with probable cause to believe they were legally just and proper. In reversing the judgment and remanding the cause with directions to reinstate the petition, the court distinguished between a judgment or finding in favor of the plaintiff in the original action, which is conclusive evidence of probable cause, and the one here on two grounds: the judgment in issue was an *ex parte* judgment since it was obtained by default; and the default judgment was not merely erroneous or irregular but was void *ab initio*. Therefore, the order of the probate court allowing against Ripley's estate the demand based on the

void judgment and the order of sale of the farm were likewise void and no evidence of probable cause. The court also held that "although the original action was against John A. Ripley, the tort complained of in this case is the malicious prosecution of plaintiffs which commenced after his death, and which is based on proceedings ancillary to the void judgment against him to collect the void judgment from plaintiffs or their property. After Ripley's death the original suit was, for the purposes of this action, against plaintiffs herein, represented by the widow as administratrix, who, in effect, became the adversary parties to the bank."[34] The proceedings against the administratrix and against the administrator were also held, for the purposes of this action, equivalent to proceedings against the plaintiffs.[35]

WILLS, TRUSTS AND ADMINISTRATION

GEORGE W. SIMPKINS*

The Supreme Court of Missouri during the year 1947 was called upon to decide a number of novel questions, some of considerably general interest.

PROBATE ADMINISTRATION PROCEEDINGS

Perhaps the case of greatest general interest to lawyers is the decision in the matter of *Sternberg's Estate*[1] discussing the circumstances under which services involving business considerations, when performed by an attorney, are compensable as legal services to be paid for as such by the estate and not to be paid by the executor out of its fee. The case lays down a largely pragmatic test as to when lawyers should participate in business negotiations on behalf of executors, to-wit, the test of whether the other parties to the negotiations were also represented by lawyers. The case further holds that, even though an executor is a lawyer or, as in this instance, employs lawyers on a salary basis, he or it may nevertheless employ outside counsel whose compensation will be allowed as legal fees.

34. The statute of limitations had run on some of the proceedings terminated more than five years before the filing of the present action for malicious prosecution. The court in remanding the cause with directions to reinstate the petition doubted whether the plaintiffs in this action would be permitted to recover actual damages for the expenses incurred in the proceedings which had finally terminated more than five years before the filing of this case. However, the allegations in those cases were necessary in stating a case to recover for successive proceedings, and were relevant on the issue of malice and, therefore, to the right to recover for punitive damages.

35. In Nash v. Normandy State Bank, 201 S. W. 2d 299 (Mo. 1947), there was a good analysis of the necessary elements of an action based on deceit, but the plaintiff facts did not make out a case.

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1. 204 S.W. 2d 761 (Mo. 1947).

The question of what assets should bear the burden of federal estate taxes was before the supreme court in the case of *In Re Poe's Estate*[2] where it was held that the executor should pay federal estate taxes out of the personal estate and could not collect them out of the real estate although the court expressly refused to rule whether, if the personal legatees had brought a separate suit in equity they could have compelled the devisees of the real estate to make contribution. The court further held that with reference to ordinary real property taxes they should be paid out of the personal estate, assuming there was sufficient personal estate. In the slightly later case of *Priedeman v. Jamison*[3] the essential issue was whether or not the burden of federal estate taxes should be apportioned as between testator's residuary estate and the beneficiaries of insurance on his life. Section 826 (c) of the Internal Revenue Code provides that the beneficiaries of policies of insurance must contribute pro rata to the amount of such taxes ". . .unless decedent directs otherwise in will." The court held that the following clause did not constitute such a direction:

> "I direct that all inheritance, succession and estate taxes, both federal and state, which may be assessed against my estate, or against any legatee or devisee in this my Will named, shall be paid by my Executors, so that each legatee or devisee shall receive his or her legacy or devise in full, clear and free of all taxes herein described."

The decision is placed upon the ground that the beneficiary of an insurance policy is not, within the language of said clause, either a legatee or devisee and does not receive part of the testator's probate estate and hence is not entitled to the benefits conferred by said clause.

The issue as to the finality of orders of the probate court was before the supreme court in the cases of *Brune v. Rathbun*[4] and *Boatmen's Nat. Bank of St. Louis v. Bolles*.[5] In the first case it was held that although an order of the probate court selling land which is in fact homestead property, without the required appraisal, is wholly void, there need not be such an appraisal where the land is not homestead, and where, on sale of non-homestead land, the widow's dower is not set apart to her the only effect is to render the sale subject to the widow's dower right, but otherwise the sale is valid. In the latter case it was held that a settlement to revocation of the administratrices who had been replaced by an executor when the will of Hugh W. Thomasson

2. 201 S.W. 2d 441 (Mo. 1947).
3. 202 S.W. 2d 900 (Mo. 1947).
4. 204 S.W. 2d 705 (Mo. 1947).
5. 202 S.W. 2d 53 (Mo. 1947).

was subsequently found was res judicata so as to prevent attack on settlement of claims of the alleged widow, which settlement had been approved by an order of the probate court before the payments were made and were again approved in the settlement to revocation. The case further holds that Section 233 of the Missouri Revised Statutes gives to the probate court broad power to approve compromises of claims of any character of a person who is alleged to owe money to the estate, to hold property of the estate, or to have a claim against the estate for money or property.

Although not strictly within the scope of this discussion, the case of *Sontag v. Stix*[6] is of interest in connection with the finality of orders of a probate court. In that case, brokers had, pursuant to an order of the probate court, sold to the curator of the estate of an insane person notes which the brokers did not know were an illegal investment under the statute. It was held that the brokers were, in fact, protected by such order and were not liable to the estate even though, in fact, such order was improperly made, since, as a matter of law[7] Section 418 of the Missouri Revised Statutes authorizes a curator only to "loan" funds of his ward on the basis of real estate security and does not authorize the purchase of existing real estate mortgage notes.

In Barnes v. Boatmen's Nat. Bank of St. Louis[8] it was held that claims of an alienist for services to administratrices may be established by suit in the circuit court and that probate court does not have exclusive jurisdiction thereof, thereby deciding a matter which had been one of doubt and difficulty in Missouri for a number of years.

In *Hamilton v. Linn*[9] it was held that the one year statute of non-claim does not bar a suit in the circuit court by which plaintiffs seek to have title to real estate vested in them by virtue of alleged payments made to a deceased under a contract for a deed.

Will Contests and other Attacks on Validity of Wills

State ex rel. *Muth v. Buzard*[10] was a proceeding by writ of prohibition to prevent the setting aside by the trial court of a judgment previously rendered by the trial court holding the will invalid, in which judgment it had been

6. 199 S.W. 2d 371 (Mo. 1947).
7. See Re Keisker's Estate, 350 Mo. 727, 168 S.W. 2d 96 (1943).
8. 199 S.W. 2d 917 (Mo. 1947), noted 13 Mo. L. Rev. 89 (1948).
9. 200 S.W. 2d 69 (Mo. 1947).
10. 205 S.W. 2d 538 (Mo. 1947).

found that the widow was the sole heir. It had subsequently developed that there were surviving brothers and sisters who would be entitled to the estate if the will was invalid (subject to the widow's statutory rights of election). The supreme court held that the trial court could not set aside its judgment on the basis of a writ of error coram nobis because the alleged error of fact contradicted the records of the trial court, the verity of which cannot be impugned on a writ of error coram nobis, the issue of heirship having been raised in the pleadings of certain of the defendants in the will contest.

In the case of *Odom v. Langston*[11] the supreme court had previously held that the five year statute of limitations bars a suit by an heir or distributee to have the residuary clause in a will declared invalid on the ground that it violated the rule against perpetuities. This was qualified in the case of *St. Louis Union Trust Company v. Kelly*,[12] which construed the complicated provisions of the will there involved as violating the rule against perpetuities, and then held that this point might be raised by the trustee under the purported will in a suit for instructions. With reference to the prior decision in *Odom v. Langston*, the court said:

> "We think the decision is not in point. It concedes that an executor or trustee under a will may bring a suit for the construction of the will without being subject to statutory limitations. The appellant trustee *is* trustee of the testatrix's will in this case, and it *is* a suit for the construction of the will. The trustee itself raises the perpetuities issue as a live question. Neither is it shown that the trustee has been in adverse possession of the trust property, but only as trustee, for better or worse, whatever the will means and whatever may be its legal effect. We think there is no merit in this point."

The limitation upon the doctrine of presumption of undue influence due to confidential relationship was again pointed out in *Buckner v. Tuggle*[13] where it was held that there was no such presumption unless there was a showing that the ". . .fiduciary beneficiary was active in some way which caused or assisted in causing execution of the will." Likewise, in *State* ex rel. *Smith v. Hughes*[14] it was held that contestants did not make a submissible case of undue influence merely by showing that the beneficiary had dominated the testator's personal conduct and home life, when there was no evidence that

11. 195 S.W. 2d 463 (Mo. 1946).
12. 199 S.W. 2d 344 (Mo. 1947).
13. 203 S.W. 2d 449 (Mo. 1947).
14. 200 S.W. 2d 360 (Mo. 1947).

the beneficiary had suggested the making of the will or even knew about it at the time.

In *Crampton v. Osborn*[15] the issue involved was whether or not a will found in a partially mutilated condition had been revoked after the divorce of testator from his former wife, the sole beneficiary in said will. Following *Sawyer v. French*[16] and rejecting *Childers v. Pickenpaugh*[17] the court held that hearsay testimony of two witnesses who had heard the testator say that he had torn up his will with intent to revoke it was to be considered where it had been introduced without objection and was to be given "its natural probative effect." The court clarified the Missouri law, following the weight of authority outside of Missouri, and held that the declaration of the testator that he did not want his ex-wife to have any of his property and that he had revoked the will was admissible of his intent, although not admissible of the facts themselves. Likewise, and for the same limited purpose, it upheld the admission of the petition in the divorce case in which the testator had charged his ex-wife of being guilty of adultery.

Stewart v. Shelton[18] holds that where a husband and wife had made a joint will pursuant to an oral contract between them, such will was irrevocable after the death of the husband.

Defeating a Widow's Marital Rights

In the cases of *Wanstrath v. Kappel*[19] and *Wahl v. Wahl*[20] the court again had before it the validity of gifts made by a husband during his lifetime which after his death were claimed by his widow to have been made in contemplation of death and with an intent to defraud her of her marital rights. In the first case the court found from the evidence that such a contemplation of imminent death existed, while in the second, likewise upon the evidence, the court found that there was no immediate contemplation of death. The cases represent the further clarification of the rule of law first clearly laid down in Missouri in the case of *Merz v. Tower Grove Bank and Trust Company*.[21]

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15. 201 S.W. 2d 336 (Mo. 1947).
16. 290 Mo. 374, 1.c. 385, 235 S.W. 126, 1.c. 130 (Mo. 1921).
17. 219 Mo. 376, 1.c. 436, 118 S.W. 453 (Mo. 1909).
18. 201 S.W. 2d 395 (Mo. 1947).
19. 201 S.W. 2d 327 (Mo. 1947).
20. 206 S.W. 2d 334 (Mo. 1947).
21. 344 Mo. 1150, 130 S.W. 2d 611 (Mo. 1939).

CASES INVOLVING TRUSTEES

Mercantile-Commerce Bank and Trust Company v. Morse[22] answers questions which have long been unsettled in Missouri and holds that a trustee, in the absence of contrary directions in the instrument, is bound to amortize any premiums over par which the trustee may pay for bonds purchased by it, but is neither obligated nor permitted to accumulate discounts under par which it might pay for such bonds and distribute such discounts to the life tenant when such bonds purchased under par are redeemed. Where a bond is purchased for more than its call price, where the bond is not callable until some future year, then such premium over the call price should be amortized to the first call date rather than all being charged off in the year of purchase. The court thereby adopts in toto the Massachusetts rule, although pointing out that a number of states reject such requirement of amortization, and that such requirement is not in accordance with the Uniform Principal and Income Act adopted by twelve states. The court further held that a provision in a will that the trustee might determine what was principal and what was income as "may seem just and equitable" did not authorize the trustee to act contrary to the rules of law as they are now being laid down by the court, thus illustrating again the illusory nature of attempting to give discretion to trustees in matters which the court determines are questions of law.

Lane v. St. Louis Union Trust Company[23] involved the conflicting claims of the children of the first marriage of the deceased and of her second husband to a trust which had been executed in 1908. The trust provided that upon her death the trustee should pay over the trust estate to her second husband upon receipt from him of a valid waiver of his rights to her estate, otherwise it should be paid to her executors. The court finds as a fact that the second husband had prior to his wife's death abandoned her. The court holds that the trust was a continuing offer which could only become a contract if the husband was still entitled to marital rights at the time of his wife's death. The court further holds that he had forfeited such rights by abandoning her without just cause, applying Section 337 even though it did not provide for such forfeiture when the trust was executed in 1908.

Mercantile-Commerce Bank and Trust Company v. Morse[24] was an action to construe the will of Paul Brown. His will as to the share of one of his granddaughters (now Dorothy Brown Morse) directed as follows:

22. 201 S.W. 2d 915 (Mo. 1947).
23. 201 S.W. 2d 288 (Mo. 1947).
24. 201 S.W. 2d 317 (Mo. 1947).

"(14) As and when my said granddaughter attains the age of thirty (30) years, I direct my Trustee to pay over, deliver and convey unto her one-eighth (1/8) of her portion of the trust estate then in its hands, free of trust.

"(15) As and when my said granddaughter attains the age of thirty-five (35) years, I direct my Trustee to pay over, deliver and convey unto her one-eighth (1/8) of her portion of the trust estate then in its hands, free of trust."

The court held that at age 35 the granddaughter was entitled to receive only one-eighth of the then amount in the hands of the trustee and not one-eighth of the original amount of the trust estate as it had existed prior to the distribution of the first one-eight at age 30. The court rejects the ruling in the somewhat similar case of *Industrial Trust Company v. Hall*[25] where the will had contained a complete division of the trust estate in one paragraph and had referred to the second one-quarter as "another one-fourth" and the final amount as the "other half."

Ervin v. Davis[26] involved the powers of trustees in a deed by which a house was conveyed to named individuals in trust ". . .that said premises shall be held, kept and maintained and disposed of as a place of residence for the use and occupancy of the Preachers of the Methodist Episcopal Church, South, who may from time to time be appointed in said town." The named individuals were, in fact, trustees of the local Methodist Church, South, which was unincorporated and hence was required to hold title to any property in the name of trustees. The court holds that the members of the church (rather than the minister from time to time) were the beneficiaries of the trust and that the powers of the trustees would be governed by the Rules of Church Discipline, even though the normal clause (required by said Rules) providing to this effect was not incorporated in this particular deed.

MISCELLANEOUS

The practical problem in suits involving wills and trusts of determining the jurisdiction of the supreme court and the absolute necessity of there being a definite and positive affirmative showing that more than $7500.00 is in controversy was emphasized in three cases.[27] In *Adams v. Moberg*[28] the court found upon the facts that a contract to devise real estate should be specifically enforced.

25. 66 R.Is. 201, 18 Atl. 2d 629 (1941).
26. 199 S.W. 2d 366 (Mo. 1947).
27. First National Bank of Kansas City v. Schaake, 200 S.W. 2d 326 (Mo. 1947); Hanna v. Sheetz, 200 S.W. 2d 338 (Mo. 1947); McGuire v. Hutchinson, 201 S.W. 2d 322 (Mo. 1947).
28. 205 S.W. 2d 553 (Mo. 1947).