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THE NEW GENERAL CODE FOR CIVIL PROCEDURE AND SUPREME COURT RULES INTERPRETED¹

CARL C. WHEATON*

OBJECTIVES OF CODE

The purpose of our new code is to simplify and liberalize procedure, to the end that litigation shall be expedited and justice be administered with a minimum of technical procedural hindrance. It is the privilege of our appellate courts to construe its provisions so as to permit the accomplishment of the purpose so earnestly sought by its authors.²

Section 2 of the code provides that the code shall be construed to secure, among other things, the just determination of every action. 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.³

The provision in Section 2 that it "shall be construed to secure the just, speedy and inexpensive determination of every action" does not mean that courts are to adopt a construction of the code clearly not warranted by the language of the legislature. If the view was adopted that the falsity of a sheriff's return may be attacked and nullified, it would make it easy for attacks to be made upon the solemn final judgments of courts. This would encourage delay in the trial of causes on their merits while the courts attempted to deal with questions of alleged false returns of service. Such procedure, instead of contributing to the speedy and inexpensive determination of every action, would unsettle and make judgments uncertain and unstable. It would really delay and make more expensive the processes of the administration of justice.⁴

CASES COVERED BY THE CODE

Our General Code for Civil Procedure governs "the procedure in the supreme court, court of appeals, circuit courts and common pleas courts."⁵

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1. These interpretations are based on Volumes 202 through 208 of Southwestern Reporter, second series.

2. John A. Moore and Co., Inc., v. McConkey, 203 S.W. 2d 512 (Mo. App. 1947).

3. Liefkring v. Birt, 356 Mo. 1092, 204 S.W. 2d 935 (1947).

4. Anthony v. Downs Amusement Co., 205 S.W. 2d 925 (Mo. App. 1947).

5. Liefkring v. Birt, *supra* note 3. See Section 2 of the code.

It applies to all civil actions in law or in equity, unless a special procedure statute makes provision for a different procedure. Thus, since there is no requirement in Article 7 of Chapter 8 of the Revised Statutes of Missouri on injunctions that a motion for a new trial or a motion to set aside a judgment shall be filed within the term to which it was entered, nor any other procedural act required to be done within a time measured by a term or terms of court, the civil code supplanted the previous procedure and the defendants have ten days in which to file a motion for a new trial, Section 116 of the civil code, and the trial court, under Section 119, has thirty days after the entry within which it may on its own initiative grant a new trial.⁶ Further there being no specific provision respecting requests for peremptory instructions or demurrers to the evidence in the article relating to Garnishment procedure, our new procedure code, by Section 2, supplanted the former procedure and made its Section 113 applicable.⁷

But in a divorce proceeding the mandatory provisions of Section 73 of the code are not applicable. The reason is that Section 2 of the new code provides that it shall govern the procedure in the circuit courts in all suits and proceedings of a civil nature whether cognizable as cases at law or in equity, "unless otherwise provided by law. . . ." The quoted clause means to exclude "Particular Actions" which have a special statutory procedure that is inconsistent with the new general code.

Section 1516 of the divorce code authorizes a defendant to plead facts which will defeat the plaintiff's right to a divorce and, in addition, if desired, to file a cross-bill seeking a divorce, but it does not make it mandatory that a defendant file a cross-bill for divorce. If Section 73, providing for compulsory counterclaims, were applicable in this case, it would completely destroy the option given to a defendant by the divorce code merely to deny the plaintiff's allegations or to plead further in a cross-petition for divorce and would destroy the right of a wife merely to defend against her husband's divorce petition without pleading or forfeiting her right to separate maintenance. Any provision of the general code that would compel the defendant in the divorce case to elect in such action between any cause he or she may have for divorce and any cause of action the wife may have for separate maintenance, and which would cause a forfeiture of

6. *J. J. Newberry Co. v. Baker*, 205 S.W. 2d 935 (Mo. App. 1947). See also Supreme Court Rule 3.02(c).

7. *Linenschmidt v. Continental Casualty Co.*, 356 Mo. 914, 204 S.W. 2d 295 (1947).

either or both not so elected, would be inconsistent with the provisions in Section 2 of the new code, "unless otherwise provided by law." Being inconsistent with and destructive of a special procedural statute, Section 2 excludes Section 73 from any application to the pleadings in a divorce proceeding.⁸

Also, the board of regents of a state teachers college, in summoning owners of land which the board sought to condemn for a students' dormitory project, appropriately followed the statutory procedure for the appropriation of land for telegraph, telephone, or railroad rights of way, as authorized by the statute under which the condemnation proceeding was brought, rather than civil code provision allowing a longer time for the filing of an answer after the service of summons, since the special statute had a different provision in relation to service than did the general code.⁹

Where it was contended that the trial court had no authority to grant a new trial because of Section 118 of our new code since the plaintiff's motion, which was filed in December 1944 (before the effective date of the new code), was not passed on within 90 days thereafter, it was held that the new code contained no requirement limiting the sustaining of a previously filed motion for a new trial to 90 days after its effective date; and that Section 3 thereof gave the court the power in all actions then pending to apply the former procedure, in a particular action pending, when, in its opinion, the application of the new code thereto would not be feasible or work injustice. It was further held that, by exercising its authority to consider the pending motion under the old code, it would be deemed to have been of said opinion and to have continued the application of the old procedure. Appellants said that the motion herein was argued and taken under advisement within 90 days after the effective date of the new code, and was later required to be re-argued before it was sustained. This would support the conclusion that the court was continuing to apply the old procedure. Since the new code made no provision for the application of Section 118 to pending motions for a new trial, such an application of it, more than 90 days after its effective date, would have worked injustice in many cases because parties could not have known when the time for appeal would expire in such cases. Thus the right of appeal might have been lost in many pending cases by such a later strict

8. *Fawkes v. Fawkes*, 204 S.W. 2d 132 (Mo. App. 1947).

9. *Board of Regents for Northeast Missouri State Teachers College v. Palmer*, 356 Mo. 946, 204 S.W. 2d 291 (1947).

interpretation and application of this section. Therefore, the construction of Section 3 above referred to was correct and in accordance with the spirit and purpose of the new code to decide cases on the merits, whenever possible, instead of upon procedural technicalities.¹⁰

DISTINCTION BETWEEN ACTIONS IN LAW AND EQUITY

It is abstractly true that there is no longer any procedural distinction between suits in equity and actions at law in so far as ordinary procedure is concerned. But, to say that all distinction between an action in equity and an action at law has been eliminated is error. Section 4 of the new code is in effect the same as Section 847 of the Revised Statutes of 1939, which was first enacted one hundred years ago. It is fundamental that a litigant cannot proceed by way of an equitable action to enforce a strictly legal demand, nor can he proceed in an action at law to enforce a strictly equitable right.¹¹

COMPUTING PERIODS OF TIME

Where a notice of appeal was filed on December 16, 1946, the appellants had until March 17, 1947, to file the transcript on appeal in the circuit court, as the end of the 90 day period fell on Sunday and the following day, or March 17, 1947, would have been timely in that court.¹² The law, however, does not permit the exclusion of Sundays or holidays except in cases where the last day happens to fall on such a day.¹³

EXTENDING THE TIME FOR DOING SPECIFIED ACTS

The trial court may extend the time for filing a transcript, upon application, for "cause shown," if made before the expiration of the 90 days, and afterwards upon motion and a showing that the failure to file it was the result of "excusable neglect."¹⁴ But the Supreme Court, under authority of Section 10 of the general code, has provided by Rule 3.26: "The trial court shall not extend the time for filing the transcript on appeal for a longer period than six months from the date the notice of appeal is filed in the trial court."¹⁵ Moreover, Section 6(b) of the civil procedure code of Missouri provides that the court "may not enlarge

10. *Teague v. Plaza Express Co.*, 356 Mo. 1186, 205 S.W. 2d 563 (1947).

11. *Krummenacher v. Western Auto Supply Co.*, 206 S.W. 2d 991 (Mo. App. 1947).

12. *Rubinstein v. City of Salem*, 204 S.W. 2d 502 (Mo. App. 1947).

13. See Section 6(a) of the code. *Taylor v. Greer*, 206 S.W. 2d 349 (Mo. App. 1947).

14. *Bailey v. City of Charleston*, 204 S.W. 2d 500 (Mo. App. 1947).

15. *Mueller v. Burchfield*, 207 S.W. 2d 546 (Mo. App. 1948).

the period for filing a motion for or granting a new trial, or for commencing an action or taking an appeal as provided by this code."¹⁶

PARTIES

a. *Joinder of*

A truck passenger may join owners and operators of both the truck and the streetcar as parties defendant in an action for injuries sustained in a collision between a truck and a streetcar allegedly resulting from the negligence of all the defendants.¹⁷

Interpleader is an equitable remedy, existing independent of statute. As such it depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: 1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; 2) all their adverse title or claims must be dependent, or be derived from a common source; 3) the person asking the relief must not have or claim any interest in the subject matter; 4) he must have incurred no independent liability to either of the claimants, that is, he must stand perfectly indifferent between them, in the position of a stakeholder.

However, our legislature has by enactment of the General Code for Civil Procedure enlarged the scope of bills of interpleader, and has liberalized the law on this subject. Section 18 completely abolishes condition 2 above, and also permits a plaintiff to deny liability, in whole or in part, to any or all of the defendants, thus broadening and liberalizing the remedy in regard to conditions 3 and 4. The crucial test of the right to maintain a bill of interpleader is that the plaintiff should be possessed of money or property which he owes, if money, to some one else, or, which, if property, belongs to some one else, and which is claimed by defendants or some of them, and, by reason of diverse claims of defendants or of some of them, the plaintiff has a reasonable bona fide doubt, either growing out of a question of law or of fact, as to which one of the rival claimants is legally entitled thereto.¹⁸

b. *Third-Party Practice*

Section 20(a) of the civil code, in part permits the defendant in an action, by leave of court, to file a petition against a third party "who is

16. *Camden v. St. Louis Public Service Co.*, 206 S.W. 2d 699 (Mo. App. 1947).

17. *Ibid.*

18. *John A. Moore and Co., Inc. v. McConkey*, *supra* note 2.

or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him."¹⁹ But the right of a defendant to file such a petition is to be exercised only against "a person not a party to the action."²⁰

c. *Intervention*

Since paragraph (a) of Section 21 gives an absolute right to intervene to a person who brings himself within the terms of this paragraph, the trial court has no discretion in the matter. If a trial court should wrongfully deny a person application to intervene, the court can be compelled to permit intervention. The proper remedy for an applicant having a legal right to intervene, but who is denied this right by the trial court, is mandamus. Under this paragraph application to intervene must be timely.

If one may not be adequately represented by the parties to an action and if he may be bound by the judgment therein, he is brought within provision (2) of paragraph (a).²¹

d. *Substitution of*

Section 22 of the civil procedure code in Subsection (a)(1) thereof deals with situations where a party to an action dies "and the claim is not thereby extinguished." In such a case the "successors or representatives" of the deceased, or "any party" to the action, have a right under Section 22 to make a timely motion for substitution of a proper party plaintiff for and in lieu of the deceased party. Subdivision (a)(1) of Section 22 plainly states that "the motion for substitution may be made by the successors or representatives of the deceased party or by any party."

Subsection (a)(3) of Section 22 of the code in the last sentence thereof specifically provides that "if death occurs after appeal and before final determination thereof and substitution on motion therefor is not made within one year after the death, the appeal shall be dismissed as to the deceased party." Supreme Court Rule 3.08 and the statute referred to do not *require* an appellate court to set aside the judgment obtained by a deceased plaintiff, if substitution is not requested within a year after his death. There is nothing in the *statutes* which would *permit* an appellate court to do so.

19. Thomas J. Johnson & Co. v. Mueller, 356 Mo. 1109, 205 S.W. 2d 521 (1947).

20. Camden v. St. Louis Public Service Co., *supra* note 16.

21. State *ex rel.* Duggan v. Kirkwood, 208 S.W. 2d 257 (Mo. 1948).

The word *any*, as used in the statute is all comprehensive, is not modified by the context, and includes all who were parties to the suit. It is the equivalent of "every" and "all," and means all or any party to the action. One must read the statute and rule together. They authorize and permit the motion for substitution to be made not only by the successors or representatives of the deceased party, but by any party. If the motion for substitution is not made within one year by *some one* of these parties the *appeal* shall be dismissed as to the deceased party.²²

INSTITUTION OF SUITS

An attorney employed on a contingent fee contract does not, by negotiating for a settlement of the claim, "commence an action" within meaning of code section providing for an attorney's lien for compensation after commencement of an "action."²³

SERVICE OF SUMMONS

While it is true that the article on election contests is a code unto itself, nevertheless the notice of contest and the service thereof take the place of the petition and summons in the ordinary case, and Section 24 of the general code of civil procedure requires service of summons to be by the sheriff or a person specially appointed. Section 2 of the new article, so far as concerns the notice of contest and service thereof, is the same as old Section 11632, and, since the construction of Section 11632 was, at the time of the enactment of the new article, that the notice of contest could not be lawfully served by an individual, the presumption obtains that the legislature, in adopting Section 2, intended to adopt the construction theretofore given.

Service of notice of an election contest is, therefore, insufficient if it is served by the contestant himself.²⁴

PLEADINGS

a. *Office of*

The office of the pleadings is to define and to isolate the issues to those controverted so as to advise the trial court and the parties of the issues to be tried and to expedite the trial of a cause on the merits, hence

22. *Wormington v. City of Monett*, 356 Mo. 875, 204 S.W. 2d 264 (1947).

23. *Orr v. Mutual Ben. Health & Accident Ass'n*, 207 S.W. 2d 511 (Mo. App. 1947).

24. *Messick v. Grainger*, 356 Mo. 1227, 205 S.W. 2d 739 (1947).

the absence of a formal pleading traversing the allegations of the answer should not be considered prejudicial to a party defendant who understood what issues were being tried. For example, where issues are discussed and analyzed by the trial court, and the parties, before the court rules on the defendant's motion for judgment on pleadings, and prior to the trial of case, proceed on the theory that the plaintiff has denied the allegations of the defendant's answer, even if the answer is a cross-claim, the plaintiff's failure to file an answer to it does not entitle the defendant to a judgment on the pleadings.²⁵

b. *Joinder of Claims*

Section 37 of the General Code for Civil Procedure is applicable to the pleadings in cases provided for both in Chapter 8 on "Divorce" (Section 1515), and Chapter 21 on "Married Women" (Section 3382) of the Revised Statutes of Missouri 1939, since each states that like process and proceedings shall be had in such cases as in other civil suits. This means that, except so far as such two chapters specifically prescribe matters of pleading and procedure, the general code applies. For example, modes of service of process, time for pleading, kinds of motions permitted, periods required for notice, provision for amendments, and the like, applicable to other civil actions, apply to suits for divorce or for separate maintenance. Therefore, the specific limitation in Section 2 of the new code declaring it to be inapplicable when "otherwise provided by law," means that, to such extent as such other provisions of the law do not extend or conflict, the provisions of the code will apply. In other words, the general code does apply to suits for divorce and separate maintenance, except only when conflicting with other laws on the subject. However, Section 37 does not conflict with other provisions of the law pertaining to divorce and separate maintenance since it merely permits, if the defendant so chooses, that claims not arising out of the same transaction or occurrence on which the petition is based, or any claim the defendant may have against the plaintiff, *may* be pleaded. This principle is verified and clarified by Supreme Court Rule 3.16 authorizing the pleading of any matured claim against the adverse party not arising out of the transaction or occurrence that is the subject matter of the adverse party's petition, when such claim or counterclaim existed at the time the first pleading was required. This rule was made supplemental to Section 37 and other sections noted. Thus,

25. *Linders v. Linders*, 356 Mo. 852, 204 S.W. 2d 229 (1947).

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under Section 37 a wife who is sued for divorce may or may not, as she may elect, and without forfeiture of any claim, merely deny her husband's allegations, or she may also file a cross-petition for *divorce* (Section 1516), or one for a separate maintenance (Section 3376).

The reason our courts have heretofore held that an action for maintenance could not be pleaded as a counterclaim in a divorce suit was that they were independent causes of action and did not seek the same relief, and that Section 917 (joinder of causes of action) and Section 929 (actions which could be pleaded as a counterclaim) of the Revised Statutes were so limited that they did not permit such a joinder. But that reasoning has now been abrogated by new Section 37, which permits independent actions to be joined in the petition or in a counterclaim. They need not arise out of the same transaction or occurrence, or series thereof, and a common question of law or fact need not exist. They may include both contract and tort claims; may be legal or equitable; and may be joined as independent or alternate claims.

However, Section 37 of the new code permits, but does not require, a defendant in his answer, by way of a counterclaim, to join either as independent or as alternate claims as many claims either legal or equitable as he has against the plaintiff.²⁶

c. *Incapacity of a Party to Sue*

The authority of the board of regents of a state teachers' college to initiate an action must be raised by specific averments in the pleadings.²⁷

d. *Denial of Performance of Conditions Precedent*

Recoupment is a defense based upon new matter not included among the matters necessary to make out the plaintiff's cause of action. By such a defense the defendant does not deny the contract and the plaintiff's performance under it, but by proof of defective performance he seeks to avoid his liability to the plaintiff for payment of the agreed price. In view of the nature of the defense as one in confession and avoidance, the authorities hold that "in an action to recover the contract price agreed to be paid for work and materials, defendant cannot show that the work was done in an unworkmanlike manner, unless he has pleaded such defense."²⁸

26. *Fawkes v. Fawkes*, *supra* note 8.

27. *Board of Regents for Northeast Missouri State Teachers' College v. Palmer*, *supra* note 9.

28. *Brush v. Miller*, 208 S.W. 2d 816 (Mo. App. 1948).

e. *Special Damages*

Failure to object to the lack of the pleading of special damages waives such a defect.²⁹

Section 52 of the general code, has no application to a proceeding under the wrongful death statutes.³⁰

f. *Times Within Which to File Pleadings*

A court has the inherent power, of its own motion, to strike a pleading filed out of time, because such power is necessary for the court to bring about the orderly and expeditious transaction of such businesses as may be brought before it, the very purpose of its existence.³¹

g. *Admittance of Averments in Pleadings*

By his default a defendant admits the truth of the allegations of the petition constituting the plaintiff's cause of action and the defendant's liability thereunder; but he does not admit the amount of damages claimed.³²

h. *Counterclaims*

Section 73 of the new procedure code does not apply to a counterclaim which has not accrued by the time the defendant files his answer.³³

i. *Cross-Claims*

Where a streetcar company was sued jointly with truck owners for injuries sustained by the truck passenger in a collision between a streetcar and the truck, it could file a cross-claim against the truck owners and thereby assure itself of an adjudication as to the liability as between itself and the truck owners, though the plaintiff dismissed as to the truck owners after their motion for a new trial was sustained and judgment had become final against the streetcar company.³⁴

j. *Amendments to Pleadings*

Courts are liberal in allowing amendments where the cause of action is not totally changed, and rules providing for amendment would be use-

29. Spalding v. Robertson, 206 S.W. 2d 517 (Mo. 1947).

30. *Ibid.*

31. Oliver v. Scott, 208 S.W. 2d 468 (Mo. App. 1948). See also Section 58 of the General Code for Civil Procedure.

32. *Ibid.* See also Section 41 of the General Code for Civil Procedure.

33. Niedringhaus v. Zucker, 208 S.W. 2d 211 (Mo. 1948).

34. Camden v. St. Louis Public Service Co., *supra* note 16.

less if petitions, in the first instance, must state perfect and complete causes of action.³⁵

In an action for breach of contract which provided that the plaintiffs should convey realty to the defendant, subject to a trust deed, and that, if a purchaser was found by the plaintiffs within five years, the latter were to receive the purchase price less the amount of the incumbrance, permitting a pleading alleging that the effective date of conveyance was October 9, 1935, to be amended at the close of all the evidence to change the date to February 17, 1936, was proper over the objection that the amendment changed the cause of action.³⁶

A pleader should be allowed a reasonable time or opportunity to amend.³⁷

The circuit court being one of general jurisdiction, there is always a presumption of right action, in the absence of proof to the contrary. Therefore, though a transcript does not show any action taken by a court upon a motion to strike, or any objection to the court's failure to rule on it, if in fact it did so, it must be assumed that the amended answer was filed by leave of the court, where, on the same day that it was filed, a trial was had without any objection being made by any one.³⁸

An original petition is abandoned when an amended petition is filed.³⁹

AMENDMENTS TO RETURNS

A reasonable construction of the language of Section 31 of the new procedure code leads inescapably to the view that it was the legislative intent to authorize the court to "allow" an amendment to a sheriff's return on the motion of the sheriff, or of a party, so as to cure an "insufficiency," and thus avoid unnecessary delay. However, the curing of an "insufficiency" of a sheriff's return by an allowed "amendment," in order to avoid delays on technical grounds, is far different from a ruling by a court completely setting aside a final judgment on the ground that a sheriff's return is "false." That cannot be done.

If a sheriff makes a false return, a defendant has a complete and definite remedy by bringing an action for damages against him on his official

35. *Campbell v. Webb*, 356 Mo. 466, 202 S.W. 2d 35 (1947).

36. *Ibid.*

37. *Edwards v. Sittner*, 206 S.W. 2d 578 (Mo. App. 1947).

38. *Warren v. Royal Exchange Assurance Co.*, 205 S.W. 2d 744 (Mo. App. 1947).

39. *Locasio v. Ford Motor Co.*, 203 S.W. 2d 518 (Mo. App. 1947).

bond. Each sheriff of this state is required by law to give a substantial bond to protect the public against any such misconduct as a false return.⁴⁰

MOTIONS

a. *Speaking Motions*

Under our new procedure code a motion, in a proper situation, may perform the function of a "speaking demurrer." Such a motion might, not improperly, be referred to as a "speaking motion," since demurrers are no longer recognized by that name.⁴¹

b. *Motions to Dismiss Petitions*

A defendant moved to dismiss the plaintiff's petition in an action to recover for breach by the employer of an employment contract.

The defendant's motion contained detailed allegations covering the existence and the terms of the grievance procedure which, it said, was specifically provided for in the contract. However, the contract itself was not set out in the motion, nor was a copy thereof attached. No evidence was received in support of the motion. That part of the contract which, defendant contended, required submission of any dispute over application of seniority rules was not set out in the motion. At most, defendant merely pleaded its conclusion, to the effect that submission to the grievance procedure was a condition precedent to filing this suit. It pleaded no provision of the contract wherein such procedure was stated or required.

None of the pleadings contained averments of facts showing the existence and provisions of a grievance procedure. It was held that, absent an allegation in the petition of facts amounting to an admission of the existence of a "grievance procedure" in the contract, and of a provision requiring resort thereto prior to institution of suit, or of such allegations, and proof thereof, in the motion, the defendant's motion must fail in its entirety.⁴²

c. *Motion for More Definite Statement or for Bill of Particulars*

The defendant may ask for a more definite statement or for a bill of particulars of any matter contained in the petition under Section 63 of the General Code for Civil Procedure.⁴³ However, he will be deemed, under

40. *Anthony v. Downs Amusement Co.*, *supra* note 4.

41. *Locasio v. Ford Motor Co.*, *supra* note 39.

42. *Ibid.*

Section 66 of that code, to have waived such objection to the petition by failing to file a motion requesting such a statement or bill.⁴⁴

d. *Untimely Motion, Effect of*

Refusal to strike a mere conclusion of law alleged in an answer is not error where the plaintiff, by an untimely motion to strike, had waived objections to the answer, other than failure of the answer to set forth a legal defense.⁴⁵

e. *Motion for Judgment on the Pleadings*

Ordinarily, if an issue of fact is presented by the pleadings, a motion for judgment on the pleadings should be denied. However, a motion for judgment on the pleadings is not required to be denied because there exists an issue of fact presented by pleadings respecting the value of the attorney's fees in a suit on a life policy, where the trial court held, as a matter of law, that the plaintiff was not entitled to an attorney's fee. A request therefor could be treated as surplusage. A request for a specific judgment on the pleadings, rather than a request for a judgment for such an amount as the pleadings show the plaintiff entitled to, should be treated as surplusage, and the motion treated as a motion for judgment for such sum as the pleadings show plaintiff entitled to.⁴⁶

TRIAL OF ISSUES NOT RAISED BY THE PLEADINGS

Under the broad provisions of Section 82 of the General Code for Civil Procedure, when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.⁴⁷ But it is only where an issue not raised by the pleadings is tried by the express or implied consent of the parties that such an issue is to be treated as though it had been raised in the pleadings.⁴⁸

INTERROGATORIES

Interrogatories are only a less formal and less expensive way of ascertaining facts than by depositions, and the scope of examination on interroga-

43. *Page v. Wabash Railroad Co.*, 206 S.W. 2d 691 (Mo. App. 1947); *Kreisman v. Kornfeld*, 208 S.W. 2d 79 (Mo. App. 1948).

44. *Kreisman v. Kornfeld*, *supra* note 43.

45. *Oldham v. Siegfried*, 202 S.W. 2d 132 (Mo. App. 1947).

46. *Hall v. Missouri Insurance Co.*, 208 S.W. 2d 830 (Mo. App. 1948). See Section 68 of the General Code for Civil Procedure.

47. *Campbell v. Webb*, *supra* note 35; *supra* note 43. *Duffy v. Barnhart Store Co.*, 202 S.W. 2d 520 (Mo. App. 1947); *Brackmann v. Brackmann*, 202 S.W. 2d 561 (Mo. App. 1947).

48. *Brush v. Miller*, 208 S.W. 2d 816 (Mo. App. 1948).

ories is merely coextensive with that permitted by depositions, and does not go beyond it to authorize the discovery of matters not admissible in evidence which might aid in the party's preparation for trial. It necessarily follows, therefore, that, since the extent of a plaintiff's discovery has not been augmented by the provision in the new code for the use of interrogatories, the fact that a plaintiff may employ interrogatories affects only his possible method of discovery, and does not enlarge his right to obtain the names of the particular witnesses nor afford him a right which he would not otherwise have possessed.⁴⁹

The identity of persons known by the driver of a bus (or by the police officer acting for him) to have been present at a casualty by being found then and there on the bus at the very time is a proper subject for discovery on interrogatories.⁵⁰ On the other hand, if the operator gets names of persons in a street who are not "known by him to have been present at the time and place of the casualty," there is no duty to disclose their identity.⁵¹

CONTINUANCES

Counsel Member of General Assembly

Where the plaintiffs in an unlawful detainer action in justice (now magistrate) court filed a certified application for a continuance, specifying that one of their attorneys was in actual attendance at the assembly, and that his appearance at the trial was necessary to a fair and proper trial within the meaning of Section 96 of the procedure code, justice's action in proceeding with the trial was in excess of its jurisdiction, and prohibition was a proper remedy to restrain the justice from issuing an execution on the judgment rendered by him after denying a continuance.

In a concurring opinion, Judge Hyde said:

"I concur in the opinion of LEEDY, J., that it was proper to enforce prohibition under the circumstances of this case. There was no question raised as to the validity of Section 96 of the Civil Code . . . and the sufficiency of the application and affidavit for continuance was admitted. However, if we are to continue to apply the drastic remedy of prohibition to rulings on applications for continuance under this statute, I think there should

49. *Belding v. St. Louis Public Service Co.*, 205 S.W. 2d 866 (Mo. App. 1947).

50. *Ibid. Accord: State v. Cowan*, 356 Mo. 674, 203 S.W. 2d 407 (1947).

51. *State v. Cowan*, *supra* note 50.

be some further consideration of the question of the construction and meaning of the requirements of this section.

"This statute says: 'When the general assembly is in session, it shall be a sufficient cause for a continuance *if it shall appear to the court*, by affidavit, that any party applying for such continuance, or any attorney, solicitor or counsel of such party is a member of either house of the general assembly, and in actual attendance on the session of the same, and that the attendance of such party, attorney, solicitor or counsel is necessary to a fair and proper trial or other proceedings in such suit.'

"I do not think that it can properly be held that the conclusion 'that the attendance of such party, attorney, solicitor or counsel is necessary to a fair and proper trial' does 'appear to the court,' merely when this statutory language is written into an affidavit. I think that this section must be read and construed in connection with Section 93 . . . which says: 'Every application . . . shall . . . be . . . accompanied by the affidavit . . . setting forth the *facts* on which the application is founded.' This surely does not mean conclusions which the court must reach in order to find that the applicant is entitled to a continuance. Such a construction would transfer the judicial discretion of the courts to litigants, or their counsel, and make the matter of a continuance depend upon their mere whim or desire.

"The rule is stated in 17 C. J. S. 259, Continuances, § 94, that 'in stating the grounds on which a continuance is asked, the affidavit should set forth facts constituting such grounds, and mere conclusions are insufficient.' See also 12 AM. JUR. 472, § 31; Gregory v. Hanson, Mo. App., 224 S. W. 82. Therefore, I think that the meaning of Section 96 (in saying a party has sufficient cause for a continuance 'if it shall appear to the court . . . that the attendance of such party, attorney, solicitor or counsel is necessary to a fair and proper trial') necessarily must be that the affidavit must state facts which would support such a finding and from which the court could reach such a conclusion. I think that State v. Myers, 352 Mo. 735, 179 S. W. 2d 72, making a contrary construction should be overruled.

"I think that any other construction would make this statute unconstitutional. We have held that an act which arbitrarily imposes an unreasonable or unnecessary delay upon the administration of justice would be contrary to Section 10, Article II, Const. of 1875, now Section 14, Article I, Const. of 1945, Mo. R. S. A. Kristanik v. Chevrolet Motor Co., 335 Mo. 60, 70 S. W. 2d 890. Also as stated, 16 C. J. S., Constitutional Law, § 128, p. 329, the Legislature cannot entirely exclude the exercise of the

discretion of the Court. To do so is an encroachment of one department of Government upon the functions of another, prohibited by Article III, Const. of 1875, now Article II, Const. of 1945.

"Section 96 provides for a complete moratorium (except during periods of adjournment of 20 days or more) on all proceedings in any pending case during the sessions of the General Assembly (which may be continuous under the new constitution throughout the whole period of each biennium) on the application of any party or attorney therein who is a member. It very properly states certain facts which must be shown by affidavit but does include the one matter (necessity of attendance to a fair and proper trial) which can only be a conclusion. If the court is not permitted to determine this issue, which it could only do from a consideration of some facts about the case and the situation of the parties and attorneys, then its decision is arbitrarily compelled merely by the conclusion stated by the party making the affidavit regardless of what justice to others may require. Such a construction takes away all the judicial function of the court in making continuances applied for under this section. Certainly litigants and lawyers who are members of the General Assembly should be given every reasonable consideration and their rights carefully protected by the Courts. They have duties as important as any in our Government; and they are required to perform them away from their homes at great personal sacrifice of both time and money because of inadequate compensation. This court has demonstrated that it will protect their rights by prohibition if necessary. However, our constitution requires the courts to protect the rights of all parties (especially to see that 'justice shall be administered without . . . denial or delay'); and there can be abuse of this continuance statute (although such instances are very rare) if it is construed to compel an indefinite continuance in every case under all circumstances. I do not think it should be so construed."

Judges Clark, Douglas, and Ellison, concurred in Judge Hyde's opinion.⁵²

52. *Kyger v. Koerper*, 355 Mo. 772, 207 S.W. 2d 46 (1946). In accord: *State v. Knight*, 356 Mo. 1233, 206 S.W. 2d 330 (1947). For cases in which it was held that, at the time of trial, enough time had elapsed after adjournment of the legislature not to permit a continuance under Section 96 of the procedure code, see *State v. Grove*, 204 S.W. 2d 757 (Mo. 1947); *State v. Bryant*, 356 Mo. 1223, 205 S.W. 2d 732 (1947), and *State v. Knight*, *supra* this note.

RIGHT TO TRIAL BY JURY

While the right of trial by jury is to be preserved to the parties in-
 violate, the action of a court in declaring the legal effect of undisputed
 evidence is not a denial of the right to trial by jury.⁵³

DISMISSALS

In a divorce suit, the defendant has the right to dismiss a cross-bill
 without notice to the plaintiff.⁵⁴

The right of the plaintiff to dismiss exists where the trial court has
 set aside the verdict and the judgment as to the defendant and has
 granted him a new trial. The cause is then pending awaiting such new
 trial. The cause has not only not been submitted to the jury, but
 the trial court has not even been commenced. Therefore, Section
 99(a) of the General Code for Civil Procedure, which gives a plaintiff
 the right to dismiss at any time before finally submitting the case to the
 jury, makes it possible and proper for the plaintiff to dismiss the cause as
 to the defendant at any time before finally submitting it to the jury.⁵⁵

Involuntary dismissals for lack of jurisdiction or for improper venue
 are to be dismissals without prejudice.⁵⁶

Under Section 101, where one of the judges of a trial court dismisses
 without prejudice an action against two of the defendants for want of service
 of process, another judge had jurisdiction to permit the filing of an amended
 petition against such defendants on whom service of process was had.⁵⁷

Where the defendant's counterclaim is dismissed for failure to state
 facts which constitute a cause of action and not because the plaintiff has
 dismissed his petition, Section 103 providing that no dismissal of a plain-
 tiff's action shall operate to dismiss the counterclaim does not apply.⁵⁸

INSTRUCTIONS

Sections 105 and 122 require the court to afford ample opportunity for
 counsel to examine the instructions before the same are given and to make
 objections to the same if they so desire, out of the hearing of the jury, and,
 if objections are made, the objector must state his grounds therefor. He

53. *Rowe v. Henwood*, 207 S.W. 2d 829 (Mo. App. 1948). See Section
 98 of the General Code for Civil Procedure.

54. *Brackmann v. Brackmann*, 202 S.W. 2d 561 (Mo. App. 1947).

55. *Camden v. St. Louis Public Service Co.*, *supra* note 16.

56. *State ex rel. Thompson v. Terte*, 207 S.W. 2d 487 (Mo. 1947).

57. *Ibid.*

58. *Niedringhaus v. Zucker*, *supra* note 33.

cannot object for the first time on appeal.⁵⁹ Thus, the trial judge's oral reply to a question put by a juror after submission of a case, as the jury was leaving the courtroom, was not error where the judge informed counsel of the incident and counsel made no objection or request.⁶⁰

MOTION FOR DIRECTED VERDICT

Demurrers to the evidence and requests for peremptory instructions are abolished and a motion for a directed verdict substituted therefor.⁶¹

A motion by a defendant for a directed verdict under Section 112 of the new civil code can be sustained only when the facts and the legitimate reasonable inferences therefrom are so strongly against the plaintiff as to leave no room for reasonable minds to differ. In other words, in passing upon such a motion for a directed verdict, the court is required to make every reasonable inference of fact in favor of a plaintiff which a jury might have inferred in his favor, and such motion should be sustained only when the facts and inferences to be drawn from the evidence, considered in the light most favorable to plaintiff, are so strongly against him as to leave no room for reasonable minds to differ.⁶²

The motion referred to in code Section 113 is directed against the verdict and strikes at "any judgment entered thereon" as provided in said section; *i.e.*, an interlocutory judgment contemplated under Section 1567 and a final judgment contemplated under Section 1579 of the Revised Statutes of Missouri, 1939.⁶³

A trial resulted in a verdict on May 16 against a garnishee, and the court ordered the garnishee to pay the amount determined into the court within ten days. On May 24 the garnishee filed motions to set aside the judgment, and on July 8, the garnishee having defaulted, judgment was rendered against the garnishee. On July 9 the garnishee refiled its motion for judgment in accordance with its motion for a directed verdict and refiled its motion for a new trial. The garnishee was held to have exercised due diligence and timely filed its motion striking at the verdict, interlocutory judgment, and the final judgment.⁶⁴

59. *Morrison v. Terry*, 205 S.W. 2d 902 (Mo. App. 1947). In accord: *E. C. Robinson Lumber Co. v. Cottonseed Delinting Corp.*, 207 S.W. 2d 63 (Mo. App. 1947). See also *Hensley v. Dorr*, 202 S.W. 2d 553 (Mo. App. 1947).

60. *Schonwald v. F. Burkart Mfg. Co.*, 356 Mo. 435, 202 S.W. 2d 7 (1947).

61. *Linenschmidt v. Continental Casualty Co.*, 356 Mo. 914, 204 S.W. 2d 295 (1947).

62. *Panke v. Shannon*, 207 S.W. 2d 854 (Mo. App. 1948).

63. *Linenschmidt v. Continental Casualty Co.*, *supra* note 61.

64. *Ibid.*

CASES TRIED WITHOUT A JURY

a. *Declarations of Law*

Declarations of law (in the form of instructions) are no longer necessary in non-jury trials and they cannot be made the basis of allegations of error on appeal. Instead, Section 114 of the procedure code provides for review de novo on the whole record before the trial court "as in suits of an equitable nature."⁶⁵

b. *Duties of Appellate Court*

In reviewing on its merits the case tried without a jury, an appellate court must follow the mandate of Section 114(d) of the procedure code and "review the case upon both the law and the evidence as in suits of an equitable nature." The judgment may not be set aside "unless clearly erroneous," and due regard must be given to "the opportunity of the trial court to judge of the credibility of the witnesses."⁶⁶

Reviewing a case as in equity means that the court can and will disregard any incompetent testimony that may have been offered, so that if it should find that any part of plaintiff's testimony was improperly admitted such evidence would be excluded from consideration.⁶⁷

The rule that a reviewing court will normally defer to the findings and conclusions of the trial judge on conflicting evidence does not apply when it is obvious that the decree was induced by an erroneous view of the law, and, in such case, the reviewing court will correct the error.⁶⁸

Section 114 has no application to a case which is submitted to a jury.⁶⁹

An award of the Workmen's Compensation Commission is now to be regarded "as having more nearly the force and effect of a judgment in a non-jury case under the new Civil Code."⁷⁰

MOTION FOR NEW TRIAL

a. *Form of*

A motion for a new trial is not a nullity merely because the plaintiff inadvertently failed to formally request the setting aside of the judgment

65. *Landers v. Thompson*, 356 Mo. 1169, 205 S.W. 2d 544 (1947).

66. *Peters v. Jamison's Estate*, 202 S.W. 2d 879 (Mo. 1947). In accord: *Geisinger v. Milner Hotels, Inc.*, 202 S.W. 2d 142 (Mo. App. 1947); *Loeb v. Viviano*, 202 S.W. 2d 528 (Mo. App. 1947); *Williamson v. National Garage Co.*, 203 S.W. 2d 126 (Mo. App. 1947); *Vanderhoff v. Lawrence*, 206 S.W. 2d 569 (Mo. 1947); *Charles v. Charles*, 208 S.W. 2d 476 (Mo. App. 1948).

67. *Bogges v. Cunningham's Estate*, 207 S.W. 2d 814 (Mo. App. 1948).

68. *Boudinier v. Boudinier*, 203 S.W. 2d 89 (Mo. App. 1947).

69. *Oldham v. Siegfried*, 202 S.W. 2d 132 (Mo. App. 1947).

70. *Goetz v. J. D. Carson Co.*, 206 S.W. 2d 530 (Mo. 1947).

as a preliminary to the prayer for a new trial in a case where neither the successful party nor the court could have been in doubt as to the grounds of the complaint or of the remedy sought.⁷¹

b. *Time within Which to Make Motion*

A motion for a new trial shall be filed not later than ten days after entry of judgment.⁷²

Matters raised in a motion for a new trial cannot be considered on appeal after the motion is overruled where that motion was not filed within the statutory time.⁷³

c. *When Judgment Entered*

Section 116 of the General Code for Civil Procedure provides that judgments are to be entered as of the day of the verdict and motions for new trial are to be filed within ten days after entry of the judgment.⁷⁴

Under that section a judgment becomes final at the expiration of 30 days after the entry of such judgment.⁷⁵

d. *Proof of Grounds for New Trial*

Section 117 was not intended by the General Assembly as the exclusive method of presenting proof of the existence of the grounds for a new trial. Oral proof thereof may also be given.⁷⁶

THE GRANTING OF NEW TRIALS

Stating Grounds for Granting New Trial

The trial court is required, by Sections 115 and 119 of the new civil procedure code, to specify of record the ground or grounds on which a new trial is granted. Such a court is not required to specify any particular numbered assignment in the motion for a new trial, but merely to specify the ground or grounds on which the new trial is granted, and such ground or grounds so specified, unless the new trial is granted by the court of its own initiative, should come within the purview of some assignment in the motion for a new trial.⁷⁷

71. *Terry v. Metropolitan Life Ins. Co.*, 206 S.W. 2d 724 (Mo. App. 1947).

72. *Taylor v. Greer*, 206 S.W. 2d 349 (Mo. 1947).

73. *State v. Henry*, 205 S.W. 2d 743 (Mo. App. 1947).

74. *Linenschmidt v. Continental Casualty Co.*, *supra* note 7; *Lieffring v. Birt*, *supra* note 3.

75. *Camden v. St. Louis Public Service Co.*, *supra* note 16.

76. *Wood v. Claussen*, 207 S.W. 2d 802 (Mo. App. 1948).

77. *Schreiner v. City of St. Louis*, 203 S.W. 2d 678 (Mo. App. 1947).

EXCEPTIONS TO RULINGS OF A COURT

If a party believes a court's ruling is incorrect and desires to preserve the point for review on appeal, an objection to the ruling stating the grounds thereof should be made at the time to give the trial court an opportunity to change the ruling and correct the error, if it was error. Having failed to make any such objection, the matter is not open for consideration in an appellate court.⁷⁸

A party moving for a directed verdict must make known to the court "his grounds therefor," but the grounds need not in all events be stated in the motion itself, for the code provision is sufficiently complied with whether the grounds are actually incorporated in the motion, or whether the record recites that they are orally brought to the court's attention at the time. The practice which prevails in trial courts of affording counsel an opportunity to be heard orally when a motion for a directed verdict is made has been particularly commended.⁷⁹

APPEAL

a. *Grounds for Appeal*

1. Statute Necessary

The right of appeal is statutory.⁸⁰

2. Judgments and Orders Appealable

An appeal must be from a final judgment or from an order or judgment specifically allowed by statute.⁸¹ In an action for a balance owing on a written contract of purchase signed by one defendant as purchaser and by the other three defendants as sureties, dismissal of the cause as to one of the defendant sureties with prejudice did not determine finally the cause as to the remaining defendants and was not a "final judgment" which would be appealable.⁸²

An order overruling a motion to declare void a judgment and decree is not an appealable order under Section 126 of our code.⁸³

78. *Koeppel v. Koeppel*, 208 S.W. 2d 929 (Mo. App. 1948).

79. *Schubert v. St. Louis Public Service Co.*, 206 S.W. 2d 708 (Mo. App. 1947).

80. *W. T. Rawleigh Co. v. Rouse*, 204 S.W. 2d 438 (Mo. App. 1947); *Edwards v. Sittner*, *supra* note 37.

81. *Edwards v. Sittner*, *supra* note 37.

82. *W. T. Rawleigh Co. v. Rouse*, *supra* note 80. In accord in principle: *State ex rel. Thompson v. Terte*, *supra* note 56.

83. *McIntosh v. Wiggins*, 356 Mo. 926, 204 S.W. 2d 770 (1947).

An order overruling a motion for a new trial was not an appealable order.⁸⁴

b. *How Taken*

1. Notice of Appeal

Though the filing of a notice of appeal is jurisdictional,⁸⁵ such filing is the only requirement necessary to invoke appellate jurisdiction.⁸⁶

However, the filing of both a notice of appeal and an affidavit for appeal does not invalidate the appeal. The affidavit is merely superfluous.⁸⁷

Strict adherence to the prescribed averments of the notice is not jurisdictional; the averments should be liberally construed to permit appellate review so long as an opposing party is not misled to his irreparable harm; a notice of appeal which can reasonably be construed as an attempt in good faith to appeal from a final judgment or appealable order is sufficient.

It is not fatal to an appeal that the appellant inadvertently used language indicating that he sought an appeal from the action of the court in overruling his motion for a new trial. The order overruling the motion for a new trial had the effect of making the judgment final and appealable; and it was this judgment which aggrieved him, and from which the appeal was really taken.⁸⁸

A notice of appeal stating that the appeal is taken "from the judgment" is not insufficient.⁸⁹

2. Bonds

(a) Supersedeas

An appeal from an order of a trial court modifying an original divorce decree does not stay the execution of the order and judgment rendered on the motion to modify, absent the giving of a supersedeas bond.⁹⁰

(b) Cost

There is no authority making the filing of an appeal bond a prerequisite to the right of appeal. It is not within the spirit of the code

84. *Gibson v. Metropolitan Life Insurance Co.*, 204 S.W. 2d 439 (Mo. App. 1947); *Terry v. Metropolitan Life Insurance Co.*, *supra* note 71.

85. *Ibid.*

86. *Whealen v. St. Louis Soft Ball Ass'n*, 356 Mo. 622, 202 S.W. 2d 891 (1947); *State ex rel. Thompson v. Terte*, *supra* note 56.

87. *Vance v. Vance*, 203 S.W. 2d 899 (Mo. App. 1947).

88. *Terry v. Metropolitan Life Insurance Co.*, *supra* note 71; *Gibson v. Metropolitan Life Insurance Co.*, *supra* note 84.

89. *Wiley v. Stewart Sand and Material Co.*, 206 S.W. 2d 362 (Mo. App. 1947).

90. *Ex parte Porter*, 203 S.W. 2d 748 (Mo. App. 1947).

that an appeal be dismissed for failure to post a bond for costs. The supreme court and the courts of appeal shall, according to Section 135 (d) of the code, have no power or authority to make or enforce any rule or order requiring any party to an appeal to file a bond for costs in those courts.⁹¹

3. Withdrawal of Appeal

The filing of a notice does not thereby divest the trial court of jurisdiction of a case. Under Supreme Court Rule 1.17, an appellant may withdraw his appeal in the trial court any time prior to the filing of the transcript on appeal in the appellate court, since an appeal is not finally perfected until the transcript is filed in the appellate court. Under Section 137 of the new code, the filing of the transcript on appeal transfers the case to the appellate court.

Where the plaintiff did not file a transcript on appeal and, when he filed his amended petition in the trial court, he indicated he was abandoning his appeal. Though it would have been more orderly practice for him to have formally withdrawn his appeal, his failure to perform this precise act did not affect the trial court's jurisdiction to permit him to file his amended petition.⁹²

4. Transcript of the Record

(a) Time within which to File

The transcript on appeal must be filed in the circuit court and the action transferred to the appellate court "within 90 days from the date of filing of the notice of appeal," or within a proper extension of time. Otherwise a motion to dismiss will be granted.⁹³

(b) Contents

Appellants must according to Supreme Court Rule 1.08, distinctly point out alleged errors, of the trial court, show that they were prejudiced, and indicate where such rulings may be found in the printed abstract of the record. The appellate court need not search the entire record for errors.

An assignment of error that the court erred in admitting immaterial, incompetent, and irrelevant evidence on the part of plaintiffs over the

91. *Holmes v. McNeil*, 356 Mo. 846, 204 S.W. 2d 303 (1947).

92. *State ex rel. Thompson v. Terte*, *supra* note 56.

93. *Rubinstein v. City of Salem*, *supra* note 12; *Mueller v. Burchfield*, *supra* note 15.

objection of defendant is not a sufficiently specific allegation of error to conform with that rule.⁹⁴

Where the appellant and respondent agree to the full transcript on appeal prepared by the court reporter, the signature of the trial judge is unnecessary.⁹⁵

(c) Order for Further Record

Under Supreme Court Rule 1.03, permission is given, and any appellate court in Missouri is vested with a wide discretion, to require, or not to require, the clerk of the trial court to send up any papers, documents, or exhibits in any cause then pending on appeal in such appellate court. Such discretion the appellate court may exercise to send for any portion of the transcript inadvertently omitted, and thus prevent a miscarriage of justice. It may, in the exercise of such discretion, refuse and decline to make any requirement whatever of the clerk of the trial court. The appellate court may, in its discretion, refuse to permit counsel to supply the deficiency in the transcript out of time. However, if the appellate court, having exercised its discretion to call upon the clerk of the trial court to supply a deficiency in the transcript, and such omission having been supplied by such clerk, or supplied by counsel with the court's permission, then has before it a full transcript, the appellate court then has sufficient upon which to proceed upon the merits of the appeal.⁹⁶

5. Briefs

(a) Fair and Concise Statement

The statement in a brief is "fair and concise," as required by Rule 1.08, where it is sufficient to give the court a clear understanding of the issues to be decided.⁹⁷

Though a brief does not specifically state that the jurisdiction of the court of appeals is invoked because the judgment is for an amount less than \$7,500, if it recites that the judgment appealed from is for \$500, this is sufficient to inform the court, of the ground for invoking its jurisdiction, although it is better practice to state the basis of the appeal to the court in a separate paragraph at the very inception of the brief.⁹⁸

94. *Esker v. Davis*, 207 S.W. 2d 798 (Mo. App. 1948).

95. *Bailey v. City of Charleston*, 204 S.W. 2d 500 (Mo. App. 1947).

96. *Lieffring v. Birt*, *supra* note 3; In *accord*: *Whealen v. St. Louis Soft Ball Association*, *supra* note 86; *Gibson v. Metropolitan Life Insurance Co.*, *supra* note 84.

97. *Wiley v. Stewart Sand and Material Co.*, *supra* note 89.

98. *Leath v. Weaver*, 202 S.W. 2d 125 (Mo. App. 1947).

(b) Dismissal for Lack of Insufficiency of Brief

Where the appellant filed no brief the appeal was dismissed.⁹⁹ However, though the plaintiff's brief does not fully comply with the rules, inasmuch as the action involved the care and custody of a minor child in whose welfare the estate is concerned, it was held that the interests of justice required that the appeal be not dismissed for failure to comply with the rules.¹⁰⁰

Considering the plaintiff's brief on appeal and the record which was short, it was held that the inconvenience caused by plaintiff's failure to set out the evidence upon which the trial court sustained the defendants' motions for a directed verdict did not require the dismissal of the plaintiff's appeal, although the plaintiff could properly have disclosed, in the statement in his brief, the evidence upon which the trial court sustained motions for directed verdict for defendants.¹⁰¹

Even if some matters stated in a brief are unnecessary, this does not justify a dismissal of the appeal. Such a ruling would be entirely too harsh.¹⁰²

c. *Matters Considered on Appeal*

An appellate court will not review errors which are not pointed out in a brief filed by the appellant.¹⁰³

Under Supreme Court Rule 3.21, objections to instructions shall be made before the case is finally submitted to the jury. Under this rule objections to instructions raised in the appellate court for the first time are not properly before the court for review.¹⁰⁴

d. *Judgment on Appeal*

1. Proper Judgment to Give

The appellate court is, by Section 140 of the General Code for Civil Procedure, given direction to give such judgment as the trial court ought to have given.¹⁰⁵

Thus it is within the province of an appellate court to affirm or reverse the judgment of the trial court or to give such judgment as the trial court

99. *White v. Kuhnert*, 207 S.W. 2d 839 (Mo. App. 1948).

100. *Vance v. Vance*, *supra* note 87.

101. *Holmes v. McNeil*, *supra* note 91.

102. *Leath v. Weaver*, *supra* note 98.

103. *White v. Kuhnert*, *supra* note 99. See also Supreme Court Rules 1.08 and 1.30.

104. *Taylor v. Silver King Oil and Gas Co.*, 203 S.W. 2d 147 (Mo. App. 1947).

105. *Hall v. Missouri Insurance Co.*, 208 S.W. 2d 830 (Mo. App. 1948).

ought to have given and which the appellate court shall deem agreeable to law.¹⁰⁶

Where the appellant contended that the appellate court should reverse a cause outright and direct the trial court to enter a judgment in favor of defendant, the court said that it believed that justice required that it be remanded for another trial where each party would be accorded a full opportunity to present its evidence.¹⁰⁷

2. Errors Not Affecting Merits of the Action

Under the General Code for Civil Procedure, Section 140(b), it is provided that: "No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action."

The court, during the past year, has several times held that errors were not material.

Thus, in one case it held that argument outside of the record was immaterial, where the trial court refused it grant a new trial on that ground.¹⁰⁸

Where the trial court permitted hearsay testimony to be given by the plaintiff when he said that the official he applied to for a position on another railroad told plaintiff he would not hire plaintiff without a service letter, it was held that this was not prejudicial error. The plaintiff had already testified that the official had asked him for a service letter and he answered he had none. Of greater moment was the fact that the plaintiff was permitted later to testify without objection of any sort that, when he applied for work on the same railroad at another division point, the official there told him "I can't hire you without a service letter." The court felt that it could not say that the jury relied on the testimony that was challenged instead of that which was the same except for the form of expression but was not challenged.¹⁰⁹

Where damages were allowed by the jury, but were remitted by stipulation after the verdict and before entry of the judgment, the inclusion of the damages in the judgment was an obvious error, but it was not an

106. *Boudinier v. Boudinier*, *supra* note 68.

107. *M. F. A. Farmers' Exchange of Carthage, Mo. v. Kurn*, 205 S.W. 2d 878 (Mo. App. 1947).

108. *Wood v. Claussen*, *supra* note 76.

109. *Ackerman v. Thompson*, 356 Mo. 558, 202 S.W. 2d 795 (1947).

error that required a reversal of the judgment, but one that called for correction which the appellate court could make.¹¹⁰

When the appellant's counsel told the appellant to leave the courtroom with her child, the court should have told them promptly, then and there, that his order did not require them to leave the courtroom. However, it was held that such error did not warrant a new trial, for nothing in the record showed that appellant's absence from the courtroom prejudiced her case.¹¹¹

3. Plain Error

The plaintiff appealed from a judgment which he contended was in an insufficient amount, but the defendants did not appeal or even file a motion for a new trial. Though the appellate court determined on appeal that the plaintiff was not entitled to recovery in any amount, it decided that the defendants were not entitled to an outright reversal of judgment under Supreme Court Rule 3.27, which provides that plain errors affecting substantial rights may be considered on an appeal, though they are not raised or preserved for review, or are defectively raised or preserved.¹¹²

4. Transfer from Court of Appeals

Where a court of appeals transfers a cause to the supreme court because the result reached on one issue is deemed in conflict with a principle of law announced by another court of appeals, the supreme court determines the case as on an original appeal.¹¹³

Where an appeal was dismissed by a court of appeals, but the case was certified to the supreme court because of a conflict of opinion with another court of appeals as to whether the absence of a copy of a judgment in the transcript was jurisdictional, the supreme court could rule on the question and transfer the case back to the court of appeals. It was not required to finally determine the cause.¹¹⁴

110. *Esker v. Davis*, *supra* note 94.

111. *Koepfel v. Koepfel*, *supra* note 78.

112. *Loeb v. Viviano*, *supra* note 66.

113. *Vanderhoff v. Lawrence*, *supra* note 66.

114. *Lieffring v. Birt*, *supra* note 3.