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THE WORK OF THE SUPREME COURT FOR THE YEAR 1950

STATISTICAL SURVEY

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The statistical survey for 1950 is derived from the 265 majority opinions written by the judges and commissioners of the Missouri Supreme Court during that year. This sum represents an increase of 21 opinions over the preceding year and is the largest since 1943, when 306 opinions were written.[1] Five of the opinions were originally written in division and later accepted by the court *en banc*. There were four dissents with opinion and ten without opinion. Six concurring opinions were handed down and there were ten concurrences without opinion. The personnel of the court was changed in the following manner: Judge Douglas resigned December 31, 1949; Judge, formerly Commissioner, Dalton was selected January 3, 1950; Judge Clark died June 9, 1950; and Judge Hollingsworth was selected August 4, 1950. Commissioner Bradley resigned January 23, 1950; and Commissioners Aschemeyer and Lozier were selected January 3, 1950, and January 23, 1950, respectively. To enable the court to keep abreast of its work, a special division (Division Three), composed of Judge Tipton of the court and Judges Vandeventer and McDowell of the Springfield Court of Appeals, was formed and ordered to hear cases on November 14, 1950.

Table I indicates the distribution of the 265 opinions among the divisions of the court.

TABLE I

NUMBER OF OPINIONS WRITTEN BY EACH DIVISION

En Banc	48
Division Number One	119
Division Number Two	96
Special Division Number Three	2
Total	265

*Chairman, Board of Student Editors.

1. Total majority opinions for the preceding six years are as follows: 1944, 251; 1945, 197; 1946, 181; 1947, 244; 1948, 254; 1949, 244.

Table II indicates the classification of the opinions according to their dominant issue. Since many of the cases contained several issues, the selection of the most important one was necessarily somewhat arbitrary.

TABLE II

TOPICAL ANALYSIS OF DECISIONS

Administrative Law	4
Appeal and Error	17
Attorney and Client	2
Automobiles	6
Banks and Banking	2
Constitutional Law	8
Contracts	3
Corporations	4
Courts	1
Criminal Law	44
Damages	6
Death	1
District and Prosecuting Attorneys	1
Divorce	3
Equity	5
Evidence	3
Fraud	6
Gifts	1
Husband and Wife	2
Insane Persons	3
Insurance	4
Judgments	4
Levees and Flood Control	2
Limitation of Actions	2
Mandamus	3
Marriage	1
Master and Servant	1
Mortgages	3
Municipal Corporations	4
Negligence	34
Negotiable Instruments	1
Partnerships	1
Pleading	2
Practice and Procedure	11
Principal and Agent	2
Prohibition	1
Quo Warranto	1

Railroads	5
Real Property	20
Schools and School Districts	5
Statutes	2
Taxation	2
Torts (other than negligence)	3
Trusts	5
Vendor and Purchaser	2
Wills and Administration	15
Workmen's Compensation	7
Total	265

Table III indicates the disposition of the cases before the court during 1950. For the most part the phrases used are those of the judges and commissioners themselves.

TABLE III
DISPOSITION OF LITIGATION

Alternative Writ of Mandamus Modified	1
Alternative Writ of Mandamus Quashed	1
Appeal Dismissed	3
Cause Remanded with Directions	2
Cause Transferred to Court of Appeals	3
Decree Affirmed	2
Decree Affirmed in Part and Reversed in Part and Cause Remanded with Directions	1
Decree Affirmed and Cause Remanded for Further Proceedings	1
Decree Modified and Affirmed as Modified	1
Decree Reversed and Cause Remanded with Directions	3
Judgment Affirmed	129
Judgment Affirmed and Cause Remanded	1
Judgment Affirmed in Part and Reversed and Modified in Part	1
Judgment Affirmed in Part and Reversed in Part and Cause Remanded with Directions	3
Judgment Affirmed on Condition of Remittitur; Otherwise Reversed and Remanded	6
Judgment and Decree Affirmed	4
Judgment and Decree Modified and Affirmed as Modified	1
Judgment and Order Reversed and Cause Remanded	2
Judgment and Sentence Affirmed	2
Judgment Modified and Affirmed as Modified	6
Judgment Reversed	7
Judgment Reversed and Cause Remanded	16

Judgment Reversed and Cause Remanded for a New Trial	12
Judgment Reversed and Cause Remanded for Further Proceedings	5
Judgment Reversed and Cause Remanded with Directions	15
Judgment Reversed and Cause Remanded with Directions on Condition of Remittitur	1
Judgment Reversed and Declaratory Judgment Entered	1
Judgment Reversed in Part and Affirmed in Part	1
Order Affirmed	5
Order Granting New Trial Affirmed and Cause Remanded	7
Order Reversed and Causes Remanded with Directions	9
Order Suspending License to Practice Law	1
Petitioner Remanded to Custody	1
Preemptory Writ of Mandamus Issued	2
Preliminary Rule in Prohibition Discharged	2
Provisional Rule in Prohibition Discharged	2
Provisional Rule in Prohibition Made Absolute	3
Rule Made Absolute in Part and Discharged in Part	1
Writ of Ouster Ordered	1
Total	265

The final table (Table IV) indicates the disposition of the motions subsequent to decision to the extent that such disposition can be determined from present records. Cases wherein rehearings were granted or which were transferred to the court *en banc* are necessarily not included in this survey.

TABLE IV

MOTIONS SUBSEQUENT TO DECISION

Motion for Rehearing Denied	43
Motion for Rehearing or an Order Limiting Retrial Overruled	1
Motion for Rehearing or Modification of Opinion Denied	2
Motion for Rehearing or to Modify Opinion Denied and Opinion Modified on Court's Own Motion	1
Motion for Rehearing or to Transfer to Court *En Banc* Denied	58
Motion to Modify Denied	1
Motion to Modify Opinion Denied and Opinion Modified on Court's Own Motion	1
Motion to Modify Opinion or to Clarify Opinion Denied and Motion for Rehearing or to Transfer to *Banc* Denied	1
Motion to Transfer to Court *En Banc* Denied	3
Motion to Transfer to Court *En Banc* or for Modification of Opinion or for Rehearing Denied	3
Total	114

APPELATE PRACTICE

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

During the year under review the court found it necessary to transfer only three cases to the appropriate court of appeals on the ground of lack of jurisdiction in the supreme court. At least one of them involves questions of some importance.

In *Lemonds v. Holmes*,[1] an action for damages for personal injuries sustained in an automobile accident, the jury returned a verdict in favor of plaintiff and against two of four defendants, assessing damages at $5000, and also returned a verdict against plaintiff and in favor of the other two defendants. Plaintiff appealed from the judgment in favor of the two defendants against whom the judgment in favor of plaintiff was rendered also appealed. Plaintiff had sued for $20,000 damages, but did not seek to have the judgment which he did obtain reviewed upon any ground of inadequacy or damages. The court held that the amount in dispute was only $5000, and transferred the cause. The holding is based upon the rule announced in *Hoelzel v. Railroad*,[2] which in effect overruled prior decisions as to procedure to be followed where a judgment for plaintiff is reversed as to only one of two or more defendants who are jointly liable. It had formerly been the rule that, since there can be but one judgment in the case, error as to one defendant necessitated a new trial of all issues as to all defendants. That rule was later modified in cases providing that, under those circumstances, the case would be remanded to the trial court with directions to hold in abeyance the verdict of liability as to the defendants against which no error was committed and to grant a new trial as to the liability of the other defendant against whom error was committed. This resulted in a new trial as to both defendants on the question of damages.[3] In the *Hoelzel* case that rule was further modified to provide that the new trial be confined to the issue of liability only of the defendant against whom error had been committed, to be followed by a judgment for the amount of the verdict originally rendered to be entered against all defendants finally held liable. It was pointed out in the *Hoelzel* case that there is no set rule which should govern the question but that the court in the light of the facts in each

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1. 229 S.W. 2d 691 (Mo. 1950).
2. 337 Mo. 61, 85 S.W. 2d 126 (1935).
3. Compare Neal v. Curtis & Co., 328 Mo. 389, 41 S.W. 2d 543 (1931).

particular case should determine the character of the error and the issues affected thereby and rule the question accordingly. Applying that rule to the jurisdictional question involved in the *Lemonds* case, the court held that, because the plaintiff did not question the amount of the verdict as to the two defendants held liable by the jury, the other two defendants could have satisfied plaintiff's claim by confessing judgment in favor of plaintiff for $5000, and that, for that reason, the amount involved on the appeal was only $5000. The court did not consider the question of whether or not, if plaintiff should be successful in the appellate court against the two defendants who were discharged by the jury, those two defendants, in the second trial, could raise a question as to the excessiveness of a $5000 verdict. It does appear that those two defendants are necessarily deprived of the right to question the excessiveness of a $5000 award under the situation created by the decision in the *Lemonds* case.

A slightly different situation was before the court in *Reaves v. Rieger*,[4] which was also transferred because of the fact that the amount involved *on the appeal* was only $5000 although plaintiff had sued for $20,000. In that case the jury returned a verdict for $5000.00. The trial court sustained defendant's motion to set aside the verdict and enter judgment for defendant and, in the alternative, ordered a new trial. The court states that if both the order granting a new trial and the order entering judgment were reversed, plaintiff would gain and defendant would lose only $5000 by the reinstatement of the jury's verdict. On the other hand, if the judgment for defendant were affirmed, plaintiff would lose only that for which he contends, on the appeal, he is entitled to, that is, the $5000 awarded by the verdict which he seeks to have reinstated. The court holds that plaintiff's claim for the original amount prayed for is not now before the appellate court but that on the appeal the amount of the verdict which the trial court set aside is determinative of appellate jurisdiction. It does not appear that, in the event the case is returned for a new trial, the plaintiff would be limited to a $5000 recovery.

The third case transferred is *Juden v. Houck*.[5] That was a suit by life tenants for authority to execute certain leases and make certain improvements and to bind the remaindermen to the terms of the leases. Appellate jurisdiction was sought to be sustained in the supreme court be-

4. 232 S.W. 2d 500 (Mo. 1950).
5. 228 S.W. 2d 668 (Mo. 1950).

cause of the fact that the estimated cost of the improvement was $140,000. In transferring the cause on its own motion, the court points to the fact that the cost or value of the improvement is not an issue on the appeal and that there is no evidence from which the value of the relief granted to the plaintiff from the decree can be determined. It is again emphasized that the amount involved must affirmatively appear from the record in order to vest jurisdiction in the supreme court. On the other hand, the court held, in *Chemical Bank & Trust Co. v. Anheuser-Busch*,[6] that where the suit was to compel the issuance of a new stock certificate to replace a lost certificate and the ownership of the stock would be lost without the new certificate, and the market value of the stock was in excess of $5000, the court did have appellate jurisdiction on the ground of "amount in dispute."

In *Missouri State Oil Co. v. Fuse*,[7] the action was one to establish a permanent easement against defendant's land. The court held that it had jurisdiction on appeal on the ground that title to real estate was involved, pointing to the fact that, although title to the fee was not directly in issue, the relief sought is an easement which would interfere with the exclusive and unrestricted possession and use of the land in question, and would operate upon defendant's title "in some measure or decree." The court points to the fact that the question there considered differs from the question presented in an appeal in a condemnation proceeding, where the issue is not "title" but is on the "right to take all or a part of the landowner's conceded title."

The Right of Appeal

In *Kattering v. Franz*,[8] the court considered the requirement of the 1943 Code of Civil Procedure and the rules of court with reference to the time for deposit of the docket fee. Under the former practice the trial court habitually permitted the taking of appeals without payment of the docket fee, and, as a result, numerous delays in the final disposition of litigation frequently resulted. When the code was adopted it was specifically provided that the docket fee shall be deposited with the clerk of the trial court at the time of filing notice of appeal,[9] and that statutory rule is implemented by Supreme Court Rule 1.29 prohibiting the appellate clerk from filing a notice of appeal received from the clerk of the trial court not

6. 231 S.W. 2d 165 (Mo. 1950).
7. 232 S.W. 2d 501 (Mo. 1950).
8. 231 S.W. 2d 148 (Mo. 1950).
9. Mo. Rev. Stat. § 512.050 (1949).

accompanied by the docket fee, and Rule 3.28 providing that no notice of appeal shall be accepted and filed by the clerk of the trial court unless the docket fee is paid. In the *Kattering* case the court dismissed the appeal because the statute and rules had not been complied with, notwithstanding the affidavit of counsel showing the absence of inexcusable neglect upon appellant's part in failing to comply with the rules. The court calls attention to the fact that if the rules are not followed the result would be to create again the same conditions which the new code sought to remedy. The decision, in affect, amounts to a holding that the actual payment of the docket fee is jurisdictional—a very proper holding within both the intention and the spirit of the new code.

In *Coyne v. Southwestern Bell Telephone Co.*,[10] the trial court sustained defendant's motion to dismiss plaintiff's amended petition and dismissed the case with prejudice. From that order of dismissal plaintiff appealed. Defendant filed a motion to dismiss the appeal in the appellate court for lack of jurisdiction. The record shows that plaintiff's first petition was dismissed on defendant's motion for failure to state a cause of action. Ten days later the court entered an order enlarging the period for pleading. Within the enlarged time for pleading plaintiff filed the amended petition. The court held that the first order of dismissal, that is, dismissal of the first petition, was a final judgment, from which plaintiff took no appeal. Consequently the trial court did not have authority to extend the time or to enter any further orders after the 10-day period of time within which to file a notice of appeal had expired. While the trial court could have granted plaintiff relief by setting aside the first order of dismissal, or by sustaining a motion for a new trial if one had been filed within 10 days after the dismissal had been ordered, neither of those steps were taken, and the opinion holds that under those facts there was no appellate jurisdiction and that the appeal should be dismissed. This opinion again discloses the fact that in every case where a motion to dismiss plaintiff's petition is sustained, the plaintiff must see to it that affirmative action is taken within 10 days, either by filing a notice of appeal, filing a motion for a new trial, or obtaining an order of the trial court setting the order of dismissal aside. If none of those steps are taken the right of appeal is lost and the order sustaining the motion to dismiss becomes a final determination of the case from which no appeal will lie.

10. 232 S.W. 2d 377 (Mo. 1950).

The court also dismissed the appeal in *State* ex rel *St. Louis County v. Public Service Commission.*[11] In that case proceedings before the Public Service Commission were brought to the circuit court for review. The circuit court reversed the report and order of the commission and remanded the cause to the commission for further proceedings. Thereupon the relator filed its motion to reconsider the judgment of the circuit court, in the nature of a motion for a new trial and, upon the overruling of that motion, filed its notice of appeal. The court held that the order of the circuit court remanding the cause to the commission for further proceedings was not a final order and that the case could not be brought to the appellate court on appeal until the commission had acted pursuant to the order of the circuit court and the matter had again been brought before the circuit court for review. In so ordering the court rejected the theory that the Public Service Commission law provides a complete method for appeal and that the provisions of the Civil Code with respect to appeal are inapplicable.

Questions for Review

In *Nelson v. Kansas City,*[12] plaintiff sued for judgment in the sum of $10,000 for personal injuries. At the close of all the evidence defendant moved for a directed verdict on the ground that no submissible case was made. That motion was overruled and plaintiff secured a verdict for $1100. Plaintiff filed a motion for a new trial on the ground, among others, that the verdict was grossly inadequate. The trial court sustained the motion on that ground and ordered a new trial on the question of damages only. Defendant appealed from that order without filing any after-trial motion. On the appeal respondent contended that, as defendant had not filed any after-trial motion, the only question for appellate review was whether or not the trial court abused its discretion in granting a new trial on the ground of the inadequacy of the verdict. Appellant contended that the court has the right and the duty to review the evidence as to liability. That contention was sustained, the court stating that if plaintiff made no submissible case he was not entitled to any damages and could not be granted a new trial solely on the ground that the verdict in his favor was inadequate. The court then considered the evidence as to liability and held that the defendant's motion for a directed verdict should have been sustained. Point-

11. 228 S.W. 2d 1 (Mo. 1950).
12. 227 S.W. 2d 672 (Mo. 1950).

ing to the fact that under proper procedure defendant should have renewed his request for a directed verdict by an appropriate after-trial motion, the court held that this failure on the part of defendant to follow the proper procedure did not deprive the court of jurisdiction to remand the cause with direction to enter judgment in favor of defendant. In so doing, the court relied not only upon the reasoning that a verdict in any amount would be excessive where defendant is not liable in any event, but also pointed to its Rule 3.27 respecting plain errors, and its Rule 1.28 providing for liberal construction of the rules to promote justice. Thus, while not approving defendant's failure to file a proper after-trial motion, the court refused to put the parties to the expense of a new trial where the final result could only be a judgment for defendant. Similarly in *Wood v. St. Louis Public Service Co.*,[13] the plaintiff appealed from an order of the trial court overruling plaintiff's motion for a new trial on the issue of damages only. The court again held that the question of whether or not plaintiff made a submissible case was before the court for consideration, even though defendant had not appealed; but, in considering that question on its merit, reached the conclusion that a submissible case was made. The opinion then reviewed the evidence as to the adequacy of the verdict, held that it was not adequate, and affirmed the judgment.

Records and Briefs

During the year under review the court was not called upon to consider any substantial question with respect to the requirements of the statutes or of its own rules as to the sufficiency of records and briefs.

CRIMINAL LAW

Charles H. Rehm*

In the field of criminal law there were forty-two appeals decided by the Supreme Court of Missouri, during the year 1950. Despite the fact there is rarely a matter of first impression before the court in this field, the supreme court reversed approximately one case in three. Thirteen appeals resulted in reversals, while twenty-nine were affirmed, including one by a divided court.

13. 228 S.W. 2d 665 (Mo. 1950).

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I. Procedure before Trial

A. *Search and seizure*

No case involving the question of lawful search and seizure was decided on its merits by the supreme court during the year 1950. In the companion cases of *State v. Medley* and *State v. Fithen*,[1] and in *State v. Lee*,[2] the court found the question had not been sufficiently preserved or presented for review.

B. *Indictment and Information*

The court continued the tendency to sustain informations and indictments which generally follow language of the statute and apprise defendant of the offense with which he is charged.[3]

Failure of the information to state the day of the month upon which the offense occurred is not fatal;[4] nor is failure to allege with particularity the ownership or description of property allegedly stolen, when property or ownership is merely incidental and not an essential element of the crime charged.[5]

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1. 232 S.W. 2d 519 (Mo. 1950).
2. 233 S.W. 2d 666 (Mo. 1950).
3. State v. Hardy, 225 S.W. 2d 693 (Mo. 1950) (defendant was charged with assault with malice aforethought, the statute used the word, "maim", and the court found the words, "to do great personal injury or bodily harm", used in the information to be the same and within the terms of the statute); State v. Anderson, 232 S.W. 2d 909 (Mo. 1950) (charge was embezzlement by bailee, and objection was made to the indictment on the ground that it failed to show by whom the embezzled property was delivered to bailee. Court said where charge is basically predicated upon the existence of a fiduciary relationship and that relationship is expressed in the statute by the use of the word, "bailee", it may likewise be so compressed in the indictment. It is not necessary for all particulars of the fiduciary relationship to be explicitly pleaded if the term used in the statute is employed and is sufficient to indicate that relationship); State v. Jones, 227 S.W. 2d 713 (Mo. 1950) (charge was burglary of a dwelling; court found information which contained, "breaking the knob to a rear kitchen door", sufficiently followed language of statute which read, "by forcible bursting or breaking the wall or outer door of such house or the lock or bolt of such door"); State v. Dowling, 230 S.W. 2d 691 (Mo. 1950) (where charge was grand larceny; description in information of property alleged to have been stolen consisted of a listing of the specific articles together with their reasonable value); State v. Birkner, 229 S.W. 2d 674 (Mo. 1950); State v. Black, 227 S.W. 2d 1006 (Mo. 1950).
4. State v. Feeney, 226 S.W. 2d 688 (Mo. 1950). Also see State v. Shipley, 232 S.W. 2d 515 (Mo. 1950) where the information charged the crime on the 27th of March and the instruction referred to March 26th as the date.
5. State v. Lundry, 233 S.W. 2d 734 (Mo. 1950), where affidavit filled in magistrate court referred to "divers red oak and white oak trees" and amended information stated, "fifty Black Oak trees." In affirming conviction the court said the amendment could not have prejudiced the substantial rights of the defendant. See also State v. Dowling, *supra*, note 3.

Where defendant entered into a conspiracy with others to rob and pursuant to the conspiracy, and in the perpetration of the robbery, a victim was killed by a conspirator, other than defendant, it was not necessary for the information to aver the conspiracy.[6]

II. Continuances

In the two cases where a denial of defendant's motion for a continuance was presented for review, the appellate court found no abuse of trial court's discretion, where in one the evidence of the absent witness would have been merely cumulative and application allegedly due to sickness of witness failed to contain either a doctor's certificate or supporting medical opinion,[7] and in the other generally there was no abuse of discretion.[8]

III. Trial

A. *Voir Dire*

A prospective juror who at one stage of questioning indicates he has formed an opinion based on "general newspaper reports" which is not a fixed opinion, but one that would influence his judgment and take evidence to remove and that it would be impossible for him to be fair and impartial in the case, then later states he could go into the trial with an open mind and not be guided by anything but the evidence and instruction, is a qualified juror, and where record did not disclose any objection to court's method of questioning juror, the appellate court held that there was no showing of abuse of trial court's discretion.[9] Nor was there an abuse of discretion in overruling a challenge for cause in a murder case where a venireman qualified as a competent juror, but for personal reasons stated he would rather not serve.[10]

B. *Opening statement*

While the reading of the information to the jury during the opening statement is not favored, it does not constitute reversible error; but reading

6. State v. Bradley, 234 S.W. 2d 556 (Mo. 1950). It was not necessary for the information to allege the homicide was committed by another, who with defendant and others had entered into a conspiracy to rob. Defendant was not prosecuted for robbery nor for entering into a conspiracy, but for murder and evidence of the conspiracy was but an incident to the crime charged, and proof that the homicide was committed in the perpetration of robbery was tantamount to proof of the necessary elements of the crime of murder in the first degree.
7. State v. Britton, 228 S.W. 2d 662 (Mo. 1950).
8. State v. Garner, 360 Mo. 50, 226 S.W. 2d 604 (1950).
9. State v. Tiedt, 360 Mo. 594, 229 S.W. 2d 582 (1950).
10. State v. Brown, 360 Mo. 104, 227 S.W. 2d 646 (1950).

the prosecutor's affidavit vouching for the facts underlying and constituting the charge, according to prosecutor's best information and belief, is reversible error.[11]

C. *Evidence*

1. Confessions and admissions

Failure of the record to affirmatively show that before making a confession the defendent had been advised of his right to counsel, does not render the confession involuntary, even though defendant was under arrest at the time.[12]

Holding defendant in jail without a criminal charge being placed against him, for a period of more than twenty hours, which is a violation of Section 544.170, of *Missouri Revised Statutes* (1949), does not render defendant's confession, given while under arrest, involuntary as a matter of law.[13]

2. Conduct of Defendant

Proof of flight, resisting or attempting to escape and possession and threatened use of a weapon at the time of arrest are competent as bearing on the question of defendant's guilt.[14] However, in another case, defendant's witness' testimony, that some five or six weeks prior to the killing defendant had related to him that defendant had had a discussion with victim and witness received the impression defendant was disturbed, worried, excited and alarmed because of victim's threats, was excluded as heresay, purely self-serving and not part of the res gesta, in the absence of other evidence that the defendant had prior difficulty with the victim or that his condition was due to his relationship with the victim.[15]

In a murder prosecution the court approved admission of evidence that the defendant believed the grand jury was investigating his conduct and that of his son in certain transactions with the deceased and that the defendant exhibited an active interest in what the grand jury was doing, on the

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11. State v. Bohannon, 234 S.W. 2d 793 (Mo. 1950).
12. State v. Tillett, 233 S.W. 2d 690 (Mo. 1950).
13. State v. Lee, *supra* note 2; In State v. Tillett, *supra* note 12, defendant was also held in custody beyond the statutory period and urged that as a ground for acquittal without avail.
14. State v. Garner, *supra* note 8; In State v. Missey, 234 S.W. 2d 777 (Mo. 1950), the court approved admission of testimony of a police officer relating conversation of co-defendants, overheard through the use of a microphone placed in the jail.
15. State v. Tillett, *supra* note 12.

issue of motive, and held it did not violate the statute with respect to secrecy of grand jury proceedings.[16]

3. Proof of other crimes

Where intent is an essential element of the crime charged, evidence tending to show intent is admissible, although showing other offenses; and evidence of other crimes, where admissible on the issue of intent, can be shown independent of any conviction therefor.[17]

In a prosecution for statutory rape, evidence of two state's witnesses' convictions in juvenile court for petit larceny was inadmissible to affect witnesses' credibility.[18]

In a murder prosecution, where the state charged that defendant hired another to help defendant and his son kill the deceased, evidence of the acquittal of the son in a prior trial was properly excluded.[19]

4. Privilege, competency and credibility

During the year reviewed the court interpreted Section 546.260, *Missouri Revised Statutes* (1949), and found under this section that a wife, while a competent witness against her husband, cannot be forced to testify for the State, contrary to her wishes.[20]

A witness, who some six years prior to the trial was adjudged by the probate court to be an habitual drunkard and incapable of managing his affairs and committed to a state hospital, was prima facie a competent wit-

16. State v. Brown, *supra* note 10.

17. State v. Medley, *supra* note 1. The court further held in this case that a general objection to the admission of evidence concerning prior convictions was insufficient unless the evidence was wholly inadmissible for any purpose. Objection must be specific and call court's attention directly to the group upon which the objection is being made. It was suggested that had an objection to the evidence been made upon the ground that it tended to prove a separate crime for which defendant was not on trial, a more serious question would have confronted the court.

18. State v. Coffman, 360 Mo. 782, 230 S.W. 2d 761 (1950).

19. State v. Brown, *supra* note 10.

20. State v. Dunbar, 230 S.W. 2d 845 (Mo. 1950). Wife filled an affidavit against her husband for felonious assault with a gun, her arm being amputated due to the injury she received. At the trial she refused to testify and the court required her to do so. This was reversible error, court saying while she was a competent witness she was not a compellable witness. The statute expressly applies to criminal cases and the option to testify or not to do so is with the spouse and not with the defendant. This is true despite wording of the statute which reads, "but any such person may, at the option of the defendant, testify in his behalf", the court holding this was an unnecessary provision and having no relation to the first part of the section making the spouse a competent witness. In State v. Black, *supra* note 3, the question of wife and children testifying against defendant was also discussed but here no question was preserved for review.

ness and, in absence of request for hearing on the issue of mental competency, the court did not err in overruling objection to witnesses' testimony.[21]

Two cases involved the competency of children to testify. In one case the supreme court found that the trial court abused its discretion in permitting a girl aged five years and four months to testify,[22] and in another case the appellate court found the testimony of a boy six years of age to be competent.[23]

In two rape cases the appellate court approved of the trial court's permitting prosecutrix to exhibit to the jury the child born of the intercourse for the purpose of comparing the child's features with those of the defendant.[24] Our court had not previously ruled on this question and there is a conflict of authority in other jurisdictions.

D. Cross-examination

Where defendant's daughter was the deceased, the court, in reversing a manslaughter conviction, held it was erroneous and prejudicial to defendant, for the state to be permitted to examine defendant's wife on cross-examination concerning the way defendant treated the witness. On direct examination the wife was asked how the defendant treated the children, including the deceased, but was not asked how he treated her, and the court found that she was clearly examined on a subject not brought out in direct examination, in violation of Section 546.260, *Missouri Revised Statutes.* (1949).[25]

Limiting the scope of the cross-examination is within the sound discretion of the trial court;[26] and the same is true concerning a request for mistrial due to incidents arising during the course of the cross-examination.[27]

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21. State v. Brown, *supra* note 10.
22. State v. Jones, 360 Mo. 723, 230 S.W. 2d 678 (1950).
23. State v. Tillett, *supra* note 12. In this and the Jones case the court discusses this matter fully, saying that there is no precise age at which a child can be considered competent or incompetent. In each case the trial judge is to determine this by appropriate questions, and his decision can only be set aside where there has been an abuse of this discretion. The four fundamental elements are: a) present understanding of, or intelligence to understand on instruction, to tell the truth; b) mental capacity at the time of occurrence in question truly to observe and register such occurrence; c) memory sufficient to retain an independent recollection of observations made; d) capacity truly to translate into words the memory of such observations.
24. State v. Johnson, 234 S.W. 2d 219 (Mo. 1950); State v. Bryant, 234 S.W. 2d 584 (Mo. 1950).
25. State v. Black, *supra* note 3.
26. State v. Ronimous, 227 S.W. 2d 58 (Mo. 1950).
27. State v. Ronimous, *supra* note 26; State v. Mahan, 226 S.W. 2d 593 (Mo. 1950).

E. Instructions

The court is not required to instruct the jury upon the defense of alibi as part of the law of the case, without a request from the defendant for such an instruction;[28] and in absence of a request by the defendant, the court is not bound to instruct upon questions which are merely cautionary and collateral to the principal issues involved in the case.[29] Failure to instruct the jury that a unanimous verdict was required was not fatal, where when verdict of guilty was returned, the jury was polled and the court ascertained that the verdict was unanimous.[30]

Where defendant was charged with the crime against nature, and the charge was supported by substantial evidence, the trial court properly refused to instruct that if the jury found prosecuting witness's testimony to be contradictory or contrary to human experience the jury should disregard such testimony unless corroborated, as being comment on the evidence.[31]

In a larceny case, where uncontradicted evidence shows the value of the property stolen to be over thirty dollars, an instruction on petit larceny is improper;[32] likewise where evidence does not justify any inference that defendant had attempted but failed in his purpose, the court properly refused defendant's instruction submitting the issue of an attempt to commit a crime.[33]

In the case of *State v. McGee*,[34] the constitutionality of the instruction relative to the defense of insanity was raised. By this approach, the court was again asked, without avail, to review and reverse its former decisions

28. State v. Johnson, 234 S.W. 2d 219 (Mo. 1950); State v. Missey, *supra* note 14.

29. State v. Lee, *supra* note 2 (on question whether a confession is voluntary. Where state's main instruction admitted the essential facts to be proved by the state to authorize a conviction, defendant's requested instruction submitting the converse of the facts and issues, but which did not do so correctly, was properly refused; but had they been correct, court was obligated to give them); State v. Bradley, *supra*, note 6; State v. Mahan, 226 S.W. 2d 593 (Mo. 1950) (involving accomplice's creditability as a witness where there was testimony in addition to that of the accomplice).

30. State v. Brown, *supra* note 10.

31. State v. Wilson, 233 S.W. 2d 686 (Mo. 1950); however an instruction that if defendant filed to avoid arrest, jury might take that into consideration in determining guilt or innocence was not subject to objection as a comment on the evidence. State v. Bryant, *supra* note 24.

32. State v. Stegall, 226 S.W. 2d 720 (Mo. 1950).

33. State v. Wilson, *supra* note 31. And in a rape case where state showed penetration, however slight, instruction covering attempted rape or common assault is not proper. State v. Coffman, *supra* note 18.

34. 234 S.W. 2d 587 (Mo. 1950).

that the doctrine of "volitional insanity" or "irresistible impulse" is not recognized in this state. The court approved the instruction which limits the defense of insanity to the test of knowledge of right from wrong, and refused to extend it to include those cases where the individual may be able to distinguish between right and wrong, but still have an uncontrollable impulse to commit an unlawful act.

In another case where defendant was charged with murder, and some evidence showed that defendant, after starting an argument, abandoned his attempt and this was made known to deceased, and defendant later had to kill deceased to protect himself, an instruction to the effect "if defendant, without a felonious intent, did not enter in a difficulty . . .", was reversible error, as narrowing defendant's right of self-defense.[35]

Where there was evidence that the shooting of deceased was justified in defense of defendant's home, failure to give an instruction on the law as to defense of habitation was reversible error.[36] The same was true where there was a failure to instruct on the question of whether the shooting was accidental or not, where there was some evidence that it was.[37]

In another case defendant admitted taking certain hogs but claimed that he did so at the direction of his father who was entitled to the hogs. The defense was submitted to the jury on the usual grand larceny instruction with these words added, "without any honest claim thereto." State's contention that this clause was a sufficient submission of defendant's defense was overruled, the court pointing out that defendant did not have or make any honest claim or right to the hogs, but his defense was that his father had the right and he was acting under his father's direction.[38]

Where evidence for the defense does not establish an actual battery upon defendant's person, it is insufficient to require an instruction on manslaughter;[39] however, where the evidence shows personal violence to defen-

35. State v. Mayberry, 226 S.W. 2d 725 (Mo. 1950). Under this instruction the jury may well have thought defendant's right of self-defense was lost to him and was not revived if the jury believed defendant entered into the difficulty with felonious intent although jury may have also believed defendant's testimony tending to show he nevertheless repented and had attempted in good faith to withdraw. In State v. Colbert, 226 S. W. 2d 685 (Mo. 1950) court approved a self-defense instruction.

36. State v. Kizer, 230 S.W. 2d 690 (Mo. 1950).

37. State v. Dunbar, *supra* note 20.

38. State v. Webster, 230 S.W. 2d 841 (Mo. 1950). Point advanced in this case was that the subject matter of the defense must be embodied in a separate instruction.

39. State v. Kizer, *supra* note 36.

dant a manslaughter instruction should be given even though defendant, as a witness, claims he killed deceased to save his own life.[40] Where evidence shows a man was killed in perpetration of a robbery, the court did not err in failing to instruct on second degree murder or manslaughter.[41]

In *State v. Dunbar, supra,*[42] reversed on other grounds, the court held that the inclusion of the words, "or to do some great bodily harm," in the instruction was not error, even though information only charged defendant with intent to kill.

Defendant is not entitled to an instruction that he is to receive the benefit of the doubt as to the severity of the punishment.[43]

F. *Argument of Counsel*

Failure to grant a mistrial because of counsel's argument that defendant was a dangerous man, was not reversible error or an abuse of the trial court's discretion where there was evidence that the defendant had burglarized a dwelling house while carrying a deadly weapon.[44]

The court held that in a murder trial, it is within the discretion of the trial court to determine how far counsel for defendant should be permitted to go outside the record to detail circumstances of other specific crimes or trials for the purpose of illustration and argument.[45]

In a rape case where the defendant was colored, the court found that the prosecuting attorney's reference to the victim as "this eleven year old white girl," was not intended to, nor did, arouse a racial prejudice against defendant.[46] During the trial of this case the matter was discussed freely by both sides and no objection was made.

In another case, where defendant's counsel offered in evidence and read to the jury defendant's written statement of his version of the killing, and in argument to jury stated that the reason for the state's failure to introduce

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40. State v. Edwards, 226 S.W. 2d 592 (Mo. 1950). The doctrine of this case is that evidence of violence to the person makes a jury question as to whether the killing was one in hot blood, and that the jury may believe the defendant's testimony concerning the battery, but disbelieve he acted in self-defense, thus he is entitled to manslaughter instruction in spite of his testimony on self-defense.

41. State v. Bradley, *supra* note 6; also State v. Britton, *supra* note 7, where court properly refused manslaughter instruction.

42. Note 20.

43. State v. Tiedt, *supra* n. 9.

44. State v. Jones, *supra,* n. 3.

45. State v. Brown, *supra,* n. 10.

46. State v. Oscar, 226 S.W. 2d 722 (Mo. 1950).

such statement in evidence was "up to you," defendant impliedly called attention to defendant's failure to testify and thereby waived the statutory right to non-reference by counsel to defendant's failure and invited state's counsel's reply that they thought defendant's counsel would put defendant on witness stand and could have cross-examined him. The court held the right was personal and could be waived by him and that it was waived in this case. The case was affirmed by a divided court.[47]

G. *Verdict*

Where there are only two defendant's on trial, a verdict which reads, "We, the jury in the above entitled cause find both defendant's guilty of robbery in the first degree by means of a dangerous and deadly weapon, and assess the punishment of each defendant at twenty years in the penitentiary," is not defective in that it fails to assess the punishment of each defendant separately.[48] The verdict of a jury, even in a criminal case, is not to be tested by technical rules of construction. The controlling object is to ascertain the intent of the jury and if this intent is disclosed, the verdict is good though irregular in form.[49]

IV. Specific Offenses

An intentional killing with a deadly weapon raises a presumption of malice and of murder in the second degree;[50] but where the state's evidence shows the killing in the heat of passion and shows the absence of malice the presumption is destroyed, and the crime would be manslaughter.[51]

Where prosecution was under Section 561.450, *Missouri Revised Statutes* (1949), dealing with obtaining money by trick or deception, artifice and confidence game, due to defendant's passing a bad check, the court found that the state did not sustain the burden of proof that defendant had no funds in the bank or that defendant knew he had no funds.[52]

Where the constitutionality of the section dealing with the crime against nature was questioned due to the general and vague definition given it in

47. State v. Tiedt, *supra,* n. 9.
48. State v. Loyd, 233 S.W. 2d 658 (Mo. 1950).
49. State v. Perry, 233 S.W. 2d 717 (Mo. 1950).
50. State v. Lawson, 227 S.W. 2d 642 (Mo. 1950); State v. Whited, 231 S.W. 2d 618 (Mo. 1950).
51. State v. Whited, *supra* n. 50.
52. State v. Scott, 230 S.W. 2d 764 (Mo. 1950).

the statute, the court indicated that the definition was sufficient, even though the matter had not been preserved for review.[53]

In *State v. Black, supra* note 3, where a father was charged with manslaughter, there is a good discussion concerning the right of a parent to punish children. The parent is the judge in his house within certain limits. Punishment must be for the good of the child and not to satisfy evil passion of the parent, and punishment cannot be excessive or cruel. All factors are taken into consideration and it is question for the jury whether the parent stayed within his rights.

Where metal stolen by the defendant consisted of three small truck loads, two taken one night and one the next night, and all was deposited in one pile, and then later sold in one load, the taking constituted but one transaction, and it was not error to charge the entire taking as a single larceny.[54]

EVIDENCE

JACKSON A. WRIGHT*

The supreme court in only twenty-five cases during the year 1950 touched upon questions of evidence which the writer deems to be worthy of note. Again, most of the questions regarding evidence were determined along generally established rules.

JUDICIAL NOTICE

In only two cases was the question of judicial notice mentioned by the court. In the case of *In re DeGheest's Estate*,[1] the court stated it would take judicial notice of federal executive orders that have the force and effect of law. However, under the Missouri statutes, purported printed regulations of the Republic of France were not admissible as prima facie evidence of regulations, and the statute making the laws of foreign nations an issue for the court was not in effect.[2]

The court also took judicial notice that during the twenty years prior to 1950 there had been a very great increase in the number of motor vehicles;

53. State v. Wilson, *supra*, n. 33.
54. State v. Stegall, *Supra*, n. 32.

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1. 232 S.W. 2d 378 (Mo. 1950).
2. See MO. REV. STAT. §§ 490.020, .120 (1949); MO. REV. STAT. ANN. §§ 1817, 1814.6.

that they are now extensively used for transportation of persons and property; and that off street parking tends to facilitate traffic and avoid hazards to life and property.[3]

RELEVANCY, MATERIALITY, COMPETENCY

A. *Competency in General*

The court held in *Menzi v. White*,[4] that the word "original" is a relative term. This was a case involving a purported will of one Berenice Ballard Barker. In the trial and pleading of the case, the court found vagueness and equivocation as to the physical documents. The court referred to one as "an executed duplicate," while the appellant referred to the action as involving a "duplicate original." In discussing the matter, the court points out that the term "original" may mean completely and fully executed by the maker, or may merely mean a physical original document. In this instance, they were referring to a carbon copy which had been executed.

In a case arising out of a collision of an automobile and a truck, *Ford v. Dahl*,[5] a prior statement of a witness was offered at the trial. The witness testified at the trial to four statements of fact regarding the sounding of a horn, the screeching of brakes, the location of a car, and the presence of a truck. In the prior statement, the witness had made exactly contrary statements with regard to these four items. This statement was offered for impeachment purposes. Objection was made that the impeaching statement contained a number of conclusions which invaded the province of a jury. Among these were, "That there was nothing for him to do but hit the John Ford car on the center of its right side"; "The truck driver did everything he could to avoid the accident"; "And it appears to me that he was solely to blame for the accident." The trial court admitted the statement for impeachment purposes. The supreme court held that apparently the trial judge was applying the rule followed in some jurisdictions, to-wit: That if the broad statement of opinion contains an implied assertion of fact inconsistent with an assertion of fact made by the witness, it is admissible for impeachment purposes. The court states, however, that this is not the rule in Missouri. But the court held that the reading of the exhibit was not prejudicial and therefore did not require reversal. The court held that either

3. Bowman v. Kansas City, 233 S.W 2d 26 (Mo 1950).
4. 228 S.W. 2d. 700 (Mo. 1950).
5. 228 S.W. 2d 800 (Mo. 1950).

the jury believed what the witness said on the stand, in which event the exhibit did not impair the force of what he said, or disbelieved what he testified to on the stand because of his prior contradictory factual statements. They also stated that the error was cured by an instruction regarding the statement.

In *New York Life Insurance Company v. Feinberg*,[6] a lay witness was called to testify as to the appearance of the insured in a life insurance policy. The action was brought by the life insurance company in equity, to cancel two life insurance policies on the life of one Philip Feinberg. The court held that the testimony of lay witnesses that the insured appeared to be well and healthy, and that he was physically active, did not carry much probative value in the face of the positive testimony by two physicians that the insured had a heart disease and had been so advised by a physician.

In *State v. Medley* and *State v. Fithen*,[7] the defendants objected to the introduction of evidence of a prior conviction for automobile theft and grand larceny. Both defendants were jointly charged, tried and convicted of the possession of burglar's tools. The court held that one necessary requirement for conviction was the proof of intent that the burglar tools were in possession to be used for burglarious purposes, and the evidence of the prior conviction was admissible as tending to show this necessary item of proof.

In another criminal case, *State v. Johnson*,[8] objection was made to evidence on the basis of competency. This was a prosecution for statutory rape. The State offered in evidence the child which the prosecuting witness testified to have been born as the result of the acts of the defendant. Objection was made on the grounds that it would tend to prejudice the jury and that it would not shed any light on the case whatsoever. The supreme court held that in such a case the exhibition of the child was proper evidence to show that the crime was committed; to show that the child was conceived prior to the time when the mother arrived at the age of consent; and for the purpose of comparison on the question of race or color. They held that there is a question as to whether it may be exhibited for the purpose of enabling a jury to compare its features and characteristics with those of the accused. In this instance, however, they held that since the evidence was competent, the mere fact that it was prejudicial, or might have been prejudicial, was no ground for exclusion. The matter was left to the discre-

6. 229 S.W. 2d 531 (Mo. 1950).
7. 232 S.W. 2d 519 (Mo. 1950).
8. 234 S.W. 2d 219 (Mo. 1950).

tion of the trial court, and the weight of authority supported the ruling of the trial court. The holding in this case was followed in a case of *State v. Bryant*,[9] which was another prosecution for statutory rape, involving the same question of evidence. The court did not mention the former case, but stated that the weight of authority seemed to favor the rule, and that while the probative value of a comparison was debatable, it was a circumstance which could be considered by the jury.

B. *Parol Evidence Rule*

Commerce Trust Company v. Watts,[10] was an interpleader suit by the Commerce Trust Company alleging that it held funds in a joint bank account under the names of Crandall and Watts. Crandall had died, and Watts' title to the balance of the funds in said bank account was challenged by the administrator of Crandall's estate. It was shown that there was a written agreement between the trust company and Crandall and Watts establishing the joint bank account and the terms thereof, including the right of survivorship. The administrator contended that parol evidence should be introduced to show the terms of the account, and to whom the balance of the money in the account belonged. It was his contention that the parol evidence rule was inapplicable in this case because the deposit agreement was not a valid contract nor a transfer of a present interest at the time it was entered into. The court held that this was not true, that it was a contract, that the parol evidence rule applied, and that in the absence of fraud, duress, mistake or mental incapacity, an unambiguous contract could not be varied and a new and different contract substituted by parol evidence. It was pointed out that the parol evidence rule is one of substantive law and not a rule of evidence, and that even if parol evidence were received without objection, it must be ignored.

C. *Cross Examination*

In the cases of *State v. Brown*[11] and *Hilton v. Thompson*[12] the court reaffirmed the stand that the scope of cross examination is ordinarily a matter of discretion with the trial court, and that unless such discretion is abused, the upper court will not interfere.

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9. 234 S.W. 2d 584 (Mo. 1950).
10. 231 S.W. 2d 817 (Mo. 1950).
11. 227 S.W. 2d 646 (Mo. 1950).
12. 227 S.W. 2d 675 (Mo. 1950).

Again speaking of cross examination, the court in *State v. Black*,[13] restated the general rule that in a criminal case cross examination can only extend to those matters referred to in the examination in chief. This was a prosecution for manslaughter. The wife of the defendant testified for the defendant. On direct examination, the wife was asked regarding treatment of the children by the defendant, and the relationship between the defendant and his children. On cross examination, the wife was questioned regarding the relationship between herself and the defendant, and was asked whether or not she had been hurt by the defendant numerous times and as to whether or not she was scared of the defendant. The court held this to be error and improper examination as relating to other matters not covered on direct examination.

WITNESSES

Piehler v. Kansas City Public Service Company,[14] presented an interesting use of unsworn written statements. In this instance, one of the defendant's witnesses was impeached by the plaintiff. The defendant then introduced prior unsworn written statements made by the witness out of the presence of the plaintiff. The court held them to be admissible for the purpose of rehabilitation of the witness.

The cases of *State v. Jones*[15] and *State v. Tillet*[16] present an interesting picture regarding the use of children as witnesses. In the *Jones* case, a criminal case, the court allowed a five year old child to testify. The child stated that she knew what it was to tell the truth and then when little girls took an oath and did not tell the truth, some of them went to jail. However, it was not shown that the witness knew what jail was, and on cross examination, the child stated that she did not know what an oath meant; that she had not been to school; that she could nor read nor write; and from the testimony it appeared that the witness was incapable of having a just impression of facts respecting which she was examined or of relating them truly. The court held that the trial court abused its discretion in permitting the child to testify. The court said in this instance that there was no presumption that an infant under the age of ten years had sufficient intelligence, discretion and understanding to testify as a witness, and the party offering

13. 227 S.W. 2d 1006 (Mo. 1950).
14. 226 S.W. 2d 681 (Mo. 1950).
15. 230 S.W. 2d 678 (Mo. 1950).
16. 233 S.W. 2d 690 (Mo. 1950).

such a witness has the burden of proving the capacity and competency to testify.

In the *Tillett* case, a six year old boy was offered as a witness. In qualifying the witness, the prosecution questioned the boy quite closely upon his knowledge of what an oath was, whether or not he believed in God, whether he knew what might happen if he did not tell the truth, and of his general knowledge of the difference between the truth and a lie. The record showed that out of the hearing of the jury many qualifying questions were asked in an extensive preliminary hearing. At the close of the preliminary hearing, the trial court overruled the objection, and observed that, "He is a bright boy." The court, in ruling upon the admissibility of his testimony upon appeal, stated that they had gone over the testimony of the boy carefully and that it clearly appeared that he was an intelligent boy, with a capacity to observe and register the events about which he testified. The court then set forth the rule of the four fundamental elements required to be present to make a child of tender years competent to testify as follows: (1) present understanding of or intelligence to understand, on instruction, an obligation to speak the truth; (2) mental capacity at the time of the occurrence in question truly to observe and to register such occurrence: (3) memory sufficient to retain an independent recollection of the observations made; and (4) capacity truly to translate into words the memory of such observation.

In an action to establish a lost will, the defendants objected to the testimony of the beneficiary of the will on the grounds that the beneficiary was not competent to testify as to the contents of the will and as to who the witnesses to the will were.[17] The court, relying upon *Mann v. Balfour*,[18] held that the beneficiary is competent to establish the contents of a lost will. In this case, however, the testimony was limited to testimony as to the names to identify the propounded will, and not for the purpose of proving its due execution.

Admissions and Confessions

Wilson v. Miss Hulling's Cafeterias, Inc.,[19] was an action for damages for personal injuries sustained when the plaintiff stepped upon a substance on the floor of the cafeteria and slipped and fell. An alleged statement of

17. Wright v. McDonald, 233 S.W. 2d 19 (Mo. 1950).
18. 187 Mo. 290, 303, 86 S.W. 105 (1905).
19. 229 S.W. 2d 556 (Mo. 1950).

the manager of the cafeteria to the effect that the cafeteria would assume responsibility for everything was held not to be admissible. The court held it not to be admissible either as an admission against interest or as a part of the res gestae. It was shown that the manager was not present when the plaintiff fell and could only know of the fall by hearsay, and that if a foreign matter was on the floor as alleged, it had been wiped up before the manager arrived.

After judgment for the plaintiff in *Davis v. Kansas City Public Service Company*,[20] the trial court sustained a motion for a new trial, which was reversed by the Kansas City Court of Appeals. This was an action for injuries arising out of a collision between a street car and the plaintiff's automobile. Upon transfer to the supreme court, the order granting the new trial was reversed with orders to reinstate the verdict and the judgment. A portion of the evidence in the case concerned the testimony as to estimates of time, speed, and distance. The plaintiff had testified to some damaging estimates of time, speed and distance, and the defendant attempted to establish that such testimony on the part of the plaintiff was binding upon him. The supreme court holds that the plaintiff, in estimating time, speed and distance, is not making a judicial admission, but an estimate, and that the plaintiff can avail himself of the testimony of other witnesses for the plaintiff in this regard. The court distinguishes this situation from the situation in the case of *Steuernagel v. St. Louis Public Service Company*,[21] in which the court held that the plaintiff could not claim the benefit of any of the defendant's evidence which contradicted the plaintiff's own testimony and which was at war with the plaintiff's theory of the case. In the present instance, the testimony was not in conflict with the plaintiff's theory of the case, but in accordance with such theory. The holding of the court follows that in *Hemminghaus v. Ferguson*,[22] holding that a plaintiff can avail himself of favorable testimony of a defendant, but that he cannot invoke it on one theory of recovery as to one defendant and reject it on another theory as to another defendant. The court points out that this is the general rule as to estimates of speed, time and distance.

Privileges

In the case of *State v. Black*,[23] a prosecution for manslaughter, the testimony of the defendant's wife at a coroner's inquest was offered at the

20. 233 S.W. 2d 669 (Mo. 1950).
21. 357 Mo. 904, 211 S.W. 2d 696 (Mo. 1948).
22. 358 Mo. 476, 215 S.W. 2d 481 (Mo. 1948).
23. 227 S.W. 2d 1006 (Mo. 1950).

trial. The court held that this testimony was privileged as to the defendant and the wife, and that unless the privilege was waived by the defendant such testimony could not be used.

State v. Dunbar[24] involved the prosecution of a husband for felonious assault upon his wife. The court held that his wife was a competent witness against the husband in such a case, but that the statute providing that neither spouse shall be required to testify made it reversible error to compel the wife to testify against her husband after testimony by the wife that she did not desire to testify and that she appeared as a witness only because she had been subpoenaed. It was likewise held that the admissibility of the testimony should be determined according to the marital status at the time the testimony is offered and not at the time the offense was committed.

Presumptions

In *Donald v. Missouri-Kansas-Texas Railroad Co.*,[25] the court held the plaintiff contributorily negligent as a matter of law on the presumption that the plaintiff saw the defendant's approaching locomotive. This was an action for damages arising out of a collision between a truck driven by the plaintiff and a locomotive owned by the defendant. The court held that, giving consideration to the physical facts, to look was to see, and that the plaintiff's testimony that he looked and could not see the defendant's train must be disregarded as contrary to the physical facts. They held that if he looked and did not see, as he said, he did not look with any degree of care, and was contributorily negligent as a matter of law.

Expert and Opinion Evidence

Norton v. Johnson[26] was a suit to set aside a will on the ground of mental incapacity. Evidence was offered by a room-service waiter as to the sanity of the testatrix. The court affirmed the rule that the opinion of a lay witness as to the sanity of the testatrix should be admitted so long as the witness gives facts upon which such opinion is based, and so long as facts are consistent with the opinion given. The same holding was made by the court in the case of *McCoy v. McCoy*,[27] an action for partition with a counterclaim to set aside a deed.

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24. 230 S.W. 2d 845 (Mo. 1950).
25. 231 S.W. 2d 627 (Mo. 1950).
26. 226 S.W. 2d 689 (Mo. 1950).
27. 227 S.W. 2d 698 (Mo. 1950).

The necessary qualifications for testifying as an expert, or as to giving the opinion of the witness with regard to the value of land, were reviewed and set forth in *State* ex rel *Kansas City Power & Light Co. v. Gauld.*[28] This was an appeal from a condemnation proceeding in which the appellant contended that the respondent's witnesses failed to qualify as experts with regard to testimony on damages. The court reviewed the many Missouri condemnation cases with regard to the necessary testimony in witnesses to testify as to damage to land in a condemnation hearing, and holds reversible error the introductoin of evidence when it is shown that the testimony regarding the witness's opinion as to the decrease in the value of land by reason of the right of way is based upon pure speculation, or upon elements which are not proper items of damage.

HEARSAY

Tennison v. St. Louis-San Francisco Ry. Co.[29] was an action for damages for the wrongful discharge of the plaintiff, who was a brakeman. It was alleged that he was discharged for an alleged violation of the rule against drinking liquor or intoxication. It was contended that he had not violated the rule, and in support of such, the statements made by another brakeman during an investigation by the railroad company conducted over an hour after the occurrence of the event involved, to the effect that the plaintiff showed no signs of being intoxicated, were excluded from evidence. Upon appeal, the supreme court held that such statements were properly excluded, being hearsay, and not coming under any of the exceptions to the hearsay rule. The defendant attempted to introduce them as an admission against interest on the part of the speaking co-worker, alleging that it would have been to the co-worker's interest to have the plaintiff discharged, so that the co-worker could move up a step in the ranks of seniority. The court held this argument to be too indirect and remote.

An interesting exception to the hearsay rule was involved in the case of *Scott v. Missouri Insurance Company.*[30] This was an action on a life insurance policy, which was contested by the insurance company on the grounds that the insured was not in good health at the date of the issuance of the policy. The plaintiff sued for the amount of the policy and alleged damages

28. 230 S.W .2d 850 (Mo. 1950).
29. 228 S.W. 2d 718 (Mo. 1950).
30. 233 S.W. 2d 660 (Mo. 1950).

for failure to exercise good faith on the part of the defendant. The defendant company offered in evidence the report by the Retail Credit Company which was made at the request of the company after the death of the assured, and which tended to establish that the insured was not in good health at the time of the issuance of the policy. This was excluded by the trial court and alleged as error on appeal. The supreme court held that, while the report was hearsay for the purpose of proving the truth of the statements therein, it should have been admitted in evidence as a link in the chain of circumstantial evidence tending to show that the defendant had made a reasonable investigation, and had ascertained facts which would cause a reasonable person in good faith to believe that the insured had heart trouble when the policy was issued. They held that it was error to exclude the exhibit. Of course, the opponent would have had the right to an instruction limiting the extent to which the jury could consider the evidence.

THE HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.

[*Editor's Note.* Continuing developments in this field make it desirable to have Mr. Becker's article include a discussion of cases decided in 1951. Therefore, publication of his article has been deferred until the January, 1952 issue.]

INSURANCE

ROBERT E. SEILER*

In 1950 the supreme court handed down five insurance decisions, which is about the average for the past several years. These decisions do not appear to involve any departure from well-established insurance law. In *Young v. New York Life Insurance Company*,[1] the court permitted recovery for double indemnity for death by accidental means where traumatic pneumonia activated a dormant tuberculosis, despite some rather plain policy provisions seemingly to the contrary. In *Zumwalt v. Utilities Insurance Company*,[2] the court adopted the test of fraud or bad faith in determining the liability

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1. 360 Mo. 460, 228 S.W. 2d 670 (1950); 221 S.W. 2d 843 (Mo. App. 1949).
2. 360 Mo. 362, 228 S.W. 2d 750 (1950).

of an insurer for failing to settle a personal injury claim within the policy limits. In *Scott v. Missouri Insurance Company*,[3] the court dealt with a question of waiver by the insurer and release by the beneficiary. In *Dysche v. Bostian*,[4] a question of cancellation of a workmen's compensation policy was involved. In *Persons v. Prudential Life Insurance Company of America*,[5] the question was as to the effective time of change of beneficiary. A more detailed summary of these cases follows.

In *Young v. New York Life Insurance Company, supra,* the deceased fell while washing windows when the ladder on which he was standing slipped. His injuries caused traumatic pneumonia, which activated a dormant tuberculosis and caused death. The widow sued for double indemnity under the policy provisions requiring that ". . . death . . . resulted directly and independently of all other causes from bodily injuries affected solely through external, violent and accidental means . . . provided, however, that such Double Indemnity shall not be payable if the Insured's death resulted, directly or indirectly, from . . . (g) infirmity of mind or body; (h) illness or disease; or, (i) any bacterial infection other than that occurring in consequence of accidental aand external bodily injury."

The court affirmed judgment for the plaintiff, on the ground that deceased might not have died of tuberculosis had it not been for the fall and the fall activated a dormant condition resulting in death. This seems to nullify the above quoted provisions (g), (h) and (i). The court recognized that a division of authority exists but concluded that the cases allowing recovery represent the sounder view.

In *Zumwalt v. Utilities Insurance Company, supra,* the insured sued the insurer for failure to settle a damage suit within the limits of a certain liability insurance policy. The court holds that the test of liability of the insurer is not whether the insurer was guilty of negligence in failing to settle, but whether the insurer was guilty of fraud or bad faith. Offering to pay less than the limit of the policy if the insured would contribute the balance of the amount required to meet the settlement demand is evidence of bad faith.

The insured was not entitled to penalties under Section 6040 of the 1939 Statutes[6] because the statute applies only to actions under terms of the insurance contract and not to tort actions growing out of the contract.

3. 233 S.W. 2d 660 (Mo. 1950); 222 S.W. 2d 549 (Mo. App. 1949).
4. 233 S.W. 2d 721 (Mo. 1950); 229 S.W. 2d 25 (Mo. App. 1950).
5. 233 S.W. 2d 729 (Mo. 1950).
6. Mo. Rev. Stat. § 375.420 (1949).

Scott v. Missouri Insurance Company, supra, was an action on an industrial life policy. The defense was that the insured was not in good health at the date of the policy, that the insured had wilfully misrepresented her health at the time of application and that the beneficiary had executed a release. As to the release, the court held that it was a question for the jury and that the trial court should have admitted a report of investigation made by the Retail Credit Company for the insurer as tending to show that the defendant had made a reasonable investigation and had reason to believe the insured had long standing heart trouble which caused her death.

As to alleged waiver by defendant of the untruthful answers in the application, the court held that for there to be a waiver, the jury must find that the soliciting agent knew that the answers given in the application were false.

In *Dyche v. Bostian, supra,* the question involved was whether cancellation of a workmen's compensation policy had been completed prior to claimant's injury. The policy provided for cancellation by either party on written notice "stating when, not less than ten days thereafter, cancellation shall be effective." The insured sent the polices to the agent for cancellation, without specifying any date, but the agent did not until the day of the injury send them on to the branch office, where they were received the following day.

The court held that actual cancellation is necessary, as distinguished from a mere intention to cancel. Perhaps the parties could have agreed to cancel on less than ten days' written notice, but under Section 6009 of the 1939 Statutes,[7] prohibiting cancellation after the insured has become responsible for loss, there could be no cancellation unless it was completed before liability occurred.

In *Persons v. Prudential Insurance Company of America, supra,* the issue was whether the insured made an effective change of beneficiary. The policy provided the insured could change beneficiary without consent of the beneficiary by written notice to the insurer, ". . . such change . . . to become effective only when a provision to that effect is endorsed on or attached to the policy by the company. . . ." On June 8, the insurer's St. Louis office received a signed request, dated June 7, requesting defendant be named primary beneficiary. On June 8, the St. Louis office forwarded the application to the home office, where it was received on June 10. On June 18 (after

7. Mo. Rev. Stat. § 379.195 (1949).

insured died June 16, but prior to receipt of notice of death) the home office endorsed the change of beneficiary on the policy. The court holds that since the insured had substantially complied with the company's requirements, the change was effective before his death. Any act of the insurer thereafter was a mere formality.

PROPERTY

WILLARD L. ECKHARDT*

ORIGINAL TITLES—AGRICULTURAL COLLEGE LANDS

The State of Missouri acquired by floating grant 330,000 acres of non-mineral land "in place" under the Act of Congress of July 2, 1862,[1] popularly known as the "Morrill Act."[2] These lands comprise three-fourths of one per-cent of the total area of Missouri. These lands frequently are referred to as "Agricultural College Lands," and the usage is proper if no inference is drawn that title to such lands was or is in any particular college of agriculture.[3] Section 1 of the act was in terms a present grant to the state.[4] Section 2 provided that the lands "shall be selected" from available land within the State. Section 5(7) required acceptance by the state within two years from July 2, 1862, and Section 5(3) required the state accepting the benefits to provide a college of agriculture and the mechanic arts within five years.

Missouri accepted the benefits of the Morrill Act on March 17, 1863.[5] An act of March 19, 1866, provided for three agents to select the lands to

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1. Act of July 2, 1862, c. 130, §§ 1-8, 12 U.S. Stat. 503; 7 U.S.C.A. §§ 301-308. This act, with the exception of § 7, was not incorporated in U. S. Rev .Stat. (1875, 1878), probably because the grants made thereby were regarded as executed, and the provisions incidental thereto as merely temporary. Historical Note to 7 U.S.C.A. § 301.

See DONALDSON, THE PUBLIC DOMAIN 223, 229-231, 710-711, 1249-1250 (1884). This volume sometimes is cited as 3 LAND LAWS; because of the numerous collections of land laws, this form of citation may be confusing.

2. This act is to be distinguished from the Morrill Act of 1890, Act Aug. 30, 1890, c. 841, 26 U. S. Stat. 417, 7 U.S.C.A. §§ 321-328.

3. Mo. Laws 1870, p. 19, § 18, uses the term "Agricultural College Lands." See *infra*, n. 12 as to title to such lands.

4. "That there be granted to the several states," etc., 7 U.S.C.A. § 301: "There is granted to the several states," etc.

5. Mo. Laws 1863, p. 34, Joint Resolution approved March 17, 1863.

which the state was entitled.[6] The Act of Congress of July 23, 1866 extended the time for providing the college to July 2, 1872.[7] On Februray 24, 1870, Missouri established an Agricultural and Mechanical College and a School of Mines and Metallurgy.[8]

The Morrill Act did not convey the fee simple to designated land, and did not require patents to be issued for land selected by the state. Consequently the grant under the Morrill Act was controlled by an earlier general act of August 3, 1854, which provided: "In all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee-simple title of such lands, or require patents to be issued therefor; the lists of such lands which have been, or may hereafter be certified by the Commissioner of the General Land-Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."[9]

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6. Mo. Laws 1866, p. 91, approved March 19, 1866, and effective from passage. Mo. Laws 1870, p. 19, § 19, as amended by Mo. Laws 1871, p. 38, § 1, made further provision for selection of lands in case of the full 330,000 acres had not been selected previously.

See also Mo. Laws 1864, p. 98, as Joint Resolution approved Dec. 11, 1863.

7. Act July 23, 1866, c. 209, 14 U. S. Stat. 208; 7 U.S.C.A. § 305(7).

8. Mo. Laws 1870, pp. 15-21, §§ 1-30, approved February 24, 1870, and effective from passage

The College of Agriculture [and Mechanic Arts] was opened in the fall of 1870 at Columbia. The School of Mines and Metallurgy was opened in the fall of 1871 at Rolla. See VILES, THE UNIVERSITY OF MISSOURI, A CENTENNIAL HISTORY 298, 470 (1939).

9. Act of Aug. 3, 1854, c. 201, 10 U. S. Stat. 346; U. S. Rev. Stat. § 2449 (1875); 43 U.S.C.A § 859

See PATTON, LAND TITLES § 160, n. 84 (1938).

For a discussion of problems with state selections and uncertainty as to titles thereunder, together with recommended corrective legislation, see REPORT OF THE PUBLIC LANDS COMMISSION sliii-xliv; xc-xci, §§ 224-226 (1880). Such uncertainty as exists is principally from the proviso in the statute quoted in the text above. See Milner v. United States, 228 Fed. 431 (C.C.A. 8th 1915), *appeal dismissed* 248 U. S. 594, 39 Sup. Ct. 132, 63 L.Ed. 437 (1918), where title of United States to [mineral] land listed and certified to the state was quieted as against persons having equitable title from state, where such persons by fraudulently representing such lands to be non-mineral moved state agents to select such lands; title also was quieted against a good faith mortgagee.

Under the above acts the State of Missouri received legal title to the lands selected by the agents when the lists thereof were certified to the state by the Commissioner of the General Land Office.[10] No patent from the United Staates to the State of Missouri was necessary. The records are now in the office of the Secretary of State in Jefferson City.

Conveyance of the lands by the State of Missouri must be by patent, prior to February 24, 1870.[11] From and after February 24, 1870, conveyances of such lands are by deed executed by the president of the Board of Curators of the University of Missouri, signed by him, with the seal of the corporation attached thereto, and attested by the secretary of the board.[12]

State v. Lundry[13] seems to be the first Missouri case discussing these lands and what is necessary to prove title thereto. Defendants were convicted of cutting trees on agricultural college lands in violation of *Missouri Revised Statutes* § 560.480 (1949). One question was the propriety of amending the information: the original information charged them with cutting trees on the land of the *University of Missouri;* this was amended to *Board of Curators of University of Missouri;*[14] this was further amended to *State of Missouri held for the use and benefit of the Board of Curators of*

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10. McNee v. Donahue, 142 U. S. 587, 601, 12 Sup. Ct. 211, 35 L.Ed. 1122 (1892). "No title to lands under that grant [Morrill Act of 1862] vested in the State until their selection, and listing to the State."

11. SILVERS, MISSOURI TITLES § 12 (2d ed. 1923).

12. Mo. Laws 1870, p. 21, § 26; Mo. Laws 1889, p. 275; Mo. Laws 1909, p. 884, Mo. REV. STATS § 172.380 (1949).

SILVERS, MISSOURI TITLES § 12 (2d ed. 1923) states that said lands "are conveyed by deed of 'the Board of Curators of the Univresity of the State Missouri,' executed by the president of that board," etc. GILL, MISSOURI TITLES § 65 (3d ed. 1931), states: "Agricultural College lands are conveyed by the Board of Curators of the University of Missouri since Acts 1870-15."

Neither of the above statements is altogether correct. The deed is that of the State of Missouri, and the State of Missouri is the grantor. From 1870 to 1909 a commissioner appointed by the curators had the power to sell the lands at the price fixed by the board of curators: Mo. Laws 1870, p. 19, § 19; Mo. Laws 1871, p. 38, § 1; Mo. Laws 1889, p. 272, § 7293. From 1909 to date the board has the power to sell the lands: Mo. Laws 1909, p. 892, § 44; Mo. REV. STATS. § 172.380 (1949).

The form of conveyance for these lands in current use runs from "the State of Missouri, grantor, represented by the Board of Curators of the University of Missouri, acting through the President of said Board," but is signed "————, President, Board of Curators of the University of Missouri." The form of the conveyance results from the fact that the power the execution thereof is not by the board but by certain officers of the board designated by statute.

13. 233 S.W. 2d 734 (Mo. 1950).

14. Mo. REV. STATS. § 172.020 (1949): "The university is hereby incorporated and created a body politic, and shall be known by the name of 'The Curators of the University of Missouri,' and by that name shall have perpetual succession, power to sue and be sued," etc.

the University of Missouri. The court held these amendments did not amount to making a different charge but were within the statutes of jeofails.[15]

Proof of title in the principal case was by a copy certified by the present Secretary of State, of a report made January 1, 1867, showing lands selected and located under the Morrill Act of 1862, and by a copy, certified by a previous Secretary of State and recorded in the local county deed records, of The Certificate of Grant [apparently the list as certified by the Commissioner of the General Land Office], both including the tract in question. The defendants contended that the ownership of the land could be established only by a patent from the United States. The court held that the certified copies were sufficient proof of ownership, title having vested in the state upon the selection and listing [and certification thereof to the state] of the land. The court distinguished cases cited by the dedendants which involved lands under other acts of Congress, swamp lands,[16] New Madrid certificates,[17] and land granted in aid of a railroad.[18]

Adverse Possession

Claim of Ownership—Seisin Within Ten Years

The facts in *Pahler v. Schoenals*[19] were as follows. John William Castle, record title holder, died in 1933. There was no administration, assignment of dower or election. The widow, Estella, continued to live in the home until her death in 1947. A son, William Castle, plaintiff's grantor, was living in the house at the time of his father's death and continued to occupy a room there with his wife "for some time." The defendant, who claimed title by

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15. The court said (emphasis added): "Thus, while the legal title was held by the State, *the University was not only the beneficial owner,* but had power to sell and convey the land for the state. . . ." The statement that "the University was . . . the benificial owner" would seem to be too broad, as a principle of general application, in view of Wyoming *ex. rel* Wyoming Agricultural College v. Irvine, 206 U. S. 278, 27 Sup. Ct. 613, 51 L.Ed. 1063 (1907), *affirming* 14 Wyo. 318, 84 Pac. 90 (1906). In that case the court said: "The grant made in this statute is clearly to the State and not to any institution established by the State." See also State v. Bryan, 50 Fla. 293, 39 So. 931 (1905).

The Missouri court, however, did not adopt the extreme position urged by the Attorney General in Respondent's Brief, p. 27: ". . . it is submitted the record discloses proof of ownership of such property was vested in the Board of Curators of the University of Missouri, a corporation."

16. Stephenson v. Stephenson, 71 Mo. 127 (1879).
17. Hammond v. Johnston, 93 Mo. 198, 6 S.W. 83 (1887).
18. Hamilton v. Badgett, 293 Mo. 324, 240 S.W. 214 (1922).
19. 234 S.W. 2d 581 (Mo. 1950).

adverse possession, was a sister of the widow and lived across the street. Defendant moved in with the widow in 1933, paid taxes, insurance, and took care of the widow. The widow died in 1947 and in 1949 the son, heir at law, conveyed the land to plaintiff. She had judgment, which was affirmed, in her suit to quiet title and in ejectment. Payment of taxes and insurance by defendant was evidence of claim of ownership; however she was in and out of her own house, and in deposition she testified the first time she really made a claim was when the widow passed away and that she never thought she had a right to the house at all but was just living there; in addition, in 1947 defendant filed a claim against the widow's estate stating the widow owned the property. On the above evidence of intention, the trial court did not err in finding defendant did not establish title by adverse possession.

The court further points out that the son's cause of action did not arise for at least some time after his father's death, inasmuch as the widow had certain rights of occupancy.[20] Defendant apparently argued for a literal reading of the basic statute on adverse possession, *Missouri Revised Statutes* § 516.010 (1949),[21] which provides (emphasis added): "No action for the recovery of any lands . . . shall be commenced, had or maintained by any person . . . unless it appears that the plaintiff, his ancestor, grantor or other person under whom he claims *was seized or possessed of the premises in question, within ten years before the commencement of such action.*" The court without discussion rejects the defendant's interpretation. The Missouri basic statute is similar to the older English statutes,[22] requiring proof seisin in the claimant or person under whom he claims within a specified period of years next preceding the action. The modern method is to limit the action to a specified period of years after the cause of action (right to possession) arises.[23]

Mistaken Boundary Line—Claim of Ownership—Intention Test

In *Morrow v. Elmore*[24] plaintiff and his predecessors since 1924 had occupied his own lot plus an adjoining strip 14.7′ x 160′ x 5.25′. Apparently

20. Apparently the court refers to the widow's right of quarantine, "until dower be assigned," Mo. Rev. Stats. § 469.220 (1949). Quarantine was for forty days at common law. Magna Charta, c. 7 (1215); 28 Mo. Rev. Stat. Ann., p. 2.

21. At p. 583.

22. Statute of Westminister I, 3 Edw. I, c. 39 (1275); Statute 32 Hen. VIII, c. 2, § 3 (1540).

23. Statute 21 Jac. I, c. 16 (1623).

24. 234 S.W. 2d 613 (Mo. 1950).

the parties mistakenly assumed a fence and the side of a driveway were the true line. The occupancy consisted of using the strip for a garden and lawn; more important, part of plaintiff's house (about two feet) was on the strip and the plaintiff's sidewalk was on the strip. The court held plaintiff had acquired title by adverse possession; plaintiff had been in actual, open, exclusive, hostile and notorious possession. "Such possession was hostile and inconsistent with any other theory than a claim of ownership."[25]

The encroachment of the house and sidewalk may distinguish this case from cases where there is simply occupancy up to a mistaken boundary line, cases which have caused more difficulty in Missouri under the "intention" test. The court does not mention the intention test, and the case may indicate that the court is moving away from that test.[26]

By Person Who Already Has Title by Unrecorded Deed

After an adverse possessor has acquired title by the running of the statute of limitations he has a legal title which does not appear of record. There are no provision in the recording act, *Missouri Revised Statutes* § 442.380 *et seq.* (1949), for the recording of such a title, and consequently the recording act is inapplicable in determining the rights of a bona fide purchaser for value from the person who formerly had title and still appears of record to have title. In such case, a bona fide purchaser for value from the former owner gets no better title than his grantor had, which is none.

In the usual case where the adverse possessor is still in possession this should present no real hardship to the purchaser, who by examining the premises will discover the fact of possession and then can make appropriate inquiries of the possessor. It may be, however, that the adverse possessor will be out of actual possession, with no one in actual posssession, at the time the record title holder conveys to the bona fide purchaser. Here an examination of the premises would not disclose the adverse possession, although inquiries in the neighborhood might. The extreme case is where the adverse possessor is out of actual possession, the record title holder has resumed actual possession, and with both record title and actual possession as indicia of ownership he conveys to a bona fide purchaser. A purchaser under such circumstances would not be apt to make inquiries in the neighborhood as to the history of the possession.

25. *Id* at 614.

26. Head, *Work of Missouri Supreme Court for 1941—Property*, 7 Mo. L. Rev. 408, 410-411 (1942); Eckhardt, *Work of Missouri Supreme Court for 1948—Property*, 14 Mo. L. Rev. 371, 377-378 (1949).

Corpus Juris Secundum states that the person who acquired title by adverse possession is protected in all three cases. "After the adverse possession has ripened into title, the original owner cannot, as is shown in the title Vendor and Purchaser § 362 [66 C.J. p. 1194 notes 10, 11], by taking possession and conveying the land, or by conveying while claimant is not in actual possession, to a bona fide purchaser, convey to the latter any title which could be enforced against or affect the title acquired by adverse possession, and a fortiori a conveyance by the original owner should not affect the rights of the claimant who at the time of the conveyance was in possession."[27] The section of *Corpus Juris* referred to, *66 C.J.*, Vendor and Purchaser § 1056, states: "In some jurisdictions it has been held that," etc. A principal authority relied on and quoted is a Missouri case, *Ridgeway v. Holiday*.[28]

In *Ridgeway v. Holiday*, one Voteau was the common source of title. In 1859 Halford, his attorney-in-fact under a defectively acknowledged power of attorney, made an oral conveyance and delivered possessison to Bennett, who a year later made an oral conveyance and delivered possession to plaintiff Ridgeway. The successive periods of adverse possession by Bennett and Ridgeway, which the court held could be tacked, made more than the ten year period; and therefore in 1869 Voteau's title was extinguished and Ridgeway acquired legal title. In 1870 Voteau brought an action of ejectment against Ridgeway's tenant who suffered a default judgment pursuant to which Voteau was put into possession; Ridgeway, who had title by adverse possession was not named as a party and had no notice of the action. Thereafter Voteau, who had possession and appeared of record to have title, quitclaimed to defendant Holiday who entered into possession; Holiday had examined the record title and found perfect record title in Voteau, and although Holiday knew of the ejectment action, he did not know Ridgeway, that he had been in possession, or that he made any claim. In Ridgeway's action of ejectment against Holiday, judgment for the plaintiff was affirmed. In the course of its opinion, at p. 454, the court made the much-quoted statement: "But it is contended by the defendant that he is a purchaser for value from Voteau who appeared from the record to be the owner, and was in possession without any notice of the prior adverse possession which passed the title to Ridgeway, or of any claim on his part to the premises; and that as against him, the defendant, Ridgeway,

27. 2 C.J.S. *Adverse Possession* § 204.
28. 59 Mo. 444, 454 (1875).

cannot assert title; that to permit him to do so, would be giving to an adverse possession greater force and efficacy than is given to an unrecorded conveyance. These objections, it must be admitted, are very forcible. The registry act, however, cannot, in the nature of things, apply to a transfer of the legal title by adverse possession, and such title does not stand on the footing of one acquired and held by an unrecorded deed, and of such title, the purchaser may not expect to find any evidence in the records."

The court's further statement in *Ridgeway v. Holiday*, which *Corpus Juris* omits from its quotation, is as follows: "Whether it is incumbent on the owner, by adverse possession, to perpetuate the evidence of his title by proceeding to remove the cloud thereon, occasioned by the existence of the record title in another, so as to affect subsequent purchasers with notice, it is not necessary to inquire. We are relieved of any discussion of this subject, by the character of the conveyance under which defendant claims. It is a quit-claim deed and will not support his claim of being a purchaser for a valuable consideration without notice. He took under it only what Voteau could lawfully convey, (Oliver vs. Piatt, 3 How. U. S., 333; 3 Wheat., 449; Bogy vs. Shoab, 13 Mo., 380;) and his title having passed to the plaintiff as completely as if he had transferred it by deed, the defendant took nothing by his quit-claim deed from Voteau, and can have no better right to the possession than Voteau had. Besides knowledge that Voteau had recovered possession of the premises in ejectment was sufficient notice of an adverse claim and possession to put the defendant upon inquiry as to the nature of that claim and possession."

A recent A.L.R. annotation[29] discusses the entire problem. In the course of the annotation the editor discusses *Ridgeway v. Holiday* and notices the court's statement that Holiday had notice by reason of his knowledge of the earlier ejectment action, but does not notice the court's principal reason, that Holiday took by quit-claim deed from Voteau.[30]

It would seem to be an open question in Missouri whether the court would protect a person who has acquired title by adverse possession as

29. Title by Adverse Possession as Affected by Recording Statutes, 9 A.L.R. 2d 850 (1950).

30. The rule in Missouri seems to be that a grantee under a quitclaim or special warranty deed takes free of unrecorded deeds or other recordable instruments, but takes subject to and with notice of outstanding equities or other claims not required to be recorded. Eckhardt & Peterson, *Possessory Estates, Future Interests, and Conveyances in Missouri*, § 94, text introduction to ANN. MO. STAT. c. 442 (Vernon). See collection cases in 2 GILL, REAL PROPERTY LAW IN MISSOURI 890-895 (1949).

against a grantee under a warranty deed from the record title holder who has reacquired possession, but it would seem clear that if the adverse possessor is still in possession he will prevail over a grantee from the record title holder.

On the other hand, under the "actual notice" provision of the Missouri recording act,[31] a purchaser is charged with notice of the rights of parties in possession only if the purchaser *in fact* knows of the possession; consequently a bona fide purchaser from the record title holder may take free of the rights of a person in possession under an unrecorded deed. This little-known doctrine has been ably discussed by Mr. Bruce A. Ring, Assistant Attorney, State Highway Commission, in a recent issue of the Missouri Law Review.[32] It follows that a person with title by adverse possession is better protected than a person with title by an unrecorded deed. The person with title by adverse possession may be completely protected even though he does not continue in actual possession.

This raises the question whether a person who has been in possession of land for ten years under an unrecorded deed can base his title on adverse possession where it would be to his advantage to do so. To put the issue crudely, can a person hold adversely to himself? I used this issue as the basis for an examination question in 1950.[33] Within six months two Missouri Supreme Court cases gave a partial answer.

King v. Fasching[34] was a suit to quiet title against a tax deed and a quitclaim deed. The tax sale was pursuant to the provisions for tax sales for cities of the first class, *Missouri Revised Statutes* § 93.290 *et seq.* (1949). The property, worth at least $900, was sold for $4.26, less than ½ of 1 %, and clearly under the Missouri authorities the amount was so inadequate as to make the sale voidable for legal fraud. The facts were that one King and his wife, now his widow and plaintiff, acquired title in 1935, and entered

31. Mo. Rev. Stats. § 442.400 (1949).
32. Ring, Comment, *Possession as Notice Under Missouri Recording Act,* 16 Mo. L. Rev. 142 (1951).
33. In the examination in Conveyances, July 22, 1950, the following question was used: "In 1930 A went into adverse possession of Blackacre, unoccupied land owned by G, by using it for grazing, having fenced it. In 1935 G discovered the facts and after some negotiations with A, duly conveyed Blackacre to A for its fair value. A did not record the deed. A continued to use Blackacre in the same way until 1942 when he sold his livestock and left for a distant city to take a shipyard job. In 1943 G duly conveyed Blackacre to D, who had searched the records and examined the premises for possession. D went into possession. In 1944 A brought a suit in ejectment and to determine title against D. What decree? Why?"
34. 234 S.W. 2d 549 (Mo. 1950).

into and remained in possession thereafter, but the deed was not recorded until 1949. Defendant Fasching received a tax deed on November 1, 1948, having paid ½ of 1% of the value of the land. Defendant had actual knowledge of plaintiff's possession and claim in November, 1948, and apparently had actual knowledge of plaintiffs possession before the tax sale. In December, 1948, the plaintiff's grantor quit-claimed to the defendant for a recited consideration of $10 and other valuable consideration.[35] The defendent thus claims under both the tax deed and the quit claim deed. The quitclaim deed may be disposed of summarily because the defendant had actual notice of the plaintiff's possession and claim at the time he took the quitclaim deed, and therefore is not entitled to the protection of the recording act. The tax deed is voidable because of the shocking inadequacy of price, if the plaintiff is entitled to attack the deed, and it would seem that title under an unrecorded deed and possession, both antedating the lien for taxes and the tax sale, entitles plaintiff to attack the tax deed. Consequently there was no need to determine whether the plaintiff, in possession for more than ten years under an unrecorded deed, had acquired title by adverse possession.

The issue appears as point three in Appellants' Brief:[36] "The Court erred in finding respondent was entitled to redeem the real estate from the tax sale. Appellant was not the record owner of the real estate and therefore not entitled to contest the sufficiency of the tax deed. Both sources of appellants' title are superior to that of respondent." Six cases[37] are cited as authority for the point, but the point and the authorities are not mentioned in the argument. The issue of adverse possession is raised by the Respondent's Brief, points one and two,[38] and argument.[39] The opinion

35. The recited consideration does not appear in the briefs or opinion, but does appear in the transcript.

36. Appellants' Brief, p. 6.

37. Payne v. Lott, 90 Mo. 676, 3 S.W. 402 (1887); Lucas v. Current River Land & Cattle Co., 186 Mo. 448, 85 S.W. 359 (1905); Harrison Machine Works v. Bowers, 200 Mo. 219, 98 S.W. 770 (1906); Hoffman v. Bigham, 324 Mo. 516, 24 S.W. 2d 125 (1930); Hobson v. Elmer, 349 Mo. 1131, 163 S.W. 2d 1020 (1942); Gee v. Bullock, 349 Mo. 1154, 164 S.W. 2d 281 (1942).

38. Respondent's Brief, p. 5. Point I: "Superior title, that is, a title good for purposes of attack or defense, may be acquired by adverse possession." Point II: "In this case respondent's title by adverse possession was superior to any other title relied upon by appellants, the city tax deed being void and subject to redemption by reason of the inadequacy of price constituting fraud."

39. Respondent's Brief, p. 8. ". . . This long, open, notorious, continuous and adverse possession of this property by the plaintiff-respondent and her family was both actual and constructive notice to all the world that it was their home, that they claimed it, they were paying taxes upon it, public tax records show taxes

follows the Respondent's Brief and *Johnson v. McAboy*[40] in recognizing "the right of one claiming title by adverse possession to question a tax deed where the adverse possession antedated the lien for taxes." This and the court's conclusion that "Plaintiff's adverse possission defeats defendants' title under the quitclaim deed," leads one to the conclusion that the plaintiff who had title under an unrecorded deed could establish an independent, original title by adverse possession.[41]

King v. Fasching was in Division Number Two. A similar case, *Shaw v. Armstrong*,[42] was decided five weeks later in Special Division Number Three. Livingstone, the defendant, acquired title in 1930, by an unrecorded deed, and was in possession from 1930 to date through himself or tenants. Taxes, assessed in the name of one Nelson, were delinquent for 1936 through 1942. In 1943 on the third sale under the Jones-Munger Act, *Missouri Revised Statutes* § 140.250 (1949), the land was sold to one Harbison through whom the plaintiff claims, for the amount of delinquent taxes, 12.8% of the value of the land. The collector's deed was executed in 1948. This was a suit to quiet title, apparently under the Jones-Munger Act, *Missouri Revised Statutes* § 140.330 (1949). The trial court found for plaintiff on the sale ground defendant had no record title to the land; the judgment was reversed with direction to enter judgment for the defendant.

Shaw v. Armstrong could have been decided simply on a point raised by the court, that the tax deed was void under *Missouri Revised Statutes* § 140.410 (1949) because more than four years had elapsed between the date

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upon it assessed against the plaintiff-respondent. Even a warranty deed executed by any prior grantee of the property could not have availed against the title established by plaintiff-respondent and her deceased husband. . . . Neither the tax deed nor the second quit claim deed of William C. Barrow and his wife could avail anything against the long, continued, open, notorious and adverse possession of plaintiff-respondent and her family in the property. . . ."

40. 350 Mo. 1086, 1091, 169 S.W. 2d 932, 935 (1943). Defendant went into possession under 1932 deed, recorded in 1934. Plaintiffs claimed under a 1940 Jones-Munger tax deed, for 1934-37 taxes. With reference to the defendant's right to attack the tax deed the court said: "It appears from the evidence that defendants were in possession of the described lands, under claim of ownership and color of title, prior to the accrual of the lien for state and county taxes and the alleged foreclosure of such lien by a tax sale to plaintiff. Defendants, therefore, have the right to challenge the sufficiency of the foreclosure proceedings and the tax deed. . . . A party in possession under claim of ownership has a better title than one who has no title or possession."

The action was one quiet title and in ejectment, under Mo. REV. STATS. §§ 524.060 [ejectment], 527.150 [quiet title] (1949).

It should be noted that possession was for less than ten years.

41. Apparently the title acquired by adverse possession was in tenancy by the entirety.

42. 235 S.W. 2d 851 (1951).

of the tax sale and the date of the collector's deed. The court, however, relied on an additional ground that the amount paid at the tax sale, 12.8%, was so grossly inadequate as to constitute fraud.

The further ground relied on by the court was that defendant was entitled to attack the tax deed, even though he had no record title, because he had perfected his title by adverse possession. The plaintiff's argument that defendant must have record title is based on *Missouri Revised Statutes* § 140.330(1) (1949).[43] After answering this argument the court says: "Under the facts defendant had such possession as to enable him to perfect his title by adverse possession for more than ten years." *King v. Fasching*, to the same effect, decided five weeks earlier, is not referred to.

The doctrine of these cases, that a person who has title under an unrecorded deed can acquire an independent title by adverse possession—*i.e.* by possession adverse to himself—may lead to difficulties if applied generally as a principle of property law.[44]

Mortgages—Twenty-Year Limitation

Missouri Revised Statutes § 516.150 (1949) provides two bars to the foreclosure of a mortgage or deed of trust: foreclosure is barred if the statutes of limitation have barred the obligation; and foreclosure is barred by the lapse of twenty years from the date of obligation is due on the face of the mortgage or deed of trust, unless before the end of such period a proper instrument is filed for record showing the amount due. A title exam-

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43. This section provides (emphasis added): "Any person holding any deed of lands or lots executed by the county collector for the nonpayment of taxes, may commence a suit in the circuit court of the county where such lands lie, to quiet his title thereto, without taking possession of such lands, and all parties who have, or claim to have, or appear of record in the county where such land or lot is situated, to have any interest in, or lien upon, such lands or lots, shall be made defendants in such suit, *and no outstanding unrecorded deed, mortgage, lease or claim shall be of any effect as against the title or right of the complainant as fixed and declared by the decree made in such cause.*"

In answer the court says, at p. 855; "First, we call attention to the fact that this section of the statute stating the manner of quieting title requires the plaintiff to make parties defendant all persons who have or claim to have or appear of record in the county where such land or lot is situated. This does not limit the defendant's right to a deed of record and the statements there made in said section of the statute that no outstanding unrecorded deed, mortgage, lease or claim shall be of any as against the title as declared by the decree of the court does not mean that a defendant in possession who might have a good and sufficient title by virtue of the statute of limitation could not redeem land sold for taxes or could not defend in any action to quiet title against a plaintiff holding a tax deed which is invalid for any reason."

44. For a further discussion of the problem, with authorities from other jurisdictions, see Note by Ring, 16 Mo. L. Rev. 461 (1951).

iner cannot pass an old unreleased deed of trust in reliance on the fact that the obligation may have been barred by the stautes of limitation, because the facts are outside the record and interest payments, etc., may keep the obligation alive for an indefinite period. On the other hand, the due date as shown on the face of the instrument of record showing the amount due are matters of record, and the title examiner may pass an old unreleased deed of trust where more than twenty years have elapsed since the due date as shown on the face of the instrument if there is nothing else of record with regard to the deed of trust.[45]

In *Carwood Realty Co. v. Gangol,*[46] the supreme court said, by way of dictum, or held, as an alternative ground for decision, that § 516.150 is a statute "of 'repose,' meaning, in legal parlance, that it simply precludes the bringing of an action to enforce rights, it affects the remedy only and may not be employed in securing affirmative relief." The plaintiff brought suit to cancel a trustee's deed in foreclosure and to quiet title, on the ground the foreclosure was barred by § 516.150. The court found that the note had not been barred by limitation, and that a proper affidavit had been recorded so that there was no bar under the twenty-year provision of § 516.150. The court's construction of the statute may resolve the conflict between decisions in the courts of appeals.

Whether § 516.150 may be the basis for affirmative relief was first considered by the supreme court in *Stock v. Schloman.*[47] That was an action begun in 1927 to determine title; the defendant's answer admitted the plaintiff owned the fee, but prayed that a note and mortgage dated March 16, 1891, due one day later, and for which no affidavit had been filed for record, be declared a valid lien on the land; plaintiff's reply asked that the mortgage be cancelled of record. The trial court's judgment was that the mortgage was a valid lien. On appeal to the supreme court, the court held it did not have jurisdiction and transferred the case to the Kansas City Court of Appeals. In the course of its opinion the supreme court said, expressly by way of dictum: "Plaintiff, in the prayer of his reply, does ask that the mortgage be declared null and void, and that it be cancelled of record. The query suggests itself, Is plaintiff entitled in a court of equity to affirmative relief on the facts admitted in his pleadings? A statute of limitations may be

45. SILVERS, MISSOURI TITLES 340-343 (2d ed. 1923). See also GILL, MISSOURI TITLES § 531 (3d ed. 1931).
46. 232 S.W. 2d 399, 401 (Mo. 1950).
47. 322 Mo. 1209, 1217, 18 S.W. 2d 428, 432 (1929).

used as a defense, but not as the basis for affirmative relief; or, as it has been stated, as a shield but not as a sword. And it has been held that, since he who seeks equity must do equity, a mortgager will not be permitted in a court of equity to maintain an action to cancel the mortgage on the sole ground that foreclosure thereof has been barred by a statute of limitations while the debt secured thereby remains unpaid. [Citation of cases and text authority] However, since the solution of this question pertains to the adjudication of the case rather than to determination of the question of jurisdiction, we refrain from discussion or decision thereof."[48]

The Kansas City Court of Appeals held in the same case, *Stock v. Schloman*:[49] "The amendment of 1921 [§ 516.150) is plainly not a statute of repose but one of extinguishment containing its own limitations. Therefore after the lapse of twenty years from the date that the note in suit fell due as shown on the face of the mortgage, the lien of the mortgage, under the circumstances, became absolutely extinguished. . . . It is claimed by the defendants that the Supreme Court intended to decide the merits of the appeal when it transferred the cause here for lack of jurisdiction in that court." However, the court refused to cancel the mortgage of record, because the relief was sought in the reply and not in the petition,[50] and the court expressly did not pass on the question as to whether such relief would be possible without payment of the note. This case, on its construction of § 516.150, has not been considered by the supreme court.

The St. Louis Court of Appeals considered the problem in *Milby v. Murphy*[51] and came to a different construction of the statute. Plaintiff sought to have the court declare that by reason of the twenty year provision "null and void and of no force and effect," and that the real estate is "forever released from the lien of said deed of trust." A decree for defendant was affirmed. The court did not determine the sufficiency of an affidavit filed for record, but based its decision on the proposition that § 516.150 is a statute of repose, and not a statute of extinguishment, and cannot be made the basis for a plea of affirmative relief. The court said, however, that the statute may be used by way of defense.[52] This case was quoted from with approval in the principal case.

48. See also Greenfield v. Petty, 346 Mo. 1186, 1195, 145 S.W. 2d 367, 371 (1940).
49. 226 Mo. App. 234, 42 S.W. 2d 61, 63 (1930).
50. On this point only, overruled by Rains v. Moulder, 338 Mo. 275, 284, 90 S.W. 2d 81, 85 (1936).
51. 121 S.W. 2d 169, 171 (Mo. App. 1938).
52. In Rice v. Hughes, 240 Mo. App. 35, 208 S.W. 2d 821 (1948), a case where the twenty-year provision of Mo. REV. STAT. § 516.150 (1949) applied, the plain-

PARTITION BETWEEN LIFE TENANT AND REMAINDERMEN

Noyes v. Stewart[53] clarifies some phases of the problem as to when partition lies when future interests are involved.[54] Rubin Hill died in 1905, devising a tract of land to his widow for life, with remainder to four named children and their bodily heirs (William Hill, Thomas Hill, Mary Hill Shields, and Annabel Hill Williams), with the further provision that if any child died not survived by issue, then his share should go to those persons who would be the testator's heirs if he died when such child died.[55] The widow died in 1908, and in 1908 Mary Hill Shields brought suit for partiton. The Commissioners set off four tracts of twenty-four acres each, and the court duly approved. The court then ordered the sale of the fee of the parcel set off to Mary Hill Shields, with commutation of the value of the life estate. The land was sold to plaintiff's predecessor for $760, and after costs were deducted Mrry Hill Shields was paid the commuted value of her life estate, $463.73. The balance, $192.51, was placed in trust for the remaindermen and in 1946 amounted to $530.06.[56] The purchaser now brings a suit to

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tiff sought to foreclose an equitable lien, the record of the deed of trust being notice of the equitable lien. Judgment for the defendant, who sought no affirmative relief, was affirmed. The court said that the plaintiff had a lien under the deed of trust, but that it could not be enforced.

The plaintiff's theory, perhaps not too clearly expressed, evidently was similar to the doctrine that a seller may waive his rights under a conditional sale agreement, avoid the 75% refund provision of the statute, and foreclose an equitable vendor's lien. See Owens, *Foreclosure of Conditional Vendor's Equitable Lien as Method of Avoiding Harsh Refund Statute,* 3 Mo. BAR J. 7 (1932). The plaintiff apparently was attempting to waive any remedies under the deed of trust and to foreclose an equitable lien to which § 516.150 may not be applicable. The opinion does not indicate that the court saw the plaintiff's theory.

53. 235 S.W. 2d 333 (Mo. 1950). This case is the subject of a recent note: Clark, *Future Interests—Partition—Contingent Remainders,* 19 KAN. CITY L. REV. 208 (1951).

54. Hudson, *The Transfer and Partition of Remainders in Missouri,* 14 U. OF MO. BULL. L. SER. 3, 33 (1917); *id.* 26 *Yale* L. J. 24 (1916); Nelson, *Partition where Life Estates and Remainders are Involved.* 42 U. OF MO. BULL. L. SER. 5 (1931); Ottman, Comment, Partition in Missouri, 6 Mo. L. REV. 87, (1941).

55. The interests created were as follows: Life estate in widow; remainder for life in each child; contingent remainder in fee in heirs of the body, alternative contingent remainder in fee in "heirs" of testator; defeasible vested reversion in testator's heirs.

There is no mention in opinion or briefs of this revision. It is a reversion whose significance is largely theoretical. Quaere whether such a defeasible vested interest would bring this case within the doctrine of Reinders v. Koppelmann, 69 Mo. 482 (1878), where it was held that a life tenant who had a life estate in the whole and a vested remainder in fee in one-eighth, could maintain partition against the owners of a vested remainder in fee in five-eighths and the "owners" of a contingent remainder in fee in one-quarter. This possible line of argument was not raised.

56. Respondents' Brief, p. 6.

quiet title against the grandchildren and great-grandchildren of the testator; the trial court entered a decree for the plaintiff. On appeal, the decree was reversed for two reasons. First, the sale of the fee in the 1908 partition suit exceeded the relief sought, and this part of the judgment was coram non judice and void.[57] Second, even though such a sale had been prayed for,[58] there is no authority for partition between a life tenant and contingent remaindermen, and a judgment for partion in such a case is void, even though a party has joined who might ultimately become one of the remaindermen. The court distinguished and confined to their facts four earlier Missouri cases, *Reinders v. Koppelmann*,[59] *Sikemeier v. Galvin*,[60] *Sparks v. Clay*,[61] and *Acord v. Beaty*.[62]

"Partition"—Non-Productive Life Estate—Sale of Fee

In *Noyes v. Stewart*,[63] discussed above, the court notices *Missouri Revised Statutes* § 528.010 *et seq.* (1949), enacted in 1925, authorizing the sale of the fee on the petition of the life tennant in certain cases of non-productive life estates. The act provides for paying from the proceeds of the sale "the commuted value of any estate as may be commutable and so requested to be by the owner or owners thereof, as in other suits in partition." In *Willhite v. Rathburn*,[64] the court sustained the validity of the act applied to estates created before the act as to sale and reinvestment, but held that the provision for paying the commuted value was void as to life estates created before the effective date of the act. In *Brittin v. Karrenbrock*,[65] the court held that a life estate created by will in 1913 is not com-

57. The petition apparently was in conventional form with prayer for sale because partition in kind could not be effected "without great prejudice to the parties in interest." Respondents' Brief, p. 5, states: "The prayer of the petition prays, among other things, for a sale of the lands in the petition described." The point is not developed in the Argument, and it would seem that there was no prayer for a sale of a part set off in kind.

58. Another twenty-four acre tract was set off to Annabel Hill Williams. She mortgaged this tract, and the purchaser at foreclosure brought suit in 1911 to partition this tract. It was sold to plaintiff's predecessor for $760; the successor to the life tenant received $433.83, and $147.78 was placed in trust for the remaindermen; the fund in 1946 amounted to $303.57 (Respondents' Brief, p. 8).

This issue as to this 1911 sale was the same as the second issue with reference to the 1908 sale, discussed in the text.

59. 68 Mo. 482 (1878), briefed *supra* n. 55.
60. 124 Mo. 367, 27 S.W. 551 (1894).
61. 185 Mo. 393, 84 S.W. 40 (1904).
62. 244 Mo. 126, 148 S.W. 901, 41 L.R.S., N.S. 400 (1912).
63. 235 S.W. 2d 333, 338 (Mo. 1950).
64. 332 Mo. 1208, 61 S.W. 2d 708 (1933).
65. 186 S.W. 2d 35, 38 (Mo. 1945).

mutable; the court's interpretation of the statute indicated that a life estate created after the effective date of the act is not commutable. In *Noyes v. Stewart* the court indicates again that under this statute a life tenant is not entitled to the commuted value of a life estate. The court does not mention any possible distinction between life estates created before July 9, 1925, and those created on and after that date, and the court's remarks could be confined to those created before July 9, 1925, inasmuch as the court was considering life estates created in 1905 and partition suits in 1908 and 1911. A practical objection to commuting the value of a life estate is that the statutes enacted in 1905, *Missouri Revised Statutes* §§ 442.430-.550 (1949), are based on 6% interest and an obsolescent mortality table.[66]

Construction of Limitations and Related Problems

A. Future Interests Following Powers of Disposal in First Taker

In *Vaughan v. Compton*,[67] the court continues to apply a doctrine which for many years has defeated the intention of grantors and testators. The typical case is where A conveys or devises to B and his heirs, but if B does not convey or devise, over to C and his heirs. Missouri cases, in accord with the weight of authority, hold that the limitation creates a fee simple absolute in B, and that C's shifting executory interest is void. The reason generally given in the cases is that C's interest is void because it is repugnant to B's interest. An alternative theoretical explanation is that the limitation of the shifting executory interest is an attempt to provide for forfeiture on intestacy, and that the restraint on devolution by intestacy is void.

On the other hand, if A conveys or devises to B *for life*, with power to convey or devise the fee, but in default of the exercise of the power remainder to C and his heirs. Missouri cases hold that B has a life estate and power of appointment, and that C has a valid vested remainder, defeasible on exercise of the power. Missouri cases show a strong preference for construing a limitation as creating a life estate with power and remainder, rather than as a defeasible fee with power and shifting executory interest.

It is obvious that in both types of cases the intention of the grantor or testator is to create the same interests in substance, and if the scrivener

66. Cf. Mo. Rev. Stat. § 145.200 (1949), concerning valuation of present and future interests for inheritance tax purposes.
67. 235 S.W. 2d 328 (Mo. 1950).

forgets the technical distinction and by chance makes the wrong choice of words the intention will be defeated.

Two Missouri cases in 1950 illustrate the operation of the rule. *Glidewell v. Glidewell*[68] was concerned with a will which may be paraphrased as follows (emphasis added): "I hereby give, devise and bequeath to my said wife all property owned by me at my death. And it is my will that if upon the death of my said wife there shall be any of my property remaining undisposed of, I give, devise and bequeath the same to the church of the Nazarene, to have and to hold the same *absolutely*." The trial court held the widow took a fee simple absolute and that the gift over was void. On appeal it was held that the widow received a life estate, with power to make an inter vivos disposition but not a testimentary disposition, with valid remainder to the local church. In the course of determining that the widow received a life estate and not a fee, the court points out that "absolutely" was used with reference to the gift to the church, but was not used with reference to the gift to the widow.

Vaughan v. Compton[69] was concerned with a will which provided in part as follows (emphasis added): "Item 8: If my beloved husband Dr. R. F. Cook, should survive me, then I give, devise and bequeath to my beloved husband, Dr. R. F. Cook, all of the rest, residue and remainder of my estate, *absolutely and in fee simple*, with the right to sell, use and otherwise dispose of said property. [¶] Item 9: At the death of my beloved husband, Dr. R. F. Cook, if he should survive me, or at my death if he predecease me, I give all of the property that I may own at my death that may not have been disposed of by my beloved husband during his lifetime, as follows: I give, devise and bequeath the property remaining at the death of Dr. R. F. Cook, if he should survive me, at my death if he should predecease me to [named nieces and nephews, defendants]; *absolutely and in fee simple*, share and share alike." The plaintiff was the heir at law of Dr. Cook and claimed the property undisposed of at his death. The trial court held Dr. Cook had a life estate only with power of disposal, and that the gift over to defendants was valid. On appeal it was held Dr. Cook took a fee simple absolute which descended to his heir at law, plaintiff. The court points out that the gift to Dr. Cook was "aboslutely and in fee simple." The court says, at p. 332: 'But if testatrix thought (erroneously) that (by the

68. 360 Mo. 713, 230 S.W. 2d 752 (1950).
69. 235 S.W. 2d 328 (Mo. 1950).

will now before us) she could direct the ultimate disposition of property her husband did not dispose of, her dearth of exact legal information in that respect does not free us to follow her uninformed conceptions. We are legally bound by the language testatrix used in her will. We cannot write a new will for her. We can neither ignore its unambiguous words nor under the guise of interpretation strike from Item 8 of her will the words 'aboslutely and in fee simple.' Those words mean just what they say. And having granted to her husband in Item 8 of her will an estate in fee simple absolute, testatrix had nothing left which was subject to speciall imitation, condition subsequent or executory devise. We cannot, for textatrix or for defendants, now write into Item 9 of the will any words or any expression implying that the estate granted in Item 8 was only for the life of her husband, with a remainder over."

The holding in *Vaughan v. Compton* would seem to be amply supported by earlier Missouri cases. Inasmuch as the court shows no disposition to overrule this line of cases, it is hoped that the General Assembly will enact the necessary legislation to change the rule. The problem will be fully reviewed in a forthcoming issue of the *Missouri Law Review*.[70]

B. *"Personal Property" Construed as "Personal Effects"*

In *Obetz v. Boatmen's Nat. Bank of St. Louis*[71] the court construed "personal property" to mean "personal effects."[72] The pertinent portions of the will were as follows (emphasis added): Items Two through Seven were bequests of specifically described pieces of jewelry to named persons; "Eight. I will and bequeath all of my *clothing, jewelry and personal property* not otherwise disposed of herein . . . to Lela Loew and Mrs. Harry Obetz, share and share alike;" Item Nine was a bequest of $10,000 to a named person; "Ten. I will, devise and bequeath all the rest and residue of my *estate, real, personal or mixed,* and wherever situate, to the following persons in the following manner: [one-sixth to *Mrs. Harry Obetz,* five-sixths to other named persons]." The estate of the testatrix consisted solely of personality at the execution of the will and at her death. At her death she left certain

70. Moore, Comment, *Executory Limitations Following Powers of Disposal,* 17 Mo. L. Rev. —— (1952). See also Eckhardt & Peterson, *Possessory Estates, Future Interests, and Conveyances in Missouri,* § 59, text introduction to Ann. Mo. Stat. c. 442 (Vernon); 2 Gill, Real Property Law in Missouri, 918-929 (1949); and the recent exhaustive annotation, 17 A.L.R. 2d 7-227 (1951).

71. 234 S.W. 2d 618 (Mo. 1950).

72. It took some four thousand seven hundred and fifty words to construe the will which, p. 622, "seems to have been drawn with meticulous care."

personal effects (clothing, jewelry, figurines, etc.), and $290,000 in bonds, stocks and cash. Mrs. Obetz brought action for declaratory judgment that she was entitled to one-half of the $290,000 under Item Eight, on the theory that "personal property" in that item meant "personal property." The court concluded that "personal property" in Item Eight had not been used in "the broad and general acceptance of the term, which would include everything except real estate," but was used in the sense of "personal effects." Therefore the $290,000 fell into the residue.

C. *"Wife" as Including a Second Wife*

A troublesome problem of construction arises where there is a limitation to "wife" or "widow" and the question is whether a subsequent wife is included. The "unborn widow" case gives trouble under the rule against perpetuities: A devises to his son B for life, then to B's "widow" for life, then to such of their children as survive the widow. If "widow" includes persons other than B's present wife, the remainder to the surviving children may vest too remotely, and violates the rule against perpetuities; B's widow may not be his present spouse and may be a person who was born after the testator's death.[73]

In *Scullin v. Mercantile-Commerce Bank & Trust Co.*,[74] a case where there was a limitation of a future interest to the "wife" of the testator's son, who was married at the date the will was executed and was married to the same wife when the testator died, the court held that "wife" did not include a subsequent wife, the plaintiff. The plaintiff argued that the first wife, Julia, was mentioned by name ten times in other parts of the will, and therefore "wife" in clause *L* under which she claimed would include a second wife. The court, in considering the will as a whole, found the intent so clearly expressed that there was no room for construction (*i.e.* consideration of surrounding circumstances); the same result would have been reached by considering circumstances. The court follows the leading Missouri case, *Gannett v. Shepley*,[75] and indicates that when the named spouse is married at the date of the execution of the will there is a presumption that "wife" means the person to whom the named spouse is then married and does not include a subsequent wife.[76]

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73. See Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).
74. 234 S.W. 2d 597 (Mo. 1950).
75. 351 Mo. 286, 172 S.W. 2d 857 (1943).
76. Note, 63 A.L.R. 81 (1929).

D. *Simultaneous Death—Common Disaster*

Stewart v. Russell[77] was concerned with a situation where a husband-stepfather, wife-mother, and daughter were last seen alive October 21 or 22, 1946, and whose badly decomposed bodies were discovered October 29, 1946, in their family residence owned by the mother. All three had died of carbon-monoxide poisoning. The plaintiff, former husband of the wife, and father of the daughter, brought an action to determine title, on the theory that the mother died first, the house went by intestate descent to the daughter, and upon the daughter's death went by intestate descent to him. The real defendants were the brothers and sisters of the mother, who claimed the stepfather and daughter died first, and that they took by intestate descent from the mother. The heirs at law of the stepfather were nominal defendants but made no claim. Title was quieted in the brothers and sisters of the mother. The court held there is no presumption as to survivorship or as to simultaneous death in the case of a common disaster, and if survivorship is an essential element in a case, the party asserting it has the burden of proving it. The evidence was such that no finding could be made as to survivorship. In such case "devolution of property of necessity is determined on the theory the deaths occurred simultaneously, not because the fact of simultaneous death is prseumed, but because he who asserts the contrary has failed to prove it."[78] Consequently title was quieted in defendants.

Inasmuch as these cases turn on the burden of proof and the inability to sustain it, it would seem that if the present plaintiff had beeen defending a suit to quiet title, he would have had judgment. There is no indication in the briefs of opinion that anyone was in the actual possession of the premises. It would seem that if the divorced husband (the present plaintiff) had been the first to go into actual possession after the deaths, he could have successfully maitained that possession, because the burden then would be on the brothers and sisters of the former wife (the present defendants) to establish survivorship, a burden they could not sustain under the evidence in this case.

The principal case was not controlled by the provisions of the Uniform Simultaneous Death Law, effective in 1947.[79] *Missouri Revised Statutes* § 471.010 (1949) provides: "Where title to property or the devolution thereof

77. 227 S.W. 2d 1011 (1950).
78. At p. 1014.
79. Mo. Rev. Stats. c. 471 (1949). See generally, Magruder, Comment, *The Uniform Simultaneous Death Act*, 13 Mo. L. Rev. 230 (1948).

depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, as determined by a court of competent jurisdiction, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this law." The result in the principal case would have been the same under the Uniform Simultaneous Death Law. However, the new act prevents capricious results possible under the common law where a person may win or lose depending on whether he happens to be plaintiff or defendant.

TAXATION

ROBERT S. EASTIN*

There were few decisions of the Supreme Court of Missouri during 1950 directly on the subject of taxation. Set out below, however, are a number of cases embracing subjects more or less collateral, but deemed relevant thereto.

I. ASSESSMENT AND COLLECTION OF GENERAL PROPERTY TAXES

In *State* ex rel. *Jackson County Library District v. Evans*[1] it was held that there was no statutory basis for the separate apportionment by the State Tax Commission of the distributable property of public utilities among library districts and mandamus will not lie to compel such an apportionment by the commission. Compare with *State* ex rel. *Benson v. Union Electric Company*[2] where such distributable property was held subject to the library tax at the local rate if the value thereof in the library district could be determined by other means than an apportionment by the State Tax Commission.

The City of Independence annexed certain territory located within the Inter-City Fire Protection District on February 2, 1948. In *Long v. City of Independence*[3] the court held that the property in the annexed area was subject to city taxation for 1948 since the assessment had not been completed on the date of the annexation. Property within the city at the time the assessment is actually made is subject to taxation for the current year although the assessment must be on the basis of January 1 values.

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1. 360 Mo. 1052, 232 S.W. 2d 386 1950).
2. 359 Mo. 35, 220 S.W. 2d 1 (1949).
3. 360 Mo. 620, 229 S.W. 2d 686 (1950).

Such annexation left the property in the annexed area subject to both city taxes and taxes for the Fire Protection District. Thereupon, the 1949 Legislature passed what is now Section 321.320, *Revised Statutes* (1949), withdrawing from Fire Protection Districts in counties of the first class having a population of over 450,000, territory incorporated in a city not wholly within the district, which covered the Independence situation. In 1949, pursuant to this statute, the County Court of Jackson County refused to extend the levy of the Fire Protection District against the property annexed to Independence. In a mandamus proceeding, *Inter-City Fire Protection District v. Gambrell,*[4] the district attacked the statute on the ground of its unconstitutionality in that (a) it was an attempt to create an additional and prohibited class of counties, (b) it did not apply to all Class 1 counties and (c) the subject matter was not clearly expressed in the title. The statute, however, was held constitutional, but the emergency clause attached thereto was held invalid because the act was not in fact one for the immediate preservation of the public peace, health or safety. The act, therefore, did not go into effect until October 14, 1949 after the date upon which the county court extended the 1949 tax levy. As a result, the district was entitled to have its taxes for 1949 levied on the territory annexed to Independence, although not thereafter.

II. Use of Funds Raised By Taxation

The moneys received by a taxing agency from the state on account of the intangible tax must be apportioned among the various purposes for which taxes on tangible property are levied in the precise ratio which the tangible tax rates bear to each other. Thus, where the levy of the City of St. Louis specified a certain amount for library purposes, the St. Louis Public Library was entitled to a similar apportioned amount from the intangible tax funds.[5] This case involved a special library tax voted by the people and it may be doubted whether the decision goes beyond such taxes and taxes for debt service funds on indebtedness voted by the people.

The expenditure of tax moneys for municipally owned off-street parking facilities, pursuant to statutory and charter authority, is for a public purpose and within the powers of Kansas City.[6]

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4. 360 Mo. 924, 231 S.W. 2d 193 (1950) (*en banc*).
5. State *ex. rel.* Board of Directors of St. Louis Public Library v. Dwyer, 234 S.W. 2d 604 (Mo. 1950) (*en banc*).
6. Bowman v. Kansas City, 233 S.W. 2d 26 (Mo. 1950) (*en banc*).

III. Special Taxes

A city operating under a charter adopted by the voters, pursuant to Section 19, Article VI of the 1945 Constitution, has the power to establish sewer districts and to issue tax bills against property in a district to pay for sewer improvements therein, without an enabling act of the legislature, if such power is conferred by the city charter. Where notice by publication is given and an opportunity to be heard afforded prior to the formation of the sewer district, the decision of a city council as to the property to be included within the district is conclusive, absent fraud or oppression, and a plaintiff therein who failed to so appear and protest cannot sue and enjoin collection of the tax bills on account of matters of fact which could have been raised at that time.[7]

A county court may levy a maintenance tax upon property in a "county court" drainage district for the purpose of cleaning out and repairing the drains and ditches under what is now Section 243.330, *Revised Statutes* (1949), and as not required to follow the procedure set out in what are now Sections 243.220 and 243.230.[8]

IV. Tax Sales and Titles

The holder of an unrecorded deed who has been in open and notorious possession for more than ten years prior to sale for city taxes in St. Joseph has a sufficient right in the property to assert that the tax deed was voidable because the consideration was shockingly inadequate.[9] However, no such right exists in a person whose possession was but permissive prior to the tax sale, who acknowledged the title of the purchaser at the sale and who only thereafter and for nominal consideration acquired a quit claim deed from some (but not all) of the former owners.[10] In contrast it was held, in *Adams v. Smith*,[11] that a purchaser, for a substantial consideration, of the interest of the former fee owner at execution sale held after a tax sale under the Jones-Munger law could attack the tax deed on the ground of gross inadequacy of consideration. Here, however, the party asserting the tax title was the vendee of the purchaser at the execution sale and was estopped, in equity, from acquiring and asserting an adverse title.

7. Giers Improvement Corporation v. Investment Service, Inc., 235 S.W. 2d 355 (Mo. 1950).
8. Drainage District No. 1 Reformed v. Matthews, 234 S.W. 2d 567 (Mo. 1950).
9. King v. Fasching, 234 S.W. 2d 549 (Mo. 1950).
10. Eld v. Ellis, 235 S.W. 2d 273 (Mo. 1950).
11. 360 Mo. 1082, 1232 S.W. 2d 482 (1950).

V. Taxing Districts

A. *School Districts*

The 1947 School Reorganization Law [now Sections 165.657-165.707, *Revised Statutes* (1949)] was held constitutional and districts reorganized thereunder were held to have the power to incur indebtedness and to issue bonds therefor and (impliedly) to levy taxes to pay the principal and interest thereof.[12]

When a proposal to divide a common school district and to release a portion to District *A* and a portion to District *B*, under what is now Section 165.300, was defeated at a special election, a proposal to annex the entire district to District *A* cannot be submitted at a special election held within the ensuing two years.[13]

A new consolidated school district cannot be formed by following the procedure outlined in Section 165.277 *et seq., Revised Statutes* (1949), where the territory contains all or part of an existing consolidated school district, but the procedure specified in Section 165.273 is exclusive.[14]

B. *Cities*

In *State* ex inf. *Taylor* ex rel. *Kansas City v. North Kansas City*,[15] it was held that: (a) Kansas City, operating under a special charter adopted by the voters, may annex unincorporated territory by amending its charter to change the boundaries therein set forth and is not required to follow any statute requiring a greater majority (reiterating the rule of *City of Westport v. Kansas City*);[16] (b) City *A* which takes the first step toward annexation of a given area prior to City *B* has priority in the territory in spite of the fact that City *B* completes its annexation procedure before City *A;* and (c) Kansas City's annexation of some seventeen square miles in Clay County was reasonable.

C. *Drainage and Levee Districts*

The annexation by Kansas City of an area (previously unincorporated) in an existing levee district did not have the effect of withdrawing the an-

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12. State *ex rel.* Reorganized School District v. Holmes, 360 Mo. 924, 231 S.W. 2d 185 (1950).
13. State *ex rel.* Rice *ex rel.* Allman v. Hawk, 228 S.W. 2d 785 (Mo. 1950).
14. State *ex inf.* Taylor *ex rel.* Zeliff v. Whitford, 233 S.W. 2d 694 (Mo. 1950). (*en banc*).
15. 228 S.W. 2d 762 (Mo. 1950) (*en banc*).
16. 103 Mo. 141, 15 S.W. 68 (1890).

nexed area from the district even though the district could not have been originally formed incorporating land within the limits of Kansas City.[17]

VI. Miscellaneous

The act of the 65th General Assembly increasing the state gasoline tax (House Committee Substitute for House Bill 165) was subject to referendum as it was neither an appropriation act nor an act for the immediate preservation of the public peace, health or safety.[18] Such referendum may be had at a special election called by the legislature by means of a concurrent resolution and not by a bill.[19]

TORTS

Glenn A. McCleary*

While the number of cases in the field of tort law continued to occupy a goodly portion of the court's time, there were very few situations which did not fall within well settled doctrines in the case law of this state. The cases having to do with the humanitarian doctrine continue, due to their importance to the lawyers of Missouri, to receive a separate and more adequate treatment by Mr. Becker.

I. Negligence

A. *Duties of persons in certain relations*

1. Possessors of land

In the cases appealed during the period under review that involved the liability of a possessor of land for injuries sustained on the land, plaintiffs in the main were unsuccessful in making submissible cases. In *Anderson v. Kansas City Baseball Club*,[1] it was held that a petition did not state sufficient facts to constitute a cause of action, where it was alleged that the defendant baseball club seated the plaintiff in a portion of the grand stand in the baseball park unprotected by wire screen and failed to warn the plaintiff of the hazards, and that the defendant's usher stated to the plaintiff that the seat was safe and that hundreds of people sat there every day,

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17. State *ex rel.* Collins v. Rooney, 235 S.W. 2d 260 (Mo. 1950) (*en banc*).
18. Heinkel v. Toberman, 360 Mo. 58, 226 S.W. 2d 1012 (1950) (*en banc*).
19. Bohrer v. Toberman, 360 Mo. 244, 227 S.W. 2d 719 (1950) (*en banc*).

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1. 231 S.W. 2d 170 (Mo. 1950).

even though plaintiff, an invitee, had no knowledge of the rules or strategy of the game. The court held, where a baseball game is conducted under usual conditions customarily prevailing in baseball parks, it is not necessary that all seats be screened against the hazard of driven balls, and the obligation to provide a place which is reasonably safe for spectators is fulfilled when those portions of the stands which are most frequently subject to the hazard of foul balls are screened. Nor does the fact that spectators in unscreened seats in a baseball park may be struck by balls which are fouled or otherwise driven into the stands present an unreasonable risk to spectators which imposes a duty to warn. "This risk," held the court, "is a necessary and inherent part of the game and remains after ordinary care has been exercised and is not the result of negligence on the part of the baseball club." It was also pointed out that "the danger of balls being fouled into the stands is open and obvious to any one who possesses normal powers of observation. A knowledge of the rules or strategy of the game is not necessary to a realization of such hazard."

Dickinson v. Eden Theatre Co.[2] was an action for injuries resulting when a 65 year old patron of the theatre, while standing in the outer lobby of the theatre, was knocked down when a newspaper vendor collided with her. In affirming the directed verdict for the defendant in the trial court, the court found that the evidence did not establish the existence of anything inherently dangerous in the customary conduct and activity of the vendor in selling newspapers in the lobby of the theatre without the consent or objection on the part of the defendant, and that the defendant under the evidence had no duty to prevent the newspaper vendor from moving about the lobby while theatre patrons were entering and leaving the theatre. The one isolated instance given in evidence, where this newspaper vendor had bumped shoulders with a witness in the lobby but without making any impression on the witness at the time, was insufficient to charge the defendant with notice of the likelihood of injury to patrons or invitees resulting from the newspaper vendor's presence in the lobby.

In *Wilson v. Miss Hulling's Cafeterias, Inc.*,[3] injuries were sustained by the plaintiff who was a patron in defendant's cafeteria when she stepped on some foreign substance on the floor of the cafeteria and fell. From a verdict for the defendant the plaintiff appealed. The witnesses for the defendant

2. 360 Mo. 941, 231 S.W. 2d 609 (1950)
3. 360 Mo. 559, 228 S.W. 2d 556 (1950).

testified that there was no foreign substance on the floor. There was evidence of some physical infirmity in one foot of the plaintiff and the defendant's theory was that her fall was due to her physical condition, since she appeared to stumble or fall forward within four feet of the table at which she had been sitting. The trial court had given for the defendant as a part of its main instruction "that the mere fact that plaintiff fell and sustained an injury while upon defendant's premises . . . does not of itself warrant you in finding against the defendant." The plaintiff contended this was misleading and argumentative, but the court ruled it was cautionary in nature and within the discretion of the trial court.

It was held that a directed verdict should have been given for the defendant in *Nelson v. Kansas City*,[4] where the plaintiff sought to recover for injuries sustained when something fell on him as he was walking through a gate in a fence at the municipal airport. The plaintiff, an airline employee, knew that this gate was not used by employees or by the general public and that it was opened only on special occasions. He had requested permission from policemen guarding the gate to go through the gate, in order to see an arriving dignitary, and to avoid passing through the crowd which had gathered for the purpose of seeing the dignitary. At the time and place where he was injured, plaintiff was a mere licensee. He had gone to the gate for his own pleasure and was not in the performance of his duties.

In *Lonnecker v. Borris*,[5] a submissable case was made by the plaintiff in an action for injuries allegedly resulting to her while a guest of a hotel operated and owned by the defendants. In attempting to move a large, rather old-fashioned Morris chair, the toe of one of the plaintiff's shoes was caught underneath the chair, causing her to fall. An investigation disclosed that there was a rather heavy, sharp-pointed wire hanging down from the mechanism under the chair. The manager said the wire was from a coiled spring which had pushed through the bottom of the chair. The sharp wire had pierced the toe of the plaintiff's gabardine shoe, causing her to fall as she was in the act of moving the chair. The plaintiff-guest had complained generally to the defendant's manager about the uncomfortable condition of the chair and had discussed the need of repairs on the chair on several occasions over a period of eight or nine months. The court recognized that although hotel keepers are not insurers of the safety of their guests they are

4. 360 Mo. 143, 227 S.W. 2d 672 (1950) (*en banc*).
5. 360 Mo. 529, 229 S.W. 2d 524 (1950).

under a duty to exercise reasonable care to keep and maintain their premises and furnishings in a reasonably safe condition. Therefore, the granting of a new trial to the plaintiff by the trial court after it had directed a verdict for the defendants was affirmed.

2. Lessor-lessee relationship

A decision of considerable interest to lessors of commercial establishments is the case of *Warner v. Fry*.[6] The action was for personal injuries to plaintiff's head and back, while seated at a table drinking beer in a tavern, caused by the plaster falling on the plaintiff from the ceiling in defendant's building which had been leased to the proprietor of the tavern. The plaster that fell was about 6 to 8 feet in diameter and about two and one half inches thick. Sufficient plaster fell to fill three tubs and its weight was estimated at 30 to 40 pounds. The ceiling was 19 feet high. The place was described as a "neighborhood tavern." Most of the people who came there were regular customers and long-time acquaintances of the lessee. These patrons would frequently sit there reading newspapers, listening to baseball broadcasts and occasionally singing to the music. No meals were served and there was no prepared place for dancing. There was a coin operated juke box and a small portable radio in the tavern. The lessee on two occasions had called the attention of an agent of the real estate agency, to which she paid the monthly rent, to the condition of the ceiling. The last time was eight days before the plaster fell. A day or two following the fall of the plaster, the husband of the defendant came in and looked at it. After a verdict for the plaintiff for $20,000 the trial court sustained the defendant's motion for judgment in accordance with the defendant's motion for a directed verdict. On appeal the court held the "public use" rule, that a lessor is liable for injuries to a tenant or his invitees because of defects in the premises leased for the purpose involving public use thereof, was inapplicable to ordinary commercial establishments, where the primary purpose was not to assemble large groups at the same time. The decision is treated more fully in 16 *Missouri Law Review* 71 (1951).

3. Railroads and other carriers

In *O'Brien v. Louisville & Nashville R.R.*,[7] the action was brought under the Federal Employers' Liability Act for injuries sustained while the

6. 360 Mo. 496, 228 S.W. 2d 729 (1950).
7. 360 Mo. 229, 227 S.W. 2d 690 (1950).

plaintiff was working as a member of a switching crew. In a switching operation, which necessitated that plaintiff step from a moving car to open a gate into an industrial plant, he stumbled as he stepped off the car and fell over a chain which had been fastened to the track, drawn through the fence and attached to a truck. It was dark at the time of the accident and the plaintiff did not see the chain which had been there 17 days. It was plainly visible in the daytime. The court held that the evidence warranted a recovery on the theory that defendant was negligent in not furnishing a reasonably safe place to work. It was further held, where two railroads indiscriminately used yards owned by them, the fact that the track where the switchman was injured belonged to one railroad did not affect the liability of the other railroad which employed the switchman.

The basic question raised on appeal in *Hilton v. Thompson*[8] was whether the duty of the employer railroad of furnishing a reasonably safe place to work applied to construction work. The plaintiff was employed by the defendant as a member of a bridge and building crew and was injured while assisting in the repair of a bridge on defendant's railroad. The crew was engaged in replacing wooden stringers on the bridge. A stringer weighing between 1200 and 1300 pounds was being brought from a supply pile by a derrick car which was pulled by a motor car. The stringer was secured by a hook on the end of a cable running from the windlass and was suspended in mid-air about 16 to 20 inches from the side of the derrick car. Nothing was used to counterbalance the weight of the suspended stringer. In stopping the motor car, plaintiff alleged that the foreman caused the derrick car to jerk and jolt, to become unbalanced, and to be derailed. It toppled to the side on which plaintiff was riding, throwing him to the public road which ran beneath the bridge. The court declined to follow the line of cases which hold that the master owes a duty to furnish a reasonably safe place to work for his employees, as this rule is inapplicable where the very work the employee is employed to do consists in making a dangerous place safe. It approved an earlier holding that, in construction work where conditions are constantly changing, the duty of providing a safe place of work cannot be imposed to the same extent as in the case of work done in a more permanent location because, under these conditions, it is impossible to keep the place of work, the actual physical location in which the work is done, as safe as a place in a completed structure. Under such circumstances, "the

8. 360 Mo. 177, 227 S.W. 2d 675 (1950).

duty of providing a safe method of carrying on the work increases and '. . . the employer's duty is not merely safety of the place of work of his employee, but also his *safety in his place of work;* in short, a safe environment as well as a safe place'."

A distinction between prematurely starting a taxicab, before the passenger has had a reasonable opportunity to become seated, and other carriers such as trains, streetcars and busses, was drawn in *Biehle v. Frazier*,[9] where the court said "Unlike in the instances of trains and streetcars or even busses it is not a usual operation of an automobile or taxicab to start before the passenger is seated. . . ." Therefore, an instruction that defendant would not be responsible for injury to the plaintiff as a result of the usual motion of a motor vehicle being started in operation, and the jury must return a verdict for the defendant if they believed from the evidence that plaintiff's injuries were not caused by the taxicab driver starting the cab suddenly with a jerk, was held to be prejudicially erroneous to the plaintiff as withdrawing the hypothesis, warranted by the evidence, in instructions given at plaintiff's request, that the driver negligently started the cab forward before the plaintiff had a reasonable opportunity to be seated. The judgment for the defendant was reversed and the cause remanded.

Two earlier courts of appeals decisions had read into the statute requiring a railroad to construct and maintain suitable openings through its embankment to connect with water courses, so as to afford a sufficient outlet to permit all water to get through its embankment to the lower side whenever drainage of such water has been rendered necessary, the additional requrement that the ditch, drain or watercourse connecting below the embankment must be amply sufficient to carry off the water, and if it was not amply sufficient to do so there was no duty on the railroad to let the water through its embankment. The Missouri Supreme Court, in *Smithpeter v. Wabash R.R.*,[10] held that "What was said in those cases in that respect is not the law, and should not be followed." The court held a "sufficient" outlet under the statute to permit all water to get through its embankment to the lower side, whenever drainage of such water has been rendered necessary, refers only to the opening through the embankment, and the water which the railroad must let through its embankment is not limited to such water as can be carried off within the banks, drains, ditch or watercourse

9. 360 Mo. 1068, 232 S.W. 2d 465 (1950).
10. 360 Mo. 835, 231 S.W. 2d 135 (1950). (*en banc*).

below the railroad. This opening must afford sufficient draining, including surface water, whether within the natural banks of the watercourse or whether outside those banks and within levees. The use of the natural watercourse by the drainage district and the building of levees by the district were held not to change the nature of the watercourse, nor relieve the defendant of its stautory duty. The judgment was affirmed for the destruction or damage to the plaintiff's crops by flood waters resulting from the violation of the statute.[11]

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11. Several other cases noted below, involving the liability of railroads for personal injuries, did not raise legal problems of sufficient importance to be given fuller treatment. In Graves v. Atchison, T. & S. F. Ry., 360 Mo. 167, 227 S.W. 2d 660 (1950), a speed of a train moving at 75 to 80 miles per hour over a country crossing, used by three families and others when they come to visit or to make delivery or to haul stock, did not constitute submissible negligence. The double track line was crossed by the country road at approximately a right angle. The crossing was not a concealed one and the day was clear. On the issue of whether warning signals were given there was substantial evidence that they were sounded while there was no substantial evidence that they were not sounded. On the latter was the negative testimony of a passenger on the train, who was playing cards, and the plaintiff. No submissible case was made on this specification of negligence. The order of the trial court granting plaintiff a new trial was reversed with directions to reinstate the verdict for the defendants.

In an action against the defendant streetcar company for the death of an occupant of the automobile in a collision with a streetcar, evidence that skidding automobile with rear wheel caught between streetcar track and ridge of ice alongside of the track could have been stopped or driven off tracks in time to avoid collision, if the streetcar had been stopped sooner or its speed slackened, was held in Wood v. St. Louis Public Service Co., 228 S.W. 2d 665 (Mo. 1950), to make a submissible case on the question of the negligence of the motorman in not keeping a proper lookout and in not stopping the streetcar in time to avoid the collision.

In an action under the Federal Employer's Liability Act for injuries sustained when a blacksmith's helper was hit by a channel iron which weighed about 600 pounds and was 10 to 12 feet in length, the evidence showed that three men were carrying the iron, the plaintiff carring the rear end and the other two men the front end, when the iron slipped from the hands of one of the men on the front end, causing it to fall to the floor and causing the injuries to the plaintiff. The evidence further showed that it usually took four men to carry an iron of this weight and size, but the foreman, after an unsuccessful attempt to find a fourth man, instructed the three men to proceed saying: "Go ahead, you three fellows can carry it. Do the best you can." A submissible case was held to have been made, In Prince v. Kansas City Southern Ry., 360 Mo. 580, 229 S.W. 2d 568 (1950), on the issue as to the company's negligence in not providing sufficient men to carry the iron.

In Widener v. St. Louis Public Service Co., 360 Mo. 761, 230 S.W. 2d 698 (1950), the court, after verdict for plaintiff for $5,000 for personal injuries, affirmed the ruling of the trial court in sustaining plaintiff's motion for a new trial on the issue of damages only. The case involves an interesting issue on damages resulting from the activation of a dormant disease, in this case a recurrence of schizophrenia. But ignoring the plaintiff's recurring insanity, the physical injuries were such as to justify an award in a greater amount than the $5,000.

A judgment for the plaintiff was reversed in Ottley v. St. Louis-San Francisco Ry., 360 Mo. 1189, 232 S.W. 2d 966 (1950), for injuries received while working as a freight car inspector in the defendant's yards, on the ground that plaintiff's evidence was insufficient to make a submissible case on the question of the defendant's negli-

4. Automobiles

While the case of *Dinger v. Burnham*[12] involves imputing negligence to the parent from permitting a 15 year old son to operate the automobile in violation of the statute, so as to establish contributory negligence, the case carries broader implications. The automobile was operated by the son, with his mother, the plaintiff, on the front seat beside him, when it collided with

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gence, in ordering and requiring plaintiff to crawl under standing cars on a switch track on his way to inspect cars on another track and in violently striking one end of such standing cars by shunting other cars onto the track from a lead track without warning. No duty to warn plaintiff inspector was made out where no member of a railroad switch crew, shunting freight cars onto a switch track, knew that the freight car inspector was crawling under couplers between two of a string of coal cars standing on such tract, and where no member of the crew had notice of his intention to do so and were not required to ascertain that he was cutting across the freight yard in violation of the company's safety rule, and where no rule, regulation, practice or custom required any other employee of the company to sound a signal or give car inspectors notice or warning of intention to start such a switching movement. The facts that assumption of risk is no defense to an action under the Federal Employers' Liability Act and that contributory negligence diminishes damages recoverable under that Act do not permit a recovery for injuries of which the employee's own negligence is the sole proximate cause.

Vail v. Thompson, 360 Mo. 1009, 232 S.W. 2d 491 (1950), involved the Kansas last clear chance doctrine which permits a recovery to a contributorily negligent plaintiff only when such person is in helpless peril from which by the exercise of reasonable care he cannot extricate himself. A judgment on a verdict for the plaintiff was reversed.

In Nance v. Atchison T. & S. F. Ry., 360 Mo. 980, 232 S.W. 2d 547 (1950), the action by a railroad switch foreman against his employer, for injuries sustained during the course of his employment, was submitted under the Kansas statutes which deprived an employer, who rejects the Workmen's Compensation Act, of the defenses of assumption of risk and contributory negligence. The plaintiff was struck by a grain door during the course of his employment, and his theory of liability was the failure of the employer to provide a safe place to work. A judgment for the plaintiff for $18,000 was set aside and judgment was entered for the defendant on the ground of failure to make a submissible case, in that he failed to show evidence from which an inference could be drawn that the alleged unsafe condition reasonably could have been anticipated by the defendant, and that the defendant had the required actual or constructive notice of such condition.

In Piehler v. Kansas City Public Service Co., 360 Mo. 12, 226 S.W. 2d 681 (1950), the plaintiff's instruction submitting primary negligence contained the following: ". . . if you further find and believe from the evidence that at said time and place plaintiff in the exercise of ordinary care for his own safety had his knee up on the seat on the right-hand side of said streetcar near the rear with one hand on the window sill of an open window and the other hand upon the signal buzzer sounding the same, if you so find, and if you further find . . . ," The court reversed a judgment for the plaintiff, an eleven year old boy, for injuries sustained by falling out of the street car window, while a passenger on the street car, and proximately caused by the operator's negligence in that he accelerated the speed with an unusual jerk, thus causing the boy, while kneeling on the seat to ring the buzzer, to fall out of the open window. The court held that this instruction did not require a finding that the plaintiff was in the exercise of ordinary care for his own safety. It was said that "The phrase 'in the exercise of ordinary care for his own safety' is incomplete to require an independent finding of the ultimate fact of 'ordinary care,'

the defendant's truck. They were on the way to park the car so the mother could go to a show. The 15 year old son had procured a driver's license to operate an automobile, having made a false affidavit that he was 16 years old. The case might have been decided on the question of imputed negligence, in the event of a finding that he was acting as her agent at the time. This was the immediate question raised on the appeal. The court, however, went further and treated the problem of the liability of parents for resulting injuries when they entrust an instrumentality, capable of becoming a source of danger to others, to an incompetent or reckless child, or when the law prohibits the entrusting of the instrumentality to the child. After setting forth the sections of the statutes which provide in part that "No person under the age of sixteen (16) years shall operate a motor vehicle on the highways of this state," *Missouri Revised Statutes* (1939, Section 8401(i), and Section 8466 of the Missouri Motor Vehicle Driver's License Law that "No person shall cause or knowingly permit his child or ward under the age of sixteen (16) years to drive a motor vehicle upon any highway when such minor is not authorized hereunder or in violation of any of the provisions of this article," the court concludes that, although violation of these sections are made misdemeanors, their provisions apply in civil as well as criminal actions, and that "our statutes declare that one under the age of sixteen years conclusively does not possess the requisite care and judgment to operate vehicles on the public highways without endangering life and property."

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lacking a verb; and, standing merely as a modifying phrase, characterizes the submitted physical facts as constituting 'ordinary care' without requiring the jury to so find. Compare a required finding 'that . . . plaintiff was in the exercise of ordinary care for his own safety and' et cetera." The instruction, held the court, "tended to give plaintiff an advantage to which he was not entitled as jurors are authorized to consider all facts bearing on their ultimate conclusion of ordinary care on the part of the plaintiff. . . ."

Donald v. Missouri-Kansas-Texas R.R., 231 S.W. 2d 627 (Mo. 1950), and Howie v. St. Louis S.W. Ry., 360 Mo. 771, 230 S.W. 2d 703 (1950), held plaintiff contributorily negligent as a matter of law where plaintiff's truck collided with defendant's train at an intersection and, if plaintiff had looked as he said he did, he could have seen the train in time and, at the speed he was going, could have stopped his truck in time to have avoided the collision

Under Illinois law, where there was nothing which would lead the operators of a freight train to believe that the driver of a truck, who drove onto the crossing at a speed of 2 to 3 miles an hour, did not intend to stop before driving upon the tracks, and there was a short blast of the whistle a second or so before the impact, and the brakes on the train were applied in emergency, the evidence in an action for the death of the truck driver did not justify a submission on the ground that the operators of the train were guilty of willful and wanton negligence. Howie v. St. Louis S.W. Ry., 360 Mo. 771, 230 S.W. 2d 703 (1950).

12. 360 Mo. 465, 228 2d 696 (1950).

In a case of first impression before the supreme court, a verdict and judgment, in *Taylor v. Taylor*.[13] were affirmed in an action brought by a mother against a 22 year old son, who lived at home as a member of the family, for damages for the death of her husband resulting from the crash of the son's autmobile into a bridge abutment when the lights on the automobile failed. The evidence showed that the lights of the automobile were known by the son to be defective and that the father, while riding as a guest, was injured when the automobile hit the bridge abutment as a result of its lights going out. On the appeal to set aside the verdict and judgment for $15,000, the defendant contended as one of his grounds that it was contrary to public policy to permit a parent to sue a child where they were living together as members of the family. The court held that this general rule was not applicable where the child was of age at the time the cause of action arose.

In *Cuddy v. Schenewark*,[14] the injuries to the plaintiff were sustained in a head-on collision between two automobiles. It appeared that the defendant had driven at such speed that he had come suddenly upon an automobile preceding him in the same direction, and that he applied his brakes for about 20 feet before swerving into the opposite lane and colliding with plaintiff's on-coming automobile. The negligence alleged in the petition was that the defendant negligently drove his car across the center line of the pavement and in the line of the opposite bound traffic and into plaintiff's car. The instruction, as to the manner of operation of the automobile, was stated in the words of the statute that the driver of a motor vehicle should drive "at a rate of speed so as not to endanger life or limb of any person," but did not predicate any verdict. Such instruction was held not to inject the speed issue into the case so as to go outside of the issues made by the pleadings. It was also held not to constitute reversible error to instruct the jury in the words of the statute as to the defendant's duty under the law as to the manner of operating his automobile, even though such instruction was stated abstractly and did not predicate a verdict. It was pointed out, however, that "It would conform with the better practice, often suggested to the bar, that if the plaintiff desired to use the above satutory words in an instruction, she should have incorporated them in her theory instruction predicating a verdict."[15]

13. 360 Mo. 994, 232 S.W. 2d 382 (1950).
14. 231 S.W. 2d 689 (Mo. 1950).
15. Other cases involving liability arising from automobile accidents. Where a truck driver applied vacuum brakes which failed, and attempted to use the hand

5. Supplier of a chattel

Blankenship v. St. Joseph Fuel Oil & Manufacturing Co.[16] was an action for personal injuries arising out of the rental and use by the plaintiff's employer of a street sweeping machine owned by the defendant. The broom was between the one front wheel and the rear wheels and was driven by means of a chain and sprocket arrangement from the axle between the rear wheels. The chain and sprockets were exposed—not guarded. The operator stood on a steel grating platform located across the right-half of the space between the rear wheels. When the sweeper lurched, or jarred, or hit something, plaintiff-operator was caused to be thrown off balance and to fall sideways, his leg catching in the chain and sprocket. Plaintiff charged negligence against the defendant-bailor for supplying a sweeper that was dangerous to the person operating it in that the chain and sprockets were unguarded, and that the defendant knew or should have known that the sweeper was dangerous to a person operating it in that condition. The court held the general rule, that a bailor who negligently fails to furnish a chattel reasonably fit and proper for the use intended may be answerable to a third person, was not applicable where the bailee himself has specifically selected it and where there is no representation of warranty, express or implied, of defendant respecting the suitability of the article for any particular purpose. Furthermore, where the defect is patent, there is no liability of the

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brake which would not bring his truck to a stop, and no evidence was produced of any legal excuse why the hand brake was inadequate, the trucking company was found, in Sams v. Adams Transfer & Storage Co., 234 S.W. 2d 593 (Mo. 1950), to be guilty of negligence, and liable for injuries resulting to a passenger on a streetcar which was struck at an intersection by the truck and for damages to the streetcar. Wendel v. Shaw, 235 S.W. 2d 266 (Mo. 1950), held that where defendant contracted to take temporary custody of a four year old child for hire during the temporary absence of the parents of the child, and the defendant took the child for a ride in his automobile into Kansas to a pony ring, such transportation was not gratuitous and the child not a guest within the Kansas automobile guest statute. The court said "It seems to us that taking plaintiff by automobile to the pony ring was just something defendant decided to do in doing his job of taking care of the infant plaintiff." In McGuire v. Steel Transportation Co., 359 Mo. 1179, 225 S.W. 2d 699 (1950), a light truck of the defendant in which plaintiff was riding and a tractor-trailer side-swiped on a upgrade curve. Negligence was predicated on the defendant's failure to keep his truck as closely to the righthand side of the road as practicable. No evidence was offered to make a submissible case on this issue. There was no mandatory duty to use the two or three feet of black top or asphalt pavement or shoulder adjacent to the two-lane concrete highway until the defendant should have become aware that the on-coming truck would not yield one half of the usually traveled portion of the concrete highway.

Wise v. Coleman, 360 Mo. 829, 230 S.W. 2d 870 (1950), was based on the Indiana guest statute whereby the guest must show wanton and willful misconduct by the operator of the automobile.

16. 360 Mo. 1171, 232 S.W. 2d 945 (1950).

bailor to third persons for injuries from the patent defects in the bailed article. Here the sweeper was not a complicated machine, "the chain and sprockets were in view and as readily comprehensible as the chain and sprocket of a bicycle." The plaintiff's employer, the bailee, had used the sweeper many time and knew as much about its condition as did the bailor, and it had remained in the same condition for approximately two years. Since the bailee would have no claim against the bailor for the alleged defect in the bailed article, likewise the bailee's employee would have no claim against the bailor. No submissible case was made.[17]

6. Employer-employee relationship

In *Linam v. Murphy*,[18] in an action for injuries to a student airplane pilot, the court ruled that "a pilot instructor, on a training flight in a dual control plane who took the controls and, despite the student pilot's protest and without his interference with the controls, operated the plane for his own personal thrill, was acting within the scope of his employment, and his employers are liable to the student for injuries resulting from their employee's negligent operation of the plane." The court was of the opinion that it was impossible for the pilot instructor to have deviated from or gone without the scope of his employment from the time he took the plane off from the home airport, and that he was still acting within and had not departed from his employment when he continued to operate the plane after he had ordered the plaintiff to release the controls. Since his acts in taking control and thereafter operating the plane were part of his duties and within the scope of employment, the buzzing of objects at low altitudes, resulting in striking the wires of a power line and in injuries to the plaintiff when the plane crashed, could not be said to be a frolic of his own or for his own enjoyment.

17. Plaintiff's theory in Stone v. Farmington Aviation Corp., 360 Mo. 1015, 232 S.W. 2d 495 (1950), was that his injuries in a crash of an airplane, which he had rented and was operating, resulted from the breaking of a safety belt on the rear seat, which threw the occupant of the rear seat against the plaintiff's seat and thereby injured him. He alleged that the belt "was old and rotten and defective and not suitable for the purpose for which it was intended." From the testimony as to the condition of the belt, the most that the court might have inferred was that it was not a new belt. It was held that the evidence was insufficient to show that the breaking of the safety belt caused or contributed to the plaintiff's injuries. Furthermore, it was impossible to say that, except for the breaking of the belt, the plaintiff would not have been injured. The plane had crashed at a 45 degree angle. The engine and fire wall of the plane were pushed back toward the pilot's seat and "he was jammed up almost to the instrument board, practically against it." The plane was so badly wrecked that it was sold for junk.

18. 360 Mo. 1140, 232 S.W. 2d 937 (1950).

Since the student was one of the other parties to a contract which defendants had entered into with him and the United States government and for their services to the plaintiff the defendants were paid by the government, plaintiff on this flight was not an employee, nor a bailee or charterer of the plane, nor a guest of either the defendant or the pilot instructor. The relationship was that of a carrier rather than a master, and the degree of care required was to be determined by the common law principles of negligence. The judgment of the trial court directing a verdict for the defendant was reversed and the cause remanded.

B. *Res ipsa loquitur*

In *Jones v. Thompson*,[19] the question was whether the defective freight car was under the exclusive control or right of control of the defendant railroad company when the plaintiff sustained his injury, so as to enable him to make a submissible case under the doctrine *res ipsa loquitur*. The plaintiff-shipper, while lawfully unloading the railroad car, attempted to force a damaged door open in the usual manner. The bottom rollers of the door were off the bottom rail and, as he forced the door, it fell on him causing the injuries complained of. The local agent of the railroad company had told the plaintiff that he had checked the condition of the car and that it was all right to go ahead and unload it. The court held the *res ipsa loquitor* doctrine applicable, distinguishing carload shipments of bulky freight, which require the consignee to unload and which gives him a measure of control, from mingled shipments requiring the railroad company to separate and unload. In the latter situation the company remains constructively in the control of the car.

In an employee's action against a railroad company for injuries sustained when a railroad car, in which the employee was separating and stabilizing freight, gave a sudden and violent jerk, causing freight to fall and bruise his foot, the trial court sustained the defendant's motion for a directed verdict on the ground that there was no substantial evidence showing that the defendant railroad had any control of or right to control the instrumentalities which caused the box car to jerk, including the switching operations of the Terminal Railroad switching crew. On appeal, in *Raze v. St. Louis Southwestern Ry.*,[20] the court held that while the Terminal switch crew and switch engine may or may not have caused it, or it may have been the result

19. 360 Mo. 285, 228 S.W. 2d 673 (1950).
20. 360 Mo. 222, 227 S.W. 2d 687 (1950).

of something done by some one else, or of some force that had not been explained, the defendant railroad was in control of the yards and the doctrine of *res ipsa loquitur* was applicable. The judgment was reversed and the cause remanded.

Whether the plaintiff pleaded and submitted specific negligence, so as to lose the benefit of a *res ipsa loquitur* case, was before the court in *Wenzel v. St. Louis Public Service Co.*[21] In her petition the plaintiff alleged that "the said bus suddenly and violently and in a very unusual manner jerked, jarred and jolted and the front door thereof was caused to be opened, directly causing the plaintiff to be thrown from the said bus. . . ." In its first instruction the trial court submitted plaintiff's case on the theory of *res ipsa loquitur,* hypothesizing the occurrence as follows: "said bus suddenly and violently and in a very unusual manner, jerked, jarred and jolted and the front door thereof was caused to be opened while the bus was in motion." The defendant-appellant contended that general negligence was submitted by the hypothesis of a sudden and violent motion of the bus, and that the submission of general negligence was combined with a submission of specific negligence by hypothesizing "and the front door thereof was caused to be opened while the bus was in motion." The court held that no direct evidence was introduced and there was no pleading or submission of the specific act or omission which caused the bus suddenly and violently to jerk, and there was no direct evidence of pleading and no submission that the bus driver opened the doors, or in what manner the doors were caused to be opened. The case was held to have been properly submitted under the doctrine *res ipsa loquitur.*

However, where the plaintiff's evidence established the specific acts of negligence there can be no submisson under the doctrine. In *Venditti v. St. Louis Public Service Co.,*[22] the action was for personal injuries as the result of a collision between two of defendant's busses. The plaintiff put on the stand as her witnesses the operator of each of the busses involved in the collision. Neither of these men was in the employ of the defendant at the time of the trial. Their testimony covered the facts of the cause of the collision. The case, held the court, should have been submitted as one of specific negligence.[23]

21. 235 S.W. 2d 312 (Mo. 1950).
22. 360 Mo. 42, 226 S.W. 2d 599 (1950).
23. Where injuries were sustained by the plaintiff as a passenger on a bus, in a collision between the bus belonging to the corporate defendant and the individual defendant's automobile, the submission of the case under the doctrine of

C. *Humanitarian Negligence*

In view of the significance of the humanitarian doctrine in the Missouri decisions, special emphasis is given to the cases predicated upon this doctrine in a separate topic elsewhere in the *Review*.[24]

D. *Burden of Proof*

In *Adams v. City of St. Louis*,[25] an instruction that "the burden of proof is upon the plaintiff to prove each and every fact necessary for her to recover, as set out in other instructions given herein . . ." was held not to be irreconcilable with an instruction to the effect that the defendant had the burden of proving that plaintiff was contributorily negligent. It was thought "that the sense and meaning of the two instructions, when read together, is so clear that no juror of ordinary intelligence would conclude that the burden of proof on that issue was upon plaintiff." The court distinguished this situation from instructions which refer the jury to the pleadings to ascertain the issues.

The combined effect of three instructions given at the request of the defendant on the burden of proof in *Ford v. Dahl*,[26] did not unduly emphasize the plaintiff's burden. Also, where the plaintiff's main instruction submitted in the disjunctive the defendant's negligence with respect to failure to stop, failure to slacken speed, and failure to change the course of travel of the defendant's truck with resulting collision, the defendant's instruction requiring a finding that the defendant was negligent in the respects set out in the plaintiff's instruction was held not objectionable as requiring plaintiff to prove all three acts of negligence.[27]

II. Torts Other Than Negligence

There were several decisions during the year under review in which liability was predicated in fields of tort law other than negligence. The three decisions in deceit involved no new questions of law nor were the facts

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res ipsa loquitur as to the carrier and under specific negligence as to the individual defendant was proper under Missouri case law. Rothweiler v. St. Louis Public Service Co., 234 S.W. 2d 552 (Mo. 1950) (*en banc*).

24. Discussed by Mr. Becker in the January, 1952 issue.

25. 360 Mo. 806, 230 S.W. 2d 862 (1950).

26. 360 Mo. 437, 228 S.W. 2d 800 (1950).

27. Davis v. Kansas City Public Service Co., 233 S.W. 2d 679 (Mo. 1950), also involved a consideration of the effect of other instructions on the burden of proof instruction.

unusual, and in each case deceit was not made out. The cases are more valuable as a study of efforts by the parties to obtain some of the money they had hoped to make in a transaction, but without actually having been misled.[28]

The case of *Hoock v. S. S. Kresge Co.*,[29] for false arrest brought against the owner of a store and its manager, followed the case law of Missouri that if one but states the facts, as he believes them to be, to a police officer, and leaves it to the officer to act or not, to arrest or not as a police officer under the facts sees fit to do, the one reporting is not liable for the independent action taken by the police. In this case the manager did not even seek out or voluntarily report the matter to the officer; in fact, the nearby traffic officer came off his beat, having seen the manager talking to the plaintiff on the street, and asked the manager the cause of the conversation and whether he was having trouble with the plaintiff. It was then that the manager explained to the officer why he had accosted the plaintiff on the street not far from the store. The court found that no inference would be warranted that the manager had instigated, encouraged, countenanced or caused the plaintiff's arrest. More is required than the mere furnishing of even wrong information to a police officer before such inference may be drawn.[30]

WILLS, TRUSTS AND ADMINISTRATION

GEORGE W. SIMPKINS*

The Missouri Supreme Court had before it in 1950 a total of 27 cases involving this subject. A number of these involved matters of first impression in Missouri. Their decision doubtless took much of the time and thought of

28. The evidence was insufficient to make a submissible case in Dolan v. Rabenberg, 360 Mo. 858, 231 S.W. 2d 150 (1950), and in Saunders v. Bannister, 235 S.W. 2d 339 (Mo. 1950). Lowther v. Hays, 225 S.W. 2d 708 (Mo. 1950), was tried to the court without the aid of a jury. The alleged deceit was raised by counterclaim.

29. 230 S.W. 2d 758 (Mo. 1950) (*en banc*).

30. Other cases not of sufficient significance to discuss: Harper v. St. Joseph Lead Co., 233 S.W. 2d 835 (Mo. 1950) (malicious prosecution action failed for failure to produce substantive evidence that the defendants had brought the indictment against plaintiff or to make a submissible case on want of probable cause); Krone v. Snapout Forms Co., 360 Mo. 821, 230 S.W. 2d 865 (1950) (defense of truth in an action of libel, as to whether or not defendant had committed a breach of good faith as charged by the defendant, left to the jury); Reger v. Nowotny, 226 S.W. 2d 596 (Mo. 1950) (assault and battery).

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the court, and these precedents will be of importance for years to come. Others of the cases were extensions of existing legal principles and we have tried in the ensuing account to indicate which of the cases represented such extensions.

I. The Execution and Proof of Wills and Trusts

In *Burkland v. Starry*,[1] the court ruled that the presumption of due execution of a will arises when the signatures of the witnesses are proved even though the will contains no formal attestation clause and that such presumption survives positive testimony of one of the witnesses that the signature was not properly witnessed and justifies submitting the issue of due execution to the jury. The opinion follows and extends the principles heretofore laid down in *German Evangelical Bethel Church of Concordia v. Reith*.[2]

Wright v. McDonald[3] was a suit to probate a last will of a deceased lawyer. The case was reversed and remanded for further proceedings because the execution of the will was not sufficiently proved. The alleged attesting witnesses testified that the deceased had requested them to witness a client's will rather than her own and that, if they in fact attested the deceased's will, they did not know it at the time. The court follows *Baxter v. Bank of Belle*[4] in ruling that an attesting witness must sign with the intention of attesting the will of the deceased.

Menzi v. White[5] was a suit to establish an executed carbon copy of a will as the last will of the decedent. The executed ribbon copy had been delivered to the deceased and could not be found after her death. After reviewing the evidence in this case, the court holds that the jury's finding that the proffered instrument was not the last will of the deceased, because she had destroyed the executed original with the intention of revoking it, was a reasonable, permissible inference from all the facts and circumstances and does not rest on the mere presumption as to revocation of the will by destruction of the executed ribbon copy which could not be found. The court points out that this presumption is a mere procedural one imposing the duty of production of other evidence by the proponents of the will. It

1. 234 S.W. 2d 608 (Mo. 1950).
2. 327 Mo. 1098, 39 S.W. 2d 1057 (1931) (*en banc*).
3. 233 S.W. 2d 19 (Mo. 1950) (*en banc*).
4. 340 Mo. 952, 104 S.W. 2d 265 (1937).
5. 360 Mo. 319, 228 S.W. 2d 700 (1950).

should be noted that this "presumption" is thus different from the "presumption" as to the attestation of a will discussed in *Burkland v. Starry*.[6]

In *Potter v. Ritchardson*,[7] a printed form of will was completed by testatrix writing in her name in the beginning of the will, writing out the dispositions she wished made of her property and having the usual attestation clause completed. The will was not subscribed. The court holds that Section 520 of the *Missouri Revised Statutes* (1939), now Section 468.150, *Missouri Revised Statutes* (1949), does not require that the signature of the testator or testatrix be at the end of the will, overruling the old case of *Catlett v. Catlett*.[8] The decision contains a very interesting review of the ancient origins of the rules as to the manner of execution of wills.

In *Kane v. Mayhew*,[9] a typewritten, duly executed will had been marked up largely in pencil, but partly in ink, by striking out certain clauses and marking changes in others. The evidence was not conclusive as to who made these changes. The trial court found that the will as altered was the true will and probated it as such. The supreme court reversed this ruling and held that the original will was not revoked in the manner provided by Section 521 of the *Missouri Revised Statutes* (1939), now Section 468.240, *Missouri Revised Statutes* (1949), by "burning, cancelling, tearing or obliterating the same" and hence was still testatrix's will. The court distinguishes on their facts the earlier decisions in *Crampton v. Osborn*[10] and *Varnon v. Varnon*.[11]

Norton v. Johnson[12] was a will contest based on testamentary incapacity. The court affirmed a jury verdict that the will was invalid, ruling that there was sufficient evidence to justify submitting to the jury the issue of testamentary incapacity. A reading of the case is of interest as showing how skillful counsel for contestants adroitly handled the incidents of the trial to create an atmosphere favorable to contestant without creating reversible error.

Tracy v. Sluggett[13] upholds the action of the trial court in setting aside an indenture of trust on the ground that the grantor was of unsound mind when she executed the indenture.

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6. 234 S.W. 2d 608 (Mo. 1950), *supra*.
7. 230 S.W. 2d 672 (Mo. 1950), noted 16 Mo. L. Rev. 79 (1951).
8. 55 Mo. 330 (1874).
9. 360 Mo. 1140, 225 S.W. 2d 786 (1950).
10. 356 Mo. 125, 201 S.W. 2d 136 (1947).
11. 67 Mo. App. 534 (1896).
12. 359 Mo. 1214, 226 S.W. 2d 689 (1950).
13. 360 Mo. 1119, 32 S.W. 2d 926 (1949).

II. Construction of Wills and Trusts

Bernheimer v. First National Bank of Kansas City[14] was a suit for a declaratory judgment involving determination whether a minor child was "lawful issue of the body" of his father within the meaning of the will of the latter's mother. Plaintiff was born four days after the marriage of his parents, which marriage took place immediately after plaintiff's father had obtained a Mexican divorce. The court first holds that the meaning of the will and the status of plaintiff thereunder as lawful issue must be decided by the law of Missouri, the domicile of the testatrix, and not the law of California, where plaintiff was born and he and his parents reside, following *Krause v. Jeannette Inv. Co.*[15] and *Zombro v. Moffett.*[16] The court finds that under the evidence both parents believed at the time that their marriage was valid and hence Section 316 of the *Missouri Revised Statutes* (1939), now Section 468.080, *Missouri Revised Statutes* (1949), made plaintiff legitimate even though the marriage was in fact void due to the invalidity of the Mexican divorce, holding that said Section only requires a child to be born after the void marriage regardless of when the child was conceived. The court again considered the ever troublesome problem of the allowance of attorney's fees in suits to determine the construction of a will and concluded:

> "The contention of the two trustees that there must be ambiguity in the *terms* of a will to warrant the granting of attorney's fees to counsel for the several parties in a suit to construe it, implies the ambiguity must be patent. But it is a matter of judicial knowledge that such ambiguities often are latent, arising on extraneous facts though the will be plain on its face. Also in many instances substantial and legitimate doubts as to the meaning and application of a will may be founded on the law alone, the meaning of statutes and decisions, etc., or on mixed questions of law and fact. But from whatever source the doubts arise, and whether the ambiguity be one of fact or of law, so to speak, the questions are of equal importance. For instance, in this case there is controversy on whether the meaning of the phrase 'lawful issue of the body' in Mrs. Bernheimer's will, as applied to the infant plaintiff, should be interpreted under the law and statutes of Missouri or those of California, and what those statutes mean. And as we have held, there is also a determinative question of fact as to whether the mother of the infant plaintiff believed his father had been legally divorced from his preceding wife Sally.

14. 359 Mo. 1119, 225 S.W. 2d 745 (1949) (*en banc*).
15. 333 Mo. 509, 62 S.W. 2d 890 (1933).
16. 329 Mo. 137, 44 S.W. 2d 149 (1931).

"Yet two of the three trustees named in the will refused to bring a suit to construe it, or at least did not do so, leaving that to the third trustee, plaintiff's father. Thus the ultimate issues have been fought out by the plaintiff, on the one hand, and the two charities and the guardian ad litem for unborn issue and his attorney, on the other. All of them have acted in good faith and are vitally interested. But the questions are also important to the testamentary trustees in ascertaining the meaning of the will, and in charting a course for the administration of the trust estate. In the opinion of the writer these adversary parties are entitled to an allowance of attorney fees and taxable court costs, but not for personal expenses. The issue give rise to a 'legitimate dispute' within the meaning of the Garrison and Kingston cases, supra, and the court may exercise a 'sound discretion,' within the meaning of the Kern case.

"But these fees cannot be based alone on the whole amount of the trust fund, $750,000. Except as to the amount the trusteees may in their discretion allow the infant plaintiff for maintenance, education, etc., out of the income of the trust fund, he now has no fixed interest in it. He may predecease his father, or the father may have other issue. The two charities will receive nothing unless the father die without issue. The trial court pointed to these facts in its opinion. The court also stated counsel for plaintiff and his father, jointly, would be entitled to a fee of $20,000, if anything, and counsel for the two charities, jointly, the same amount, but denied them any allowance at all because of their adversary self-interest. Considering these facts we think a reasonable allowance in each instance would be $10,000 jointly, the same as the allowance to the attorney for the guardian ad litem for unknown issue, along with taxable court costs."

Obetz v. Boatmen's National Bank of St. Louis[17] involved the determination of the meaning of the words "personal property" in the following clause of a will of a testatrix owning no real estate, which will contained a residuary clause:

"Eight: I will and bequeath all of my clothing, jewelry and personal property not otherwise disposed of herein, remaining at the time of my death, to Lela Loew and Mrs. Harry Obetz, share and share alike.

"Nine: In appreciation of the many kindnesses shown to me in the past, I will and bequeath to Aubrey R. Hammett, the sum of Ten Thousand ($10,000) Dollars. If he shall predecease me,

17. 234 S.W. 2d 618 (Mo. 1950).

this shall be divided among his lineal descendants living at the time of my death.

"Ten: I will, devise and bequeath all the rest and residue of my estate, real, personal or mixed, and wherever situate, to the following persons in the following manner:

"(a) Lela Loew, Mrs. Coleman Hubbard, Mrs. Harry Obetz, one-half of said residue to be divided between them, share and share alike.

"(b) Phyllis Borges, Bessie Burnsides, and Fay B. Cox, one-fourth of said residue, to be divided share and share alike.

"(c) Orville Billow, John Robert Hubbard, Rector Hubbard, Thomas Hubbard, Lonnie Hubbard, and Hervey Hubbard, one-fourth of said residue to be divided betweeen them, share and share alike."

The court held that the words meant "effects of the testatrix, which are of personal nature, subject to her personal use, comfort and adornment" and did not have the technical meaning of personal property and hence did not include bank accounts, stocks and bonds. The court denied plaintiff an allowance for attorney's fees, saying:

". . . No one could possibly benefit by this litigation but appellant and defendant Lela Loew, who, in her answer was insisting that the residue of the estate be distributed according to the provisions of paragraph 10, and that the words 'personal property' in paragraph 8 meant tangible property similar to jewelry and clothing, that is, 'personal effects.' We do not think that under the circumstances it would be equitable and just for the estate to be burdened with paying the attorneys' fees of the appellant. The Chancellor so held and we see no reason to overturn that decision. Sec. 1135, Mo. R. S. A. Littleton v. General American Life Ins. Co., Mo. App., 136 S.W. 2d 433. St. Louis Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W. 2d 578, 579."

Glidewell v. Glidewell[18] determined the construction of a mutual will of B. L. Willis and Huldah Willis, his wife, executed in 1923. By it, B. L. Willis, who died first, left all his property to his wife. The will then continued: "And it is our will that if, upon the death of the survivor of us, there shall be any property remaining undisposed of, we give, devise and bequeath the same to the church of the Nazarene, to have and to hold the same absolutely." The court holds that the quoted sentence resulted in Huldah Willis taking a mere life estate with power of disposition during her lifetime,

18. 360 Mo. 713, 230 S.W. 2d 752 (1950).

but not by will, rather than a fee simple. Since the local church was incorporated, title to its property vested in its trustees, but the devise was not void.[19] An attempt to have the 1923 will probated as the will of Huldah Willis failed because no evidence of her testamentary capacity was presented. Likewise, no evidence was presented as to the existence of any contract not to revoke the will and hence the court followed *Plemmons v. Pemberton*[20] in ruling that absent clear and convincing evidence of such agreement the will was revocable as to Huldah Willis. The court remanded the proceedings to allow, among other things, a determination of the validity of a will made by her in 1946.

In *Moran v. Suttor*[21] the court held that the following provision of the will of J. Vincent Reardon

> "Article three. I give, bequeath and devise to my dearly beloved wife, Leona E. Reardon, all of my personal effects and property, whether real or mixed, *except my stock holdings in The Reardon Company, a Missouri corporation, which stock I direct to be distributed as follows:*
>
> "To my wife, Leona E. Reardon, 50/100%, *To my beloved daughter, Mary Catherine Reardon, 40/100%, which is to be held in trust* for her by my executors, *with power to sell or otherwise dispose of as they see fit, but retain the proceeds or invest same for her sole benefit either before or after she becomes of age, as they may deem advisable or necessary.* (Italics ours)
>
> "To my surviving brothers and sisters, to be divided equally among them, 10/100%."

was unambiguous, sufficiently definite to create a valid trust, and that the discretion given the trustees did not render the trust void as being unlimited in duration. The curator of the estate of the minor daughter contended that all of the income of the trust must be paid over to him rather than allowing the trustees to expand it in their discretion for the benefit of such minor. In a case of first impression in Missouri the court denies this attempt to force circuity of payment and double commissions.

In *Hogg v. Falk*[22] a testatrix provided certain devises to her husband with remainder over if he died before the "will was executed." The opinion of a divided court holds that "executed" could not be given its literal mean-

19. 319 Mo. 633, 5 S.W. 2d 1100 (1928).
20. 346 Mo. 45, 139 S.W. 2d 910 (1940).
21. 360 Mo. 304, 228 S.W. 2d 682 (1950).
22. 359 Mo. 1103, 225 S.W. 2d 756 (1949).

ing since obviously testatrix knew her husband was alive when she signed the will and holds: (1) it refers to the time when the will is carried out by making distribution in accordance therewith, but (2) by the terms of this will the doctrine of equitable conversion is applicable and the real estate is to be treated as personalty, hence (3) no election of the husband to take his statutory rights is necessary, and (4) his conduct in acting briefly as executor under the will and receiving commissions as such did not waive his statutory rights. It should be noted, however, that all four of the judges concurred, two solely and two primarily on the ground that the word "executed" meant when the will becomes effective on the death of the testatrix and not when distribution was made thereunder.

Bogdanovich v. Bogdanovich[23] holds sufficiently definite a devise of the residue of testator's estate in trust to erect a new school building or repair and reconstruct the existing school building housing the school deceased attended in his youth in his native Yugoslavia, distinguishing the cases of *Schmuker's Estate v. Reel*,[24] *Wentura v. Kinnerk*,[25] and *Jones v. Patterson*,[26] while following *Burrier v. Jones*.[27]

An example of a will construction suit of great interest to the parties but of little general interest, since it involved only the determination of the meaning of particular language unlikely to be involved in another case, is *Scullin v. Mercantile-Commerce Bank and Trust Company*.[28]

III. Adoption and Its Effect

Robertson v. Cornett[29] was a suit to establish that plaintiff was a pretermitted heir of testator. The issues involved were (1) was the adoption void because of alleged defects in the proceedings for service by publication on the natural parents and failure to obtain their consent and (2) the effect of adoption in making the child an heir of the father of the adopting parent. The court held the adoption valid and then passed to the second question, which is a matter of first impression in Missouri, and held that the effect of the former Missouri Statute, Section 9614, *Missouri Revised Statutes* (1939), was to make the child an heir of his adoptive grandfather, saying:

23. 360 Mo. 753, 230 S.W. 2d 695 (1950).
24. 61 Mo. 592 (1876).
25. 319 Mo. 1068, 5 S.W. 2d 66 (1928).
26. 271 Mo. 1, 195 S.W. 1004 (1917).
27. 338 Mo. 679, 92 S.W. 2d 885 (1936).
28. 234 S.W. 2d 597 (Mo. 1950).
29. 359 Mo. 1156, 225 S.W. 2d 780 (1949).

"Since the law of inheritance is the creature of the statute, and since the statute, Sec. 9614, provides that an adopted child *shall* be deemed and held for *every* purpose the child of its adoptive parents as fully as though *born* in lawful wedlock, we hold that respondent is the pretermitted heir of his adoptive grandfather, Edgar M. Robertson.

"Our holding is supported by the case of In re Walter's Estate, 270 N. Y. 201, 200 N.E. 786. In that case it appears that on October 6, 1920, Maude Ayers Ganoung, when three years old, was adopted by James H. Ganoung who had no children of his own blood. She lived with her adoptive father until his death January 12, 1933. Mrs. Alice Ganoung Walter, a sister of James H., and childless, too, knew all about the adoption; approved it and was very friendly with Maude. December 2, 1932, some over a month before her brother James H. died, Mrs. Walter made her will giving all her property, real and personal, to her brother James H. May 1, 1933, about 5 months after making her will, Mrs. Walter died. There was no limitation over of the legacy in the will to James H. in the event he predeceased his sister, the testatrix. The questions were, Did the legacy to James H. lapse upon his death? Or did it pass to Maude, his adopted daughter? It was held that the legacy did not lapse, but passed to Maude.

"The Court of Appeals set out in the opinion the pertinent statute of their adoption law. It will not be necessary to set out this statute here. There was no more in the New York statute to impel the conclusion reached in the Walter's Estate case than there is in our adoption statute which impelled our conclusion that respondent is the pretermitted heir of his adoptive grandfather. In the Walter's Estate case, the court quoted from the case of In re Cook's Estate, 187 N. Y. 253, 79 N.E. 991, as follows: 'In the eye of the law, therefore, adopted children are lineal descendants of their foster parent. They are in the line of descent from him through the command of the statute, the same as if that line had been established by nature.' [270 N. Y. 201, 200 N.E. 787]

"Appellants call our attention to Fletcher et al v. Flanary et al., 185 Va. 409, 38 S.E. 2d 433, 166 A.L.R. 145. That case concerned the construction of a deed, and it was held that by the language of the deed it was the intention that only natural and not adopted children would take as provided in the deed.

"Does our holding that respondent is the pretermitted heir of Edgar M. Robertson run counter to any rights of his (Edgar M.'s) under the due process provisions of either the state or federal Constitutions? Mo. R. S. A. Const. Art. 1, sec. 10; U. S. Const. Amend. 14. As we have seen the right to inherit property is a

creature of the statute, and not an absolute or natural right, and there is no constitutional provision, state or federal, prohibiting the legislature from changing the law (Sec. 306) of descent and distribution. State ex rel McClintock et al v. Guinotte, 275 Mo. 298, 204 S.W. 806; In re Rogers' Estate, Mo. Sup., 250 S.W. 576; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 S. Ct. 594, 598, 42 L. Ed. 1037. In the brief able counsel for appellants say that 'the right to make one's will is an unlimited right, except as expressly provided by Sec. 526 as to lineal heirs of the testator.' But Sec. 9614, supra, on the subject of *consequences* of *adoption,* in our opinion, makes respondent in effect a *lineal heir* of his adoptive grandfather. On the question of due process appellants cite these cases: St. Louis Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W. 2d 578; Crawford v. Arends, 351 Mo. 1100, 176 S.W. 2d 1; In re Flukes, 157 Mo. 125, 57 S.W. 545, 51 L.R.A. 176, 80 Am. St. Rep. 619, and others. It will not be necessary to review these cases; they just do not support appellants' contention, and no case does so far as we can ascertain. There would be no more reason so far as due process and the adoptive grandfather are concerned to exclude respondent as a pretermitted heir than there would be were he a natural grandson of Edgar M. Robertson, the testator."

This result would even more clearly follow under the terms of the present Adoption Law enacted in 1947, *Missouri Revised Statutes* Section 453.090 (1949).

Mississippi Valley Trust Company v. Palms[30] involved the construction of a will by which, after an intervening life estate, testator left certain property "per stirpes to my then heirs at law under the laws of Missouri." Testator left him surviving seven children. After the death of testator, one of his daughters died, leaving her surviving three minor children. These grandchildren of testator were then adopted by their aunt, another child of testator who had no children of her own. This adoption was under the Act of 1917. The question was whether this adoption allowed these grandchildren to claim a double share (1) through their natural parent and (2) through their adoptive parent. The case involved a question of first impression not only in Missouri, but also in the United States, although there was conflicting authority as to such double inheritance where intestate succession was involved. The court held that the grandchildren were entitled to only a single share, saying:

30. 229 S.W. 2d 675 (Mo. 1950).

"We concede that Josephine's children, by virtue of their adoption by their own aunt, testator's daughter, under M. R. S. A. sec. 306 and Sec. 9614, were heirs at law of testator at the time of Dickson's death. Tevis v. Tevis, 259 Mo. 19, 167 S.W. 1003, 1007, Ann. Cas. 1917A, 865. But in Brock v. Dorman, 339 Mo. 611, 98 S.W. 2d 672, 674, we said: 'In the matter of construing the rights of an adopted child to take under a will, it should be borne in mind that it is not a question of the right of an adopted child to inherit, but simply a question of the testator's intention with respect to those who are to share in this estate.'

"Conceding that adopted children, under the Missouri Adoption Statute, Mo., R. S. A., sec. 9614, inherit from the adoptive parent, and that, under some circumstances, they may inherit through the adoptive parent as an heir at law of the father of such adoptive parent, it does not follow, that under *this* will, Josephine's children were entitled to take a second and additional share of this trust through their adoptive mother. Testator's intention must govern here. Through their own blood mother Josephine's children were in testator's blood line, and, being therein, were already heirs at law of testator. Can one come twice within the term 'heir at law' and be a double heir at law? We do not think so. When one is in testator's blood stream and an heir at law through one's own blood mother does the artificiality of an adoption by a blood relative reopen the blood stream a second time for the purpose of a double share of the inheritance? We do not think so. This must be particularly true here where the intention of the testator to divide his estate equally among the seven stirps is so obvious."

IV. Constructive Trusts

In *Proffit v. Houseworth*,[31] the court finds that the purchase and rehabilitation of a rooming house was a joint enterprise of a husband and wife and decreed that her heirs held title as constructive trustee for him, even though the contract of purchase was in her name alone.

V. Miscellaneous Cases

Clark v. Mississippi Valley Trust Company[32] is the second appeal. In the first appeal,[33] the court had directed the trustee to make further investigation and exercise its discretion to determine whether or not the trustee should exercise the power of encroachment on corpus in case of "extremity of the beneficiary." The court reviewed the evidence and found that the trustee had not abused its discretion.

31. 360 Mo. 947, 231 S.W. 2d 612 (1950).
32. 360 Mo. 452, 228 S.W. 2d 808 (1950).
33. 357 Mo. 785, 211 S.W. 2d 10 (1948).

In re Kaimann's Estate[34] upholds the validity of the typical joint and survivor bank account agreement but holds that the survivor has the burden of proving that each deposit therein was made with the knowledge and approval of the decedent where such deposits were made out of the funds of the decedent which the survivor handled during decedent's lifetime as a fiduciary for the decedent.

Commerce Trust Company v. Watts[35] holds that where a joint bank account with right of survivorship was created by a formal, unambiguous written agreement signed by both parties, then it was binding and neither parol evidence nor extrinsic circumstances were admissible to vary its terms. In so holding the court decides a case of first impression in Missouri, but follows the general rule in other jurisdictions.[36]

In *Breshears v. Breshears*,[37] suit had been brought in equity to enforce the marital rights of a widow in real estate transferred by her husband on the eve of their marriage to his children by a former marriage, he reserving a life estate and mortgage for $300.00. The property in question was apparently all the property of the husband and the trial court found that the deed was executed with the intent of depriving the widow of her marital rights.

Gardine v. Cottey[38] was a suit by a divorced wife on her own behalf and on behalf of the minor children born of her marriage with the deceased to (1) set aside a pre-divorce property settlement for fraud in that her attorney was in fact also representing the deceased, (2) contest the will for want of testamentary capacity and undue influence, and (3) have an allowance made out of the estate for the future support and maintenance of the minor children. The court holds the property settlement void on the grounds (1) it was against public policy because it provided for an uncontested divorce and (2) the dual position of the attorney in connection therewith. After a review of the evidence, the court upholds the action of the trial court in directing the jury that there was no substantial evidence of testamentary incapacity, fraud or undue influence. The court ruled that under Missouri law the obligation to support the minor children terminated with the death of the deceased, saying:

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34. 229 S.W. 2d 527 (Mo. 1950).
35. 360 Mo. 971, 231 S.W. 2d 817 (1950).
36. See Note, 149 A.L.R. 962 (1944).
37. 360 Mo. 1057, 232 S.W. 2d 460 (1950).
38. 360 Mo. 681, 230 S.W. 2d 731 (1950) (*en banc*).

"The divorce statute, Sec. 1519, supra, provides a method for determining in advance the extent of the husband's common law obligation for the support of the child. See, Kelly v. Kelly, supra, 47 S.W. 2d 762, 767; Sec. 1519, R. S. 1939, Mo. R. S. A. While absolute divorce, as recognized by our law, and the consequent power of courts granting same to make provision for the care, custody, and maintenance of minor children after marriages are dissolved, is of purely statutory creation', Robinson v. Robinson, 268 Mo. 703, 186 S.W. 1032, 1033, yet such a judgment for support is in effect substituted for the common law judgment for support is in effect substituted for the common law liability of support which would otherwise exist and which would end with the father's death. The purpose of the statute apparently is to provide a mode of procedure for obtaining maintenance for the child and for determining in advance the extent of the common law obligation of the father and the means of enforcing it against him.

"We think that orderly procedure in the administration of estates requires that such a claim for future support of minor children be denied."

The right of enemy aliens to "inherit" property under Missouri law was upheld in *American Red Cross v. Hannibal National Bank*,[39] even though the effect of the decision was that the possession of the property would pass to the Alien Property Custodian.

In *Therrien v. Mercantile-Commerce Bank and Trust Company*,[40] the court in a 4-3 decision upheld the action of the trial court in dismissing on motion a suit in which plaintiff sought a judgment that a grantor (then in German occupied Paris) had revoked pro tanto a revocable trust by delivering five checks and writing five letters to charge the amount of the checks to her account and hold the money in escrow so that the checks might be paid on presentation. The majority concludes that the checks and letters were addressed to the Mercantile-Commerce Bank and Trust Company as a banking institution and not as a trustee of the trust.

Jacquemin v. Mercantile-Commerce Bank and Trust Company[41] sustained the action of the trial court in dismissing a suit for specific performance of a contract to devise, on the ground that the services alleged in the complaint to have been performed did not meet the accepted tests as to the

39. 360 Mo. 297, 228 S.W. 2d 679 (1950).
40. 360 Mo. 149, 227 S.W. 2d 708 (1950) (*en banc*).
41. 234 S.W. 2d 789 (Mo. 1950).

kind of services required to justify a decree of specific performance in such cases.

In *Rosenberg v. Steiner*,[42] the court ruled that the evidence was not sufficient either to prove the making of an alleged oral contract to devise or the rendition of services thereunder of the character required to justify a decree of specific performance. Hence the plaintiff was not entitled either to specific performance or to a judgment for the reasonable value of services actually rendered.

Johnson v. Wheeler[43] rules that the Statute of Limitation runs in favor of a trustee as against a suit by disinherited heirs bringing suit to have two charitable trusts created by a will declared void. In so ruling the court follows its earlier decision in *Odom v. Langston*[44] pointing out that the ruling in *St. Louis Union Trust Company v. Kelley*[45] holds only that where a trustee brings suit for instructions as to the validity of the trust, a beneficiary thereof who is also an heir was not barred by limitations from setting up the claim that the trust was void as violating the rule against perpetuities. The case of *Atlantic National Bank v. St. Louis Union Trust Company*[46] is distinguished on the ground that it involved only the ruling that the statute would not run in favor of a trustee as against a claim by the beneficiary of the trust until the trustee had given to the beneficiary notice that the trustee repudiated the trust.

42. 360 Mo. 447, 228 S.W. 2d 806 (1950).
43. 360 Mo. 334, 228 S.W. 2d 714 (1950).
44. 355 Mo. 109, 195 S.W. 2d 463 (1946).
45. 355 Mo. 924, 199 S.W. 2d 344 (1947).
46. 357 Mo. 770, 211 S.W. 2d 2 (1948).

THE NEW GENERAL CODE FOR CIVIL PROCEDURE AND SUPREME COURT RULES INTERPRETED[1]

CARL C. WHEATON*

OBJECTIVES OF CODE

One of the purposes of the 1943 Code of Civil Procedure was to speed up litigation. It was particularly intended to eliminate delay in the period after judgment in the trial court. That was the reason for abolishing writs of error in civil cases, fixing limited periods for filing and acting on motions for a new trial, and for taking appeals.[2]

EXTENDING TIME FOR DOING SPECIFIED ACTS

Where, on the eighty-ninth day after the defendant filed a motion for a new trial, the trial court issued a declaration that it would overrule the defendant's motion, if the plaintiff would enter a remittitur within ten days, but, upon the plaintiff's failure to make such a remittitur, the motion would be sustained, the court did not thereby extend the time for granting a new trial. The court actually did pass on the motion for new trial within 90 days within the meaning of Section 510.360.[3] The words "passed on" mean "determined" and to pass on the motion the court had to decide what was to be done with the motion and definitely so to state in its order. Nevertheless, our remittitur practice has always permitted the court to make such an order in the alternative when the sole ground for granting a new trial is an excessive verdict. Therefore, Section 510.360 does not cut down the time in which the motion must be passed on to less than 90 days when the court decides to order a remittitur. This remittitur practice is not and never was based on any statute but comes from the common law and from the in-

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1. The interpretations are based primarily on Volume 230 through 239 of the Southwestern Reporter, second series. The statutory coverage is confined to those statutes in the MISSOURI REVISED STATUTES (1949) which replace the General Code for Civil Procedure found in the Laws of Missouri, 1943.

2. Kattering v. Franz, 231 S.W. 2d 148 (Mo. 1950).

3. Nothing to the contrary being stated, sections referred to in this article are sections in MISSOURI REVISED STATUTES (1949).

herent power of the court to set aside a verdict, so excessive as to shock the concience of the court.[4]

In *Dunlap v. Donnell*,[5] the notice of appeal was filed December 22, 1949. On March 16th, 1950, within 90 days from the filing of the notice of appeal, the time for filing the transcript was extended 60 days "from this date." On May 16—the 61st day thereafter—another 60-day extension was granted by the trial court, which, if authorized, would have extended the time to July 16. The circuit court had no right, under Supreme Court Rule 3.26, to extend the time for filing the trauscript more than six months from the date of the filing of the notice of appeal, which date would have been June 22. The trancript filed on July 8, 1950, was, therefore, filed sixteen days late. However, the court of appeals held that, while it would have been justified in dismissing the appeal for a violation of the rules, inasmuch as a transcript had been filed and the parties had briefed and submitted the case without raising any question as to the timely filing of the transcript, it would consider the case on its merits. It warned that it might not be so liberal the next time.

PARTIES

a. *Joinder of*

Secion 507.040 relating to the permissive joinder of parties is not a venue statute. Hence, it does not authorize the joinder of defendants who are residents of different counties in Missouri, when the action is begun in a county in which none of the parties were resident.[6]

Section 507.050 permitting the addition of parties on motion may not be read apart from the applicable statute of limitations respecting amendment. Therefore, it has been held that a party can not be joined after the statute of limitations has run against the claim against it.[7]

b. *Class Suits*

Class actions should be brought by a party or parties having a right to relief, for the benefit of themselves and others so situated. Where the plaintiff is entitled to no relief he can not bring an action for the benefit of others.[8]

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4. Steuernagel v. St. Louis Public Service Co., 238 S.W. 2d 426 (Mo. 1951).
5. 234 S.W. 2d 330 (Mo. App. 1950).
6. State *ex rel.* O'Keefe v. Brown, 235 S.W. 2d 304 (Mo. 1951).
7. Daiprai v. Moberly Fueland Transfer Co., 223 S.W. 2d 474 (1949).
8. Missouri Veterinary Medical Ass'n. v. Glisan, 230 S.W. 2d 169 (Mo. App. 1950).

Class suits against members of labor unions are permissible in Missouri. The provision of Supreme Court Rule 3.07(d), which provides that nothing in the rule shall be construed to affect the rights or liabilities of labor unions to sue or be sued merely means that the rule shall not alter the existing rights of unions to sue or the rights of others to sue unions or their members.[9] At the time this rule was adopted, representative suits could be brought againt unions and their members.

c. *Third-Party Practice*

A defendant may, in the discretion of the trial court, bring in third parties who are, or who may be, liable to him in connection with a claim growing out of his liability on the plaintiff's pleaded cause of action.[10]

The court's jurisdiction to summon a third-party defendant does not depend on the plaintiff's wishes in the matter, but on the defendant's, providing that he bring himself within the provisions of the statute.[11]

When a third party defendant is summoned into court, he becomes an adversary of the defendant, although the plaintiff does not see fit to make him an adversary of said plaintiff.[12]

A third-party defendant has the right to file a claim against the third-party plaintiff arising out of the same transaction out of which the plaintiff's claim against the third-party plantff arose. Since he had this right, he also had the right to have that claim adjudicated in the pending proceeding, though the plaintiff dismissed his case against the defendant.[13]

Since no provision is made for third-party practice in magistrate courts, on an appeal from such a court to a circuit court that practice is not properly permitted.[14] However, where this practice was permitted in a case in a magistrate's court, the plaintiff could not successfully appeal because of the court's error in that respect, in a case in which the evidence was exactly the same as if no third-party petition had been filed, since the error in permitting the practice was harmless as to the plaintiff.[15]

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9. State *ex rel.* Allai v. Thatch, 234 S.W. 2d 1 (Mo. 1950).
10. Hipp v. Kansas City Public Service Co., 237 S.W. 2d 928 (Mo. App. 1951).
11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. Liberty Import Corp. v. Neuman, 234 S.W. 2d 227 (Mo. App. 1950).
15. Frye v. Baskin, 231 S.W. 2d 630 (Mo. App. 1950).

d. *Substitution of*

Testamentary trustees of the plaintiff, to whom all property rights in a judgment against the defendant in an unlawful detainer action passed upon the death of the plaintiff after the case had been appealed by the defendant, were proper parties to be substituted as respondents on appeal.[16]

Where the owner of land, at the time condemnation proceedings were commenced, died in 1939, and the original owner's sole heir was not substituted in his stead until 1947, but no objection was interposed by subsequent grantees of the land condemned when the heir was made a party defendant, and they affirmatively recognized her status and moved and stipulated that she be required to interplead with them as to who was entitled to damages awarded, subsequent grantees were in no position to complain of the fact that the subsitution was not made within one year after the death of the original owner.[17]

Where, after a cause is argued and submitted on appeal, the appellant dies, the appellate court will make its decision as of the date of the submission of the case rather than to sustain a motion to substitute for the appellant his duly qualified administrator.[18]

Service of Summons

Constructive service by publication is in derogation of the common law. Authority for it arises solely from the statute creating it, so that, to be effective, strict compliance with the staute is required.[19]

The fact that one does not know the defendant's present address and is unable to obtain it is not a ground for permitting published service.[20]

The repeal of Section 974 of the *Revised Statutes of Missouri*, 1939, which permitted a sheriff to amend a return in affirmance of a judgment and the enactment of Section 506.190, which does not include the word affirmance, did not change the settled law in Missouri that a sheriff's return concerning a summons can not be impeached if the result of such an attack on the summons will be to nullify a judgment.[21]

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16. McIlvain v. Kavorinos, 236 S.W. 2d 322 (Mo. 1951).
17. State *ex rel.* State Highway Commission v. Houchens, 234 S.W. 2d 97 (Mo. App. 1951).
18. Tuohy v. Novich, 230 S.W. 2d 152 (Mo. App. 1950).
19. Orrick v. Orrick, 233 S.W. 2d 826 (Mo. App. 1950).
20. *Ibid.*
21. Majewski v. Bender, 237 S.W. 2d 235 (Mo. App. 1951).

PLEADINGS

a. *Replies*

An answer which pleads res adjudicata and asks for affirmative relief based upon that defense requires a reply. If none is made, affirmative allegations in the answer are admitted.[22] It has also been held that a reply is required to set up any affirmative defense pleaded in an answer.[23] This ruling is based upon the wording of Section 509.090 of the Revised Statutes. This law provides that, in pleading to a *preceding pleading,* one must set forth affirmatively any matter constituting an avoidance or affirmative defense. The reasoning is that a *preceding pleading* may include an answer. Hence, any affirmative defense to an answer must be pleaded. This is held, notwithstanding the fact that Section 509.010 states that replies are not required unless the answer contains a counter-claim or the court orders a reply. The writer believes that these two sections should be read together and that affirmative *defenses* must be pleaded only when the affirmative defense is to the petition or when the court orders it to be pleaded in a reply.

b. *Counterclaims*

Section 509.420 makes the counterclaims therein specified compulsory. A party failing to set up by way of counterclaim in the original suit any claims arising out of the same transaction out of which the plaintiff's cause of action arose waives the claims and cannot later assert them.[24]

For example, a teacher was not permitted to assert his cause of action for breach of contract which arose as the result of the failure of the directors of his school to give him the statutory notice of their intention not to re-employ him, when he failed to counterclaim therefor in an action by the school directors for an injunction to restrain him from acting as teacher.[25]

In an action for damage to the plaintiff's automobile in a collision with the automobile owned and operated by the defendant, the defendant must set up by way of counterclaim any claim he has against plaintiff for injuries or property damage sustained in such collision and he can not maintain a separate action against the plaintiff for such damages.[26]

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22. McIntosh v. Foulke, 228 S.W. 757 (Mo. 1950).
23. Hill v. Hill, 236 S.W. 2d 394 (Mo. App. 1951).
24. State *ex rel.* Mack v. Scott, 235 S.W. 2d 106 (Mo. App. 1950). In accord: Deeds v. Foster, 235 S.W. 2d 262 (Mo. 1951).
25 Brinkmann v. Common School Dist. No. 27 of Gasconade County, 238 S.W. 2d 1 (Mo. App. 1951).
26. Hayden v. Yelton, 237 S.W. 2d 249 (Mo. App. 1951).

A defendant in an ejectment action who desires to seek affirmative relief of the court in determining who has title to the land involved in the ejectment action must mandatorily claim the relief in a counterclaim.[27]

c. *Joinder of Claims*

An original action against an insurer can not be joined with one against the insured in an action to recover for wrongful death caused by an airplane crash. This is true since there is a special statute, Section 379.200, providing that the insured and insurer can not be sued in this fashion. Any right of the injured person to sue the insurer seems to be postponed until the former has recovered a judgment against the insured. Then the injured person may sue the insured and the insurer in equity to take advantage of the insurance.[28]

d. *Counts*

A petition for an injunction cannot properly be intermingled with a petition for a divorce in a single count.[29]

e. *Inconsistent Pleading*

Though one may, in different counts, state causes of action treating a contract as valid and as void, it has been held that he may not submit both claims for decision. It is questionable whether this is correct. If one may sue on both theories, why should he have to choose between theories at any time?[30]

f. *Pleading Evidence*

Where the plaintiff in stating its cause of action alleges that it is entitled to the immediate and exclusive possession of the property described, that it has a special interest in the property, and that the plaintiff is lawfully entitled to the possession thereof, it has sufficiently alleged an interest in the property. It should not set out in its petition the evidence of its title.[31]

g. *Pleading Fraud*

In determining the sufficiency of a petition to set aside a judgment of the probate court allowing a claim against the decedent's estate, unsupport-

27. City of Caruthersville v. Cantrell, 230 S.W. 2d 160 (Mo. App. 1950).
28. State *ex rel.* Anderson v. Dinwiddie, 359 Mo. 980, 224 S.W. 2d 985 (Mo. 1949).
29. State *ex rel.* George v. Mitchell, 230 S.W. 25 116 (Mo. App. 1950).
30. Yost v. Seigfreid, 234 S.W. 2d 231 (Mo. App. 1950).
31. Personal Finance Co. of St. Louis v. Endicott, 238 S.W. 2d 51 (Mo. App. 1951).

ed allegations that the claim was fraudulent, was known by the claimant to be so and was made for the purpose of deceiving and perpetrating a fraud upon the court must be disregarded as mere legal conclusions insufficient of themselves to make out a case of fraud. Fraud must be made to appear from an allegation of facts actually constituting fraud independently of legal conclusions as to the existence of such fraud.[32]

h. *Pleading a Writing*

A pleader may do one of three things in a suit where a claim is founded upon a written instrument. He may plead the written instrument according to its legal effect, recite it at length in the pleading, or attach a copy to the pleading as an exhibit. Having done one of these things, he need do no more toward pleading the instrument.[33]

i. *Demand for Relief*

If a petition fails to state a cause of action in equity, the prayer does not convert the proceeding at law into one in equity. The demand for relief is not a part of a cause of action.[34]

j. *Exhibits*

An exhibit to a pleading is a part thereof for all purposes. It may be considered in connection with the averments in the petition in passing upon its sufficiency and in determniing whether the petition states a cause of action.[35]

k. *Affimative Defenses*

Payment is an affirmative defense, which must be pleaded before evidence thereof can be introduced against an objection to such evidence.[36]

l. *Surplusage*

Where a petition states all of the facts entitling the plaintiff to recover, and, in addition, states unnecessary facts, the plaintiff will not be required to sustain the unnecessary part of his pleading or fail in his action, even though he tried the case on that theory below; but, if he has proved enough

32. Venegoni v. Giudicy, 238 S.W. 2d 17 (Mo. App. 1951).
33. Riley v. White, 231 S.W. 2d 291 (Mo. App. 1950).
34. Zimmerman v. Jones, 236 S.W. 2d 401 (Mo. App. 1950).
35. Corbin v. Hume-Sinclair Coal Mining Co., 237 S.W. 2d 81 (Mo. 1951).
36. Silvey v. Herndon, 234 S.W. 2d 335 (Mo. App. 1950).

to make out a case, he may still recover, and the unnecessary allegations will be treated as surplusage.[37]

m. *Admittance of Averments in Pleadings*

Allegations contained in a pleading which requires a responsive pleading stand admitted, if they are not denied in the responsive pleading.[38]

Where the plaintiffs had been in default in the filing of a reply since December 29, 1948, and knew, on April 16, 1949, that the defendant was moving for a judgment on the pleadings based on his plan of res judicata and upon the fact that no reply had been filed or offered for filing until July 5, 1949, refusal of the trial court to permit the filing of a reply was not an abuse of its discretion.[39]

Before the court can be convicted of an abuse of discretion in refusing to permit a purported reply to be filed out of time, it should at least appear that the reply offered was sufficient in law to perform the office of that pleading.[40]

n. *Amendments to Pleadings*

Since the adoption of the new civil code, amendments are unlimited in scope and, with leave, may be filed at any time before final judgment.[41]

The questions of whether an amendment to a pleading should be allowed during the course of a trial, and, if so, whether a continuance should follow, if applied for, are all matters reposing largely in the sound discretion of the trial court and the test of whether the court abused its discretion is whether the court's terms protected the rights of the party adversely affected by affording a reasonable opportunity to meet the allegations of the amendment.[42]

Where the plaintiff in an action upon an account fails to set forth in his petition items of the account or to attach thereto a copy of the account, it is proper for the court to allow an amendment either amending the petition itself or attaching exhibits thereto.[43] Refusal to permit such an amendment on the ground that it was offered after the swearing of the jury is error.[44]

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37. Hathaway v. Evans, 235 S.W. 2d 407 (Mo. App. 1950).
38. McIntosh v. Foulke, *supra* note 22.
39. *Ibid.*
40. *Ibid.*
41. Doutt v. Watson, 231 S.W. 2d 230 (Mo. App. 1950).
42. Davis v. Kansas City Public Service Co., 233 S.W. 2d 679 (Mo. 1950). Runnion v. Paquet, 233 S.W. 2d 803 (Mo. App. 1950) is substantially in accord.
43. J. R. Watkins Co. v. Baker, 236 S.W. 2d 745 (Mo. App. 1951).
44. *Ibid.*

The new code provides that the pleadings may be amended at any time, even after judgment, to make them conform to evidence which has come in upon an issue not originally raised in the pleadings. This power of amendment is not limited to instances where such evidence has come in without objection, but it is provided that, even though the evidence is objected to at the trial, the court may permit the amendment, and shall do so freely when the presentation of the merits of the action will be subserved thereby, and the opposing party fails to satisfy the court that he will be prejudiced by such amendment. Thus, where the petition in an action by a passenger against a bus company charged only negligence with respect to the closing and opening of bus doors, but it was obviously the closing and opening of the doors, coupled with the further fact that the bus was still in motion when the doors were opened, which caused the passenger to be thrown headlong on the pavement, and where the passenger introduced evidence as to the movement of the bus without any objection, and was cross-examined with respect to such movement, the court properly permitted the passenger to amend the petition after the conclusion of the trial to charge negligence in the moving of the bus, and therefore the bus company was no longer in a position to complain of the reading of an ordinance dealing with the operation of the bus and of inclusion of the element of the movement of the bus in the passenger's instruction.[45]

In an action for injuries to a passenger in the defendant's taxicab, evidence, admitted without objection or claim of surprise, that the cab was negligently started forward prematurely before the plaintiff became seated, entitled the plaintiff to amend his petition to conform to the proof and to have the case submitted to the jury on that hypothesis.[46]

Amendments correcting misnomers, even after the running of the statute of limitation, are permitted. However, where an amendment is deemed a substitution or an entire change of parties, it will not be allowed after the running of the statute of limitations. For example, where an action for death was brought against persons as copartners doing business as a company and, after the statute of limitations had run against the plaintiff's claim, the plaintiff filed an amended petition making the company the sole defendant and alleging it to be a corporation and the original and amended petition differed only in that the amended petition omitted all

45. Cooley v. St. Louis Public Service Co., 236 S.W. 2d 31 (Mo. App. 1951).
46. Biehle v. Frazier, 232 S.W. 2d 465 (Mo. 1950).

reference to the individuals sued as copartners and alleged that the company was a corporation and substituted the word "defendant" for "defendants," the amendment was properly disallowed, since it substituted an entire change of parties. The statute permitting parties to be dropped or added at any stage of the action and permitting a party to amend his pleadings as a matter of course may not be read apart from the applicable statute of limitations respecting amendments.[47]

MOTIONS

a. *Admission of Allegations*

While a motion to dismiss, which takes the place of a demurrer under our former practice, admits the allegations of each pleading to which it is directed for the purposes of that motion, it does not admit the truth of those allegations for all purposes. It is a limited admission only, and is no more or less than a claim by the moving party that, even if those allegations were true, nevertheless they would be insufficient to constitute an effective pleading.[48]

Conclusions of law[49] and forced conclusions from the facts[50] are not admitted by such a motion.

It is permissible for the trial court to hear and decide the issues raised by the defense of *res judicata* upon a motion to dismiss. Upon such issues the motion performs the office of a "speaking" demurrer. The practice of raising the defense by motion to dismiss is permissive and not mandatory and such defense may be raised for the first time in an answer.[51]

b. *Motions to Make More Definite*

In an action on an account, where the itemized statement filed with the petition showing the account was insufficient to comply with the statute, it would be proper for the defendants to file a motion to make the statement more definite and certain.[52]

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47. Daiprai v. Moberly Fuel & Transfer Co., 223 S.W. 2d 474 (Mo. 1949).
48. Leone v. Bilyeu, 231 S.W. 2d 265 (Mo. App. 1950). In *accord:* Drainage Dist. No. 1 Reformed, of Stoddard County v. Matthews, 234 S.W. 2d 567 (Mo. 1950); State *ex rel.* Public Water Supply Dist. No. 7, Jackson County v. James, 237 S.W. 2d 113 (Mo. 1951); Corbin v. Hume-Sinclair Coal Mining Co., *supra* note 35.
49. Drainage Dist. No. 1 Reformed, of Stoddard County v. Matthews, *supra* note 48; Corbin v. Hume-Sinclair Coal Mining Co., *supra* note 35.
50. Drainage Dist. No. 1 Reformed, of Stoddard County v. Matthews, *supra* note 48.
51. Metcalf v. American Surety Co. of New York, 232 S.W. 526 (Mo. 1950).
52. J. R. Watkins Co. v. Baker, *supra* note 43.

Where the relief sought by the plaintiffs was for the abatement of a particular alleged obstruction erected by the defendants over an existing roadway on the defendants' land, in which the plaintiffs claimed an easement, and for injunctive relief and there was no issue as to the existence and location of the roadway and no motion was filed to make the description in the petition more definite and certain, the description of the road as one extending from the plaintiffs' premises in a southwesterly direction to a certain hill road, which roadway was located on the defendants' property, was sufficient and could not be attacked for indefiniteness for the first time on appeal.[53]

c. *Motion for Judgment on the Pleadings*

A motion for a judgment on the pleadings admits all of the facts which are well pleaded[54] and the motion should not be sustained unless it appears on the face of the pleadings that the movant is entitled to judgment as a matter of law.[55]

A motion for a judgment on the pleadings is of common-law origin and is not favored by courts. It cannot be sustained unless, under the admitted facts, the moving party is entitled to a judgment, without regard to what the findings might be on the facts upon which issues are joined.[56] For example, if an answer pleads a good defense which is determinative of the issues sought to be raised in the petition, and such defense is admitted by the reply, or if there be no reply, judgment upon the pleadings is proper.[57]

DISCOVERY

Under the guise of discretion the trial judge cannot authorize a "fishing expedition."[58]

The mere fact of the institution of a law suit is not a "good cause" for an unlimited inspection and search of the unknown contents of the defendant's safe-deposit box.[59]

The statute permitting the inspection of documents clearly requires that the things to be inspected be designated in the order permitting the

53. Meyer v. Everett, 235 S.W. 2d 130 (Mo. App. 1950).
54. Zimmerman v. Jones, 236 S.W. 2d. 401 (Mo App. 1950). In *accord:* State *ex rel.* Taylor v. Wade, 231 S.W. 2d 179 (Mo. 1950).
55. Zimmerman v. Jones, *supra* note 54.
56. McIntosh v. Foulke, *supra* note 22.
57. *Ibid.*
58. State *ex rel.* Bostelmann v. Aronson, 235 S.W. 2d 384 (Mo. 1950).
59. *Ibid.*

inspection; that they constitute or contain evidence material to the issues in the pending cause; and that they are not privileged.[60]

In considering the issue of the materiality of the things of which an inspection is requested, the appellate court may look to the pleadings, the application for an order permitting inspection, the evidence in support thereof and the order as entered, but the issue of relevancy ultimately must be determined on the basis of the things designated in the order itself and that requires an examination of them.[61]

One opposing permission to inspect the contents of a safe-deposit box has the burden of showing that the objects sought to be inspected do not constitute or contain material evidence.[62]

Continuances

The granting of a continuance is a matter resting largely within the discretion of the trial court.[63]

Consolidation of Suits

A court of equity has the inherent discretionary power to order the consolidation of actions where the subject matter and relief sought make it expedient for the court to determine all of the issues in one litigation in order that the rights of the different parties may be adequately adjudicated.[64]

Right to Trial by Jury

The waiver of a jury trial must be an intentional act, and the intention to waive must plainly appear.[65]

Where the card listing a case for trial in the circuit court contained a notation "contested Court-Mech. lien" and the case was a mechanic's lien suit in which a jury was authorized, and where, when the case came on for trial, a jury was demanded, the listing card was not an agreement to waive the jury within the stautory provision that a party shall be deemed to have waived a trial by jury by filing with the clerk a written consent in person or by attorney.[66]

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60. *Ibid.*
61. *Ibid.*
62. *Ibid.*
63. Royston v. Royston, 230 S.W. 2d 777 (Mo. App. 1950).
64. Tracy v. Sluggett, 232 S.W. 2d 926 (Mo. 1950).
65. Hoover v. Abell, 231 S.W. 2d 217 (Mo. App. 1950).
66. *Ibid.*

DISMISSALS

Section 510.130 permits one voluntary dismissal without prejudice as a matter of right.[67]

This applies to a third-party plaintiff, who may voluntarily dismiss his third-party petition and commence an action against his third-party defendant which is entirely unconnected with the action against the third-party plaintiff.[68]

The "involuntary dismissal" referred to in Section 510.150, which shall be "with prejudice unless the court in its order for dismissal shall otherwise specify" necessarily means an "involuntary dismissal" with notice and an opportunity to be heard, and not a mere termination of the action by the court in the absence of the parties pursuant some local court rule. To prevent injustice, it is important for the plaintiff to have an opportunity to present his claim to have an involuntary dismissal ordered without prejudice. The code makes this discretionary with the court and, where it appears that the plaintiff could not have a case or has abandoned it for a long period of time or is not acting in good faith and only seeks to harass the defendant, a dismissal without prejudice could properly be denied. When a case is definitely set for trial and the plaintiff makes default by failure to appear, he already has notice that some action must be taken and nothing more is required. Therefore, a dismissal on the court's own motion without a motion of the defendant and notice thereof, and without notice by the court and opportunity to be heard on the question of whether the dismissal should be without prejudice, is not with prejudice and does not constitute an adjudication on the merits; and it will not prevent the filing of a new action within one year under Section 537.100 or Section 516.230. However, an order of a trial court sustaining a motion to dismiss on the ground that no cause of action is stated is an adjudication upon the merits as well as a dismissal with prejudice, if proper notice of the motion, and opportunity to be heard thereon, is given, unless the trial court shall otherwise specify. The conclusion seems to be inescapable that such an order, under the plain terms of the statute, is a final judgment, the reason being that the statute so says. If a plaintiff desires to file an amended petition, after losing on such a mo-

67. Crispin v. St. Louis Public Service Co., 237 S.W. 2d 153 (Mo. 1951). Compare Mosely v. McFields, 235 S.W. 2d 399 (Mo. App. 1950), which requires consent of the court for such a dismissal, since the word "allowed" in the statute demands such consent.

68. Hayden v. Yelton, 237 S.W. 2d 249 (Mo. App. 1951).

tion, it is up to him to ask leave to do so. The law no longer gives him that right as a matter of law. If he does not wish to file an amended petition he has the right to appeal and have the question of the sufficiency of his pleading determined by an appellate court. Also, the trial court, on a motion for a new trial, after ruling favorably on the motion to dismiss, may permit an amended petition to be filed after sustaining the motion for a new trial, or after setting aside its judgment within thirty days, regardless of whether or not a motion for new trial has been filed.[69]

Where the plaintiff's remedy was under the unlawful detainer statute, but his petition was based upon an alleged right to an injunction, a dismissal, on the ground that the plaintiff had failed to state a cause of action, would not be with prejudice to a suit for unlawful detainer, where it was shown, on a motion to set aside the dismissal, that the intention of the court was to permit the second action to be brought.[70]

Instructions

It is a cardinal principle of law that the court shall instruct only on issues made by the pleadings and supported by the evidence.[71] However, it is not error to instruct on an issue not pleaded if the issue is supported by evidence to which no objection has been entered.[72]

Motion For a Directed Verdict

A defendant's motion for a directed verdict admits as true every fact and circumstance which the plaintiff's evidence tends to prove and it is the duty of the trial court to give the plaintiff the benefit of every inference of fact which reasonably can be drawn therefrom. The evidence must be considered in the light most favorable to the plaintiff and all evidence unfavorable to the plaintiff must be disregarded, except unfavorable evidence of the plaintiff which is uncontradicted; and the verdict should be directed against the plaintiff only when the facts in evidence and the legitimate inferences to be drawn therefrom are so strongly against plaintiff as to leave no room for reasonable minds to differ.[73]

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69. Crispin v. St. Louis Public Service Co., *supra* note 67. See also Coyne v. Southwestern Bell Telephone Co., 232 S.W. 2d 377 (Mo. 1950) and Runnion v. Paquet, *supra* note 42.
70. Leone v. Bilyeu, *supra* note 48.
71. Johnson v. Thompson, 236 S.W. 2d 1 (Mo. App. 1950).
72. Doutt v. Watson, *supra* note 41.
73. Sigmund v. Lowes, 236 S.W. 2d 14 (Mo. App. 1951). In *accord:* Edison v. Dean Construction Co., 233 S.W. 2d 820 (Mo. App. 1950); Strawn v. Coca-Cola Bottling Co. of Missouri, 234 S.W. 2d 233 (Mo. App. 1950).

Where a jury might reasonably give a verdict for the plaintiff or for the defendant, a verdict will not be directed;[74] but where the plaintiff does not plead or submit any ground warranting a recovery against the defendant, the court may direct a verdict for the defendant on the plaintiff's claim.[75]

Where a defendant moves for a directed verdict, if the plaintiff has made a case on any ground alleged the defendant's motion for a directed verdict should be overruled, since such motions are made at the conclusion of the evidence before the jury is instructed and before the plaintiff has informed the court of the theory upon which he wishes to sumit the case.[76]

Motion for Judgment in Accordance with Motion for Directed Verdict

The difference between a motion for a directed verdict and an after-trial motion for judgment in accordance with the motion for a directed verdict is that, at the time the after-trial motion is presented, the plaintiff has made known by his requested instructions the theory upon which he stands. Hence, in passing on the after-trial motion, the court should look only to the ground or grounds on which the plaintiff submitted his case to the jury.[77]

Where the defendant's after-trial motion for judgment in accordance with its previous motions for a directed verdict advanced but one ground, and that was that plaintiff under the law and the evidence was not entitled to recover, the trial court, in sustaining the motion, was not required to state the ground upon which the motion was sustained as that would require a wholly unnecessary act.[78]

Due notice of an after-trial motion for an allowance to the respondent of an attorney's fee is essential. Failure to give such a notice would be a denial of due process.[79]

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74. Johnson v. Thompson, *supra* note 71.
75. New York Central R.R. v. Chicago & E.I. R.R., 231 S.W. 2d 174 (Mo. 1950). Compare Blankenship v. St. Joseph Fuel Oil Mfg. Co., 232 S.W. 2d 954 (Mo. 1950), holding that, if no case is made on the issues submitted in the instructions, a verdict should be directed.
76. Bean v. St. Louis Public Service Co., 233 S.W. 782 (Mo. App. 1950).
77. *Ibid.*
78. *Ibid.*
79. State *ex. rel.* Perrine v. Keirnan, 237 S.W. 2d 156 (Mo. 1950).

CASES TRIED WITHOUT A JURY

a. *Findings of the Court*

When a case is tried without a jury, the trial court is not required to make findings of fact or declarations of law unless requested to do so by a party.[80]

b. *Duties of Appellate Courts*

When a lawsuit is tried without a jury, on appeal the upper court has the duty to review the case upon the law and 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.[81]

This law has, for example, been applied during the past year in equity cases to a suit to set aside a trustee's deed made pursuant to a foreclosure sale under a deed of trust,[82] to an action to set aside a warranty deed, wherein the defendant filed a counterclaim for equitable adoption,[83] to an

80. Trask v. Arcadia Valley Bank, 230 S.W. 2d 501 (Mo. App. 1950).

81. Mathis v. Crane, 230 S.W. 2d 707 (Mo. 1950); Gardine v. Cottey, 230 S.W. 2d 731 (Mo. 1950); Welborn v. Rigdon, 231 S.W. 2d 127 (Mo. 1950); Proffit v. Houseworth, 231 S.W. 2d 612 (Mo. 1950); Johnson v. Buffalo School Dist. No. 1 of Dallas County, 231 S.W. 2d 693 (Mo. 1950); Wagner v. Hicken, 232 S.W. 2d 531 (Mo. 1950); Roberts v. Murray, 232 S.W. 2d 540 (Mo. 1950); Handlan v. Handlan, 232 S.W. 2d 944 (Mo. 1950); Bowman v. Kansas City, 233 S.W. 2d 26 (Mo. 1950); Thomason v. Berry, 235, S.W. 2d 308 (Mo. 1950); Bank of Cambria v. Briggs, 236 S.W. 2d 289 (Mo. 1951); Middleton v. Reece, 236 S.W. 2d 335 (Mo. 1951); Warford v. Smoot, 237 S.W. 2d 184 (Mo. 1951); Hartmaier v. Long, 238 S.W. 2d 332 (Mo. 1951); Ash Grove Lime and Portland Cement Co. v. White, 238 S.W. 2d 368 (Mo. 1951); Wells v. Goff, 239 S.W. 2d 301 (Mo. 1951); Blanke v. American Life & Accident Ins. Co., 230 S.W. 2d 134 (Mo. App. 1950); Doutt v. Watson, *supra* note 41; Frank v. United Benefit Life Ins. Co., 213 S.W. 2d 234 (Mo. App. 1950); Bank of Poplar Bluff v. Casey, 231 S.W. 2d 851 (Mo. App. 1950); Biggs v. Griffith, 231 S.W. 2d 875 (Mo. App. 1950); Murr v. Maxwell, 232 S.W. 2d 219 (Mo. App. 1950); Curlee v. Donaldson, 233 S.W. 2d 746 (Mo. App. 1950); Common School Dist. No. 27 of Gasconade Co. v. Brinkmann, 233 S.W. 2d 768 (Mo. App. 1950); Abbott v. Record, 233 S.W. 2d 793 (Mo. App. 1950); Rucker v. Fowler, 233 S.W. 2d 809 (Mo. App. 1950); Steinke v. Leicht, 235 S.W. 2d 115 (Mo. App. 1950); Tuller v. Railway Express Agency, Inc., 235 S.W. 2d 404 (Mo. App. 1950); Clinic & Hospital Inc. v. McConnell, 236 S.W. 2d 834 (Mo. App. 1951); Young v. Moore, 236 S.W. 2d 740 (Mo. App. 1951); McKeown v. John Nooter Boiler Works Co., 237 S.W. 2d 217 (Mo. App. 1951); Pack v. Pemberton, 237 S.W. 2d 491 (Mo. App. 1951); Adams v. Gardener, 237 S.W. 2d 495 (Mo. App. 1951); Bay v. Elmer, 237 S.W. 2d 932 (Mo. App. 1951); Rapp v. Rapp, 238 S.W. 2d 80 (Mo. App. 1951); Smith v. City of Hollister, 238 S.W. 2d 457 (Mo. App. 1951); McBee v. Twin City Fire Ins. Co., 238 S.W. 2d 685 (Mo. App. 1951); Shapiro v. Shapiro, 238 S.W. 2d 886 (Mo. App. 1951); In re Diehl's Estate, 239 S.W. 2d 523 (Mo. App. 1951); General Contract Purchase Corp. v. Propst, 239 S.W. 2d 563 (Mo. App. 1951).

82. Starr v. Mitchell, 237 S.W. 2d 123 (Mo. 1951).

83. Rich v. Baer, 238 S.W. 2d 408 (Mo. 1951).

action to enjoin the foreclosure of a deed of trust, for cancellation thereof, and for cancellation of notes secured thereby,[84] to a suit to set aside an order allowing a claim on a note, made by a probate court in favor of the defendant to this suit against the estate of the plaintiff's deceased father, on the ground that the note upon which the claim was based was forgery and that the probate court was misled by a fraudulent affidavit filed by the defendant,[85] and to an application for the statutory allowance from the estate of a deceased wife.[86]

It has also been applied to an action to recover damages for injuries sustained in an automobile collision,[87] to divorce proceedings,[88] to a replevin action,[89] and to actions to quiet title.[90]

This law has also been held applicable to declaratory judgment proceedings[91] and to the review of findings of a referee.[92]

An appellate court, in a case tried without a jury, may consider evidence rejected by the trial court, if it has been duly preserved for the appeal.[93] On the other hand, in such a case, the appellate court is not required to reverse a judgment on account of incorrect rulings on evidence, but may disregard any incompetent testimony that may have been offered, and reach a conclusion on the evidence properly admitted. This is true, since the concept of a review of a case includes the idea of disregarding incompetent evidence.[94]

New Trials

a. *Necessity for Motion*

It has been held that no motion for a new trial is necessary to preserve for review the propriety of the court's decision in a proceeding which dismissed the plaintiff's second action on the ground that the previous action on the same cause of action was dismissed with prejudice. The rea-

84. Kramer v. Johnson, 238 S.W. 2d 416 (Mo. 1951).
85. Casserly v. Schofield, 233 S.W. 2d 790 (Mo. App. 1950).
86. McDonnell v. Oxler's Estate, 236 S.W. 2d 568 (Mo. App. 1951).
87. Wyatt v. Hughes, 236 S.W. 2d 371 (Mo. App. 1951).
88. Padgett v. Padgett, 231 S.W. 2d 207 (Mo. 1950); Smith v. Smith, 231 S.W. 2d 637(Mo. App. 1950).
89. Personal Finance Co. of St. Louis v. Endicott, 238 S.W. 2d 51 (Mo. App. 1951).
90. Schell v. City of Jefferson, 235 S.W. 2d 351 (Mo. 1951); Mothershead v. Milfeld, 236 S.W. 2d 343 (Mo. 1951).
91. Matthews v. McVay, 234 S.W. 2d 983 (Mo. App. 1950); Butler v. Walsh, 235 S.W. 2d 826 (Mo. App. 1951).
92. McKinley v. Durbin, 213 S.W. 2d 286 (Mo. App. 1950).
93. Kramer v. Johnson, *supra* note 84.
94. In re Diehl's Estate, *supra* note 81.

son given for this holding is that the proceeding is the same as a non-jury case in which, under Section 510.310, "The question of the sufficiency of the evidence to support the judgment may be raised whether or not the question was raised in the trial court."[95]

b. *Grounds for*

Since the statutes regulating the method and manner of selecting jurors are directory and not mandatory, a new trial will not be granted after verdict merely because some irregularity has occurred in the selection and impaneling of the jury.[96]

The alleged misconduct of a juror in failing to answer a question on the voir dire examination as to whether the attorney for one of the defendants had ever represented her as counsel did not authorize a new trial, where no action was taken by counsel to require the juror to make a specific answer to the question, and the attorney for such defendant informed the other attorneys that he had at one time represented the juror in the collection of a note.[97]

Perjury of a witness is a valid ground for granting a new trial.[98]

The fact that a party's own witness gives testimony differing from that which the party expected him to give does not furnish adequate ground for granting a new trial on the ground of surprise, unless it appears that there was no want of diligence in guarding against such surprise.[99]

A motion for a new trial on the ground that the verdict of the jury is *against the weight of the evidence,* is not sufficient to attack the verdict on appeal,[100] but the contrary is true when a verdict or the finding of the trial court, without a jury, is *not supported by any evidence whatever.*[101] It has recently been held, however, that an allegation in a motion for a new trial that the verdict and judgment were not supported by the evidence was sufficient to require an examination of the evidence by an appellate court.[102]

For a trial judge in a personal injury action to go into the jury room and converse with the jury in the absence of the parties and their attorneys

95. Crispin v. St. Louis Public Service Co., *supra* note 67.
96. Sullivan v. Kansas City Public Service Co., 231 S.W. 2d 822 (Mo. App. 1950).
97. Lemonds v. Holmes, 236 S.W. 2d 56 (Mo. App. 1951).
98. Hicks v. Shanabarger, 236 S.W. 2d 49 (Mo. App. 1951).
99. Silvey v. Herndon, *supra* note 36.
100. Koch Construction Co. v. Nelson, 213 S.W. 2d 698 (Mo. App. 1950); Bray v. St. Louis-San Francisco Ry., 236 S.W. 2d 758 (Mo. App. 1951).
101. Koch Construction Co. v. Nelson, *supra* note 100.
102. Johnson v. Lea, 229 S.W. 2d 717 (Mo. App. 1950).

was error requiring that the defendant, against whom a verdict was returned, be granted a new trial, regardless of whether anything prejudicial to the defendant occurred because of the judge's conduct.[103]

It has been held that prejudice of the jury against the defendant resulting in what he claimed was an excessive verdict can only be remedied by a new trial, so that such prejudice is a proper ground for a new trial.[104] In truth, is a new trial necessary? What of a remittitur?

c. *Foundation for Motion*

If a person desires to take advantage of an alleged surprise at the trial, he must object when it occurs and will not be permitted to sit mute and speculate on the verdict and, when it is found against him, claim a new trial on the ground of surprise.[105]

d. *Discretion of Court*

Because the trial judge participates in the trial of the case and may note and study the attentiveness and apparent understanding with which the jury reacts to the evidence and procedure, that court is vested with considerable discretion in passing upon a motion for a new trial.[106]

During the year this law has been applied to motions for new trials based on the evidence,[107] on the conduct of the jury,[108] and on the size of the verdict.[109]

In considering the size of a verdict, the trial court has the right to weigh the evidence. To do so, the trial court may take into consideration all of the evidence pertaining to the plaintiff's injuries and not merely the plaintiff's evidence which was most favorable. The trial court has the right to consider and weigh the conflicting evidence offered by the defendant and to evaluate all of the evidence in the light of the trial court's opportunity to see, hear and observe the plaintiff and the various witnesses who testify.[110]

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103. Wiles v. Stowe, 236 S.W. 2d 21 (Mo. App. 1951).
104. Dye v. St. Louis-San Francisco Ry., 234 S.W. 2d 532 (Mo. 1950).
105. Silvey v. Herndon, *supra* note 36.
106. Gedville v. Mahacek, 231 S.W. 2d 305 (Mo. App. 1950). In *accord*: Mitchell v. Pla-Mor, Inc., 237 S.W. 2d 189 (Mo. 1951).
107. Mitchell v. Pla-Mor., Inc., *supra* note 106.
108. Brady v. St. Louis Public Service Co., 233 S.W. 2d 841 (Mo. 1950).
109. Widener v. St. Louis Public Service Co., 230 S.W. 2d 698 (Mo 1950); Mitchell v. Pla-Mor Inc., *supra* note 106; Steuernagel v. St. Louis Public Service Co., *supra* note 4; Kasten v. St. Louis Public Service Co., 231 S.W. 2d 252 (Mo. App. 1950); Gedville v. Mahacek, *supra* note 106.
110. Steuernagel v. St. Louis Public Service Co., *supra* note 4.

This use of discretion in passing on a motion for a new trial applies only to issues of fact and to matters affecting the determination of those issues.[111]

e. *Necessity for Granting Motion*

Where the amount of a verdict appears excessive to the trial court, it is not mandatory that a new trial be granted if such excessiveness can be cured by a remittitur.[112] However, where a verdict is the result of passion and prejudice, a new trial should be granted.[113]

f. *Stating Reasons for Granting Motion*

The trial court, in granting a motion for a new trial, must "specify" its reasons for so doing. It is not enough for a court to state that it grants such a motion for "error in instructions." It must specify the particular instructions which are the bases of its ruling and state wherein the errors in the instructions lie.[114] Also to state that the court erred in admitting, over the objection and exception of plaintiff, incompetent, irrelevant, immaterial, improper, prejudicial and illegal evidence offered by the defendant, is to give an inadequate ground for granting a new trial. It is too general to furnish any information to the parties, or to the appellate court, concerning the real basis of the trial court's action.[115]

When a trial court grants a new trial without properly specifying of record the ground or grounds on which the new trial is granted, the presumption is that the trial court erroneously granted the motion for a new trial and the burden of supporting such action is placed on the respondent.[116]

This burden is met if the respondent demonstrates that the motion for a new trial should have been sustained on any of the grounds specified in the motion.[117]

Where the trial court's order granted defendant's motion for a new trial on the stated ground of "error in instructions" without specifying whether

111. Gedville v. Mahacek, *supra* note 106.
112. Weber v. St. Louis Public Service Co., 232 S.W. 2d 209 (Mo. App. 1950). In *accord*: McKnight v. St. Louis Public Service Co., 235 S.W. 2d 560 (Mo. 1951).
113. *Ibid.*
114. Davis v. Kansas City Public Service Co., 233 S.W. 2d 669 (Mo. 1950); Newman v. St. Louis Public Service Co., 238 S.W. 2d 43 (Mo. 1951).
115. Goodman v. Allen Cab Co., 232 S.W. 535 (Mo. 1950). Compare In re De Gheest's Estate, 232 S.W. 2d 378 (Mo. 1950), in which case the only specific ground given for granting a new trial was failure to obtain a license to sue. Yet the court held that, since the new trial order did not limit a further trial to the specified ground, other matters might be considered at a subsequent trial.
116. Supreme Court Rule 1.10; Davis v. Kansas City Public Service Co., *supra* note 114; Goodman v. Allen Cab Co., *supra* note 115.
117. Goodman v. Allen Cab Co., *supra* note 115.

the errors were of law or of fact or what instructions were erroneous, the defendant assumed the burden of pointing out which instructions were correct or incorrect. Since, in attempting to carry out this burden, he discussed only the plaintiff's instructions numbers one and two and did not discuss the plaintiff's instructions three and four or the defendant's refused instructions number one, the defendant could not complain of the ruling on the plaintiff's instructions three and four and on his own refused instruction number one.[118]

The word, "respondent," in Supreme Court Rule 1.10 refers to the party *in whose favor* the new trial is granted, who is not always the respondent.[119]

g. *Production of Evidence to Support Motion*

On a motion for a new trial, the moving party may produce records of the state unemployment office to prove that a witness committed perjury.[120]

h. *Striking Motion from Record*

If a motion for a new trial is filed later than ten days after the entry of the judgment, it is a nullity and is properly struck from the record and files.[121]

i. *Time for Ruling on Motion*

An order, entered within ninety days after a motion for a new trial is made, granting a new trial, unless the plaintiff will remit a certain sum within a few days after the ninety-day period referred to above, is timely, as it is deemed to be final as of the day it was entered.[122]

j. *Granting New Trial on Court's Initiative*

A court, during the thirty days immediately following entry by it of a judgment, may, of its own initiative, vacate the judgment and order a new trial upon its own motion. It has such power during that period whether there is or is not a motion for new trial. However, that power is discretionary only as to questions of fact and matters affecting the determination of issues of fact. The manner of the exercise of that discretionary power is a

118. Davis v. Kansas City Public Service Co., *supra* note 114.
119. *Ibid.*
120. Hicks v. Shanabarger, *supra* note 98.
121. Albert J. Hoppe, Inc. v. St. Louis Public Service Co., 235 S.W. 2d 347 (Mo. 1951).
122. McGinley v. St. Louis Public Service Co., 239 S.W. 2d 321 (Mo. 1951); Steuernagel v. St. Louis Public Service Co., *supra* note 4.

question of law, and the court must exercise its discretion in accordance with the law relating thereto.[123]

Procedurally, the manner of the vacation of the judgment must not be arbitrary. If the trial court intends summarily to vacate a judgment, the party in whose favor such judgment stands of record unquestionably is entitled to reasonable notice and hearing.[124]

If a late motion for a new trial is filed, the court, if it sees proper, may treat it as a suggestion to grant a new trial, and, acting thereon, it may exercise its discretion and grant a new trial during the thirty-day period referred to above.[125] In such a case, if the court's order granting a new trial states that the motion for a new trial is sustained, in legal contemplation it will be deemed an action by the court of its own initiative, made at the suggestion of the defendant.[126]

Though a timely motion for a new trial is filed, the court may not, on its own initiative, grant a new trial after said thirty-day period on any ground not raised in the motion for a new trial.[127]

Exceptions to Rulings of a Court

To preserve for appeal errors of the trial court one must object to those errors. Courts, during the year, have applied this doctrine to alleged errors in admitting evidence,[128] in failing to hold that the plaintiff had not made a submissible case,[129] in giving instructions,[130] and in rulings relating to arguments.[131]

As to the adequacy of an objection to the court's ruling, it has been held that where, at the close of the paintiff's evidence, the defendant's mo-

123. Albert J. Hoppe, Inc. v. St. Louis Public Service Co., *supra* note 121; Mid-States Equipment Corp. v. Hobart Welders Sales &. Service, Inc., 233 S.W. 2d 757 (Mo. App. 1950).
124. Albert J. Hoppe, Inc. v. St. Louis Public Serevice Co., *supra* note 121
125. Mid-State Equipment Corp. v. Hobart Welders Sales & Service, Inc., *supra* note 123.
126. *Ibid.*
127. Goodman v. Allen Cab Co., *supra* note 115; Birmingham v. Kansas City Public Service Co., 235 S.W. 2d 322 (Mo. 1950); Borders v. Niemoeller, 239 S.W. 2d 555 (Mo. App. 1951).
128. Clark v. McKeone, 234 S.W. 2d 574 (Mo. 1950); Cacioppo v. Kansas City Public Service Co., 234 S.W. 2d 799 (Mo. App. 1950).
129. Silberman v. Hicks, 231 S.W. 2d 283 (Mo. App. 1950); Doran v. Kansas City, 237 S.W. 2d 907 (Mo. App. 1951).
130. Bray v. St. Louis-San Francisco Ry., *supra* note 100; Sykes v. Stix Baer & Fuller Co., 238 S.W. 2d 918 (Mo. App. 1951).
131. Clark v. McKeone, *supra* note 128.

tion for a directed verdict was overruled and his motion for a new trial, which raised the contention that he was entitled to a directed verdict, was overruled, the issue whether the defendant was entitled to a directed verdict was sufficiently raised and preserved and it was unnecessary for the defendant to go to a useless task of presenting the trial court a formal instruction for a directed verdict in order to preserve his objection for appeal.[132]

APPEAL

a. *Aggrieved Party*

Only a party to a suit may appeal. Thus, heirs-at-law who have taken no part in a suit filed against the estate in which they are interested may not appeal.[133]

Even a party to an action who is not aggrieved by the judgment rendered therein may not appeal. Thus, where after a verdict for the plaintiff, the defendant's motion for judgment was overruled but his motion for a new trial was sustained, the defendant was not aggrieved by any appealable final order of the trial court adverse to him.[134]

b. *Right Statutory*

The right of appeal is purely statutory and does not exist where it is not given by statute.[135]

c. *Piecemeal Appeal*

In the absence of specific authority, appeals do not lie from rulings on motions which do not involve a final disposition of the cause or from orders or judgments of an interlocutory nature, as cases are not to be brought to appellate courts by appeal in detached portions.[136]

However, Supreme Court Rule 3.29 provides, in part, that a judgment entered upon a verdict returned on the separate trial of one of several claims in a case constitutes a final judgment for the purposes of an appeal, and, to this extent, modifies our former conception of a judgment for the purposes of an appeal.[137]

132. Foulke v. McIntosh, 234 S.W. 2d 805 (Mo. App. 1950).
133. Ruddy v. Labar's Estate, 231 S.W. 2d 833 (Mo. App. 1950).
134. Luethans v. Lahey, 237 S.W. 2d 209 (Mo. App. 1951).
135. Madison v. Sheets, 236 S.W. 2d 286 (Mo. 1951); Schneider v. St. Louis Public Service Co., 238 S.W. 2d 350 (Mo. 1951); Ruddy v. Labar's Estate, *supra* note 133; Shoush v. Truitt, 235 S.W. 2d 859 (Mo. App. 1951); Luethans v. Lahey, *supra* note 134; Farmers Mutual Hail Ins. Co. v. Garnand, 238 S.W. 2d 437 (Mo. App. 1951).
136. Madison v. Sheets, *supra* note 135.
137. Harper v. St. Joseph Lead Co., 233 S.W. 2d 835 (Mo. 1950); Deeds v. Foster, 235 S.W. 2d 262 (Mo. 1951).

For example, in a quiet title action, where the issues of the claim stated in count 1 of the plaintiff's complaint were separately tried, and a separate judgment was entered thereon, the judgment was final for purposes of an appeal.[138]

d. *Final Judgments*

A judgment which does not dispose of a counterclaim or cross-claim is not a final judgment.[139]

Also, a judgment, in an action to establish a private road across lands of the defendants, finding that the allegations of the plaintiff's petition were true, that the plaintiff was entitled to a private road of necessity on and across the defendant's land to connect the plaintiff's land with a public road, and ordering that a private road be established on and across the defendant's land, and appointing three commissioners to view the premises, to mark out a road, and to assess damages was not a final appealable judgment.[140]

On the other hand, a dismissal without prejudice is a final judgment.[141] Again, an appeal lies from an order overruling a motion to vacate a judgment.[142] Further, in a condemnation proceeding, a decision rendered by a circuit court in a separate trial upon a voluntary interplea of conflicting claims of respective parties to an award deposited in court would be final and appealable, notwithstanding the fact that the ultimate award of damages was a question yet to be determined.[143]

A judgment becomes final, for the purpose of ascertaining the time within which an appeal must be taken, on the date a motion for a new trial is overruled.[144]

However, for that purpose, where a motion for a new trial has been made, the judgment becomes final, not as of the date of an order granting a new trial unless a remittitur is made within a stated reasonable time, but upon the expiration of that period, where the plaintiff does not remit.[145]

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138. Mothershead v. Milfeld, *supra* note 90.
139. Bennett v. Wood, 239 S.W. 2d 325 (Mo. 1951); Deeds v. Foster, *supra* note 137; Farmers Mutual Hail Ins. Co., *supra* note 135.
140. Madison v. Sheets, *supra* note 135.
141. Granger v. Barber, 236 S.W. 2d 293 (Mo. 1951).
142. Caruthersville School District No. 18 of Pemiscot County v. Latshaw, 233 S.W. 2d 6 (Mo. 1950).
143. State *ex rel.* State Highway Commission v. Houchens, 235 S.W. 2d 97 (Mo. App. 1950).
144. Starr v. Mitchell, *supra* note 82.
145. Steuernagel v. St. Louis Public Service Co., *supra* note 4.

e. *How Taken*

1. Notice of Appeal

(a) Necessity for

The timely filing of a notice of appeal is the statutory "vital step" for perfecting an appeal and is jurisdictional.[146] This is the only requirement necessary to invoke appellate juridiction. The appeal becomes effective upon the timely filing of the notice.[147]

(b) Time for Filing

It is a mandatory requirement that a notice of appeal be filed not later than ten days after the judgment or order appealed from becomes final, except where the ten days have expired and the filing of a notice of appeal, within six months from the date of final judgment, has been permitted by a special order of an appropriate appellate court.[148]

(c) Docket Fee to Accompany Notice

There can be no valid filing of a notice of appeal until the docket fee is paid.[149]

2. Bonds

The recognized purpose of a supersedeas bond is to stay the execution or enforcement, pending the appeal, of any order or judgment which commands or permits some act to be done, or which is of a nature to be actively enforced against the party affected. An appeal from an order modifying a divorce decree with respect to the custody of a minor child comes within the purview of the statute, and does not stay the enforcement of the order in the absence of the giving of a supersedeas bond, since the order is not self-executing, but requires something to be done to carry it into effect.[150]

3. Briefs

(a) Abandonment of Grounds for Appeal

Grounds for appeal which are not briefed are deemed abandonment.[151] It naturally follows that they can not be used as bases for appeal, if they are not included in a motion for a new trial.[152]

146. Starr v. Mitchell, *supra* note 82.
147. Kattering v. Franz, 231 S.W. 2d 148 (Mo. 1950).
148. Starr v. Mitchell, *supra* note 82; Kattering v. Franz, *supra* note 147; Mosely v. McFields, 235 S.W. 2d 399 (Mo. App. 1950).
149. Kattering v. Franz, *supra* note 147; Alberswerth v. Lohse, 232 S.W. 2d 213 (Mo. App. 1950).
150. Green v. Perr, 238 S.W. 2d 922 (Mo. App. 1951).
151. Persons v. Prudential Ins. Co. of America, 233 S.W. 2d 729 (Mo. 1950); Giers Improvement Corp. v. Investment Service, Inc., 235 S.W. 2d 355 (Mo. 1950); Tureman v. Altman, 239 S.W. 2d 304 (Mo. 1951); Sigmund v. Lowes, *supra* note 73.
152. Steinke v. Leicht, 235 S.W. 2d 115 (Mo. App. 1951).

(b) Jurisdictional Statement

Though a technical jurisdictional statement was lacking in a recent brief, the supreme court took jurisdiction of the case, since the first paragraph of the brief revealed that title to real estate was involved in the appeal.[153]

(c) Statement of Facts

Where the question involved on appeal was plainly obvious from the statement of facts in a brief, although the brief did not contain specific page references to the transcript, the appeal was reviewed both upon law and the evidence and an appropriate judgment was entered.[154]

(d) Points and Authorities

Under Supreme Court Rule 1.08 which provides, among other things, that the brief shall contain the points relied on, which shall specify the allegations of error, with citation of authorities, where the particular point relied on is not made in the manner prescribed by said rule, it will not be noticed. The point is not properly presented for review if made for the first time in the argument.[155]

Points should be stated definitely. For example, statements that the verdict is against the evidence,[156] that the "testimony and circumstances of the parties explain this unreasonable verdict,"[157] and that the court erred in not sustaining the appellant's motion for a new trial[158] have been held to be too general to present points for review. However, in setting forth points, one need not use the precise language he employed to state alleged errors in his motion for a new trial.[159]

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153. Noyes v. Stewart, 235 S.W. 2d 333 (Mo. 1951).
154. Pahler v. Schoenhals, 234 S.W. 2d 581 (Mo. 1950).
155. Sykes v. Stix, Baer & Fuller Co., 238 S.W. 2d 918 (Mo. App. 1951). See in *accord*: Harding v. Triplett, 235 S.W. 2d 112 (Mo. 1951). Compare Roach v. Kohn, 235 S.W. 2d 284 (Mo. 1951), in which the court reviewed the case on its merits, though the specifications of errors were very general and no attempt was made to apply them to the case, and though no authorities were cited. Also see Dolan v. Rabenberg, 231 S.W. 2d 150 (Mo. 1950); Clark v. McKeone, *supra* note 128; Kramer v. Johnson, *supra* note 84. and Bray v. St. Louis-San Francisco Ry., *supra* note 100, in which cases the appellate courts considered a meritorious contention of the appellant, notwithstanding great deficiencies in the form of the presentation of their appeals.
156. Kasten v. St. Louis Service Co., *supra* note 109.
157. Jones v. Carter, 234 S.W. 2d 229 (Mo. App. 1950).
158. Kasten v. St. Louis Public Service Co., *supra* note 109.
159. Sigmund v. Lowes, *supra* note 73.

At this point, it should again be noticed that where the trial court merely sustains a motion for a new trial on broadly stated grounds, the respondent, who moved for the new trial, is charged on appeal with the burden of supporting the court's action.[160]

f. *Burden of Proof*

Where a trial court has granted a new trial assigning as grounds therefor that the verdict was so excessive as to indicate bias and prejudice against the defendant, the party complaining of the order granting the new trial has the burden of showing that there was abuse of discretion on the part of the trial court.[161]

g. *Changing Theories on Appeal*

On appeal a party will not be permitted to change the theory on which his case is tried.[162]

h. *Matters Considered on Appeal*

An appellate court will not consider alleged errors which one who has not appealed claims have been committed by a trial court.[163] Neither will an appellate court adjudge matter not appealed from,[164] matters objected to too late to make the objection effective,[165] or those not presented to the trial court for decision,[166] as, for example, those not objected to in a motion for a new trial,[167] or not decided by the trial court.[168] Neither will it consider a point not presented in the appellate transcript.[169] Further, the action of a trial court in granting a new trial on the ground of the jury's bias

160. Newman v. St. Louis Public Service Co., *supra* note 114.
161. Dye v. St. Louis-San Francisco Ry., *supra* note 104.
162. Smithpeter v. Wabash R.R., 231 S.W. 2d 135 (Mo. 1950); Nance v. Atchison T. & S. F. Ry., 232 S.W. 2d 457 (Mo. 1950); Frye v. Baskin, *supra* note 15; Blankenship v. St. Joseph Fuel Oil & Mfg. Co., 232 S.W. 2d 954 (Mo. 1950); Winscott v. Frazier, 236 S.W. 2d 382 (Mo. App. 1951).
163. Corbin v. Hume-Sinclair Coal Mining Co., *supra* note 35; Sheridan v. Short, 237 S.W. 2d 230 (Mo. App. 1951).
164. Stafford v. McDonnell, 238 S.W. 2d 432 (Mo. 1950); Majewski v. Bender, 237 S.W. 2d 235 (Mo. App. 1951); Newman v. St. Louis Public Service Co., *supra* note 114.
165. Stremming v. Holekamp Lumber Co., 238 S.W. 2d 31 (Mo. App. 1951).
166. Graham v. Gardner, 233 S.W. 2d 797 (Mo. App. 1950); Greaves v. Huber, 235 S.W. 2d 86 (Mo. App. 1950); Johnson v. Thompson, 236 S.W. 2d 1 (Mo. App. 1950).
167. Handlan v. Handlan, *supra* note 81; Kennedy v. Boden, 231 S.W. 2d 862 (Mo. App. 1950); Runnion v. Paquet, *supra* note 42; Naylor v. St. Louis Public Service Co., 235 S.W. 2d 72 (Mo. App. 1951); Stremming v. Holekamp Lumber Co., *supra* note 165.
168. Hill v. Hill, 236 S.W. 2d 394 (Mo. App. 1951).
169. McIlvain v. Kavorinos, 236 S.W. 2d 322 (Mo. 1951).

or prejudice can not be attacked on the ground that the record did not show bias or prejudice, since the court's action may have been based upon matters which occurred at the trial, but which could not be preserved in the record.[170] Again, the appellate court does not handle matters occurring after appeal. For instance, it is the trial court's duty to deal with the question of giving credit for amounts paid by the debtor since the last appeal.[171] On the other hand, plain errors will be considered even though they are not raised on the appeal.[172] Such error exists where a default judgment is unsupported by substantial evidence,[173] and where a judgment is excessive.[174]

i. *Duty of Appellate Court*

(1) In General

When an appellate court concludes that a judgment entered below is deficient, it must proceed to consider the merits of the issues, determine and declare the rights of the parties, dispose of the appeal and give such judgment as the trial court ought to have given.[175] It must also determine whether an appeal is premature.[176]

(2) In Connection with Pleadings

On appeal an appellate court is bound by the pleadings before it.[177] It must accept the facts alleged in a position as true on appeal from an order dismissing a petition for failure to state a claim upon which relief could be granted.[178] Where an attack on the sufficiency of a petition is made for the first time on appeal, even conclusions of the pleader may be construed as allegations of fact,[179] and, in general, when a jury returns a verdict in favor of the plaintiff, on appeal, the plaintiff's petition is entitled to a liberal construction.[180]

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170. Mitchell v. Pla-Mor, Inc., *supra* note 106.
171. Stafford v. McDonnell, *supra* note 164.
172. Davis v. Kansas City Service Co., *supra* note 114; Riley v. White, 231 S.W. 2d 291 (Mo. App. 1950); Williams v. Cobb, 239 S.W. 2d 770 (Mo. App. 1951).
173. Riley v. White, *supra* note 172.
174. Williams v. Cobb, *supra* note 172.
175. St. Louis Housing Authority v. City of St. Louis, 239 S.W. 2d 289 (Mo. 1951); Tilson v. Terminal R.R. Ass'n. of St. Louis, 236 S.W. 2d 42 (Mo. App. 1951).
176. Deeds v. Foster, *supra* note 137; Farmers Mut. Hail Ins. Co. v. Garnand, *supra* note 135.
177. Jacquemin v. Mercantile Commerce Bank & Trust Co., 234 S.W. 2d 789 (Mo. 1950).
178. Schoen v. Lange, 238 S.W. 2d 902 (Mo. App. 1951).
179. Riley v. White, *supra* note 172.
180. Ewing v. Dubuque Fire and Marine Ins. Co., 237 S.W. 2d 498 (Mo. App. 1951).

(3) As to Matters Involving Discretion of Court or Jury

Appellate courts will not reverse decisions of trial courts on matters within the latter's discretion, unless that discretion has been abused. This doctrine has been applied to rulings on the prejudicial effect of emotional demonstrations by witnesses,[181] to the credibility of witnesses,[182] to the weight of evidence,[183] to the amount of damages awarded,[184] and to the reopening of a case for the presentation of additional testimony.[185] This doctrine also applies to appeals from judgments of the Industrial Commission in workmen's compensation cases.[186]

j. *Tests Applied in Reaching Judgment*

(1) Most Favorable Test

In considering whether a submissible case has been made, the appellate court looks upon the evidence, and all inferences which may be fairly and reasonably drawn therefrom, in the light most favorable to the party in whose favor the jury's verdict was given.[187] This test has also been applied

181. Gedville v. Mahacek, *supra* note 106; Clark v. McKeone, *supra* note 128.

182. Gardine v. Cottey, 230 S.W. 2d 731 (Mo. 1950); Kasten v. St. Louis Public Service Co., *supra* note 109; Clemens v. Clemens, 238 S.W. 2d. 47 (Mo. App. 1951).

183. Widener v. St. Louis Public Service Co., *supra* note 109; Gardine v. Cottey, *supra* note 182; Smithpeter v. Wabash R.R., *supra* note 162; Steckdaub v. Sparks, 231 S.W. 2d 160 (Mo. 1950); Nance v. Atchison, T. &. S. F. Ry., *supra* note 162; Clark v. McKeone, *supra* note 128; Goodwin v. Winston, 230 S.W. 2d 793 (Mo. App. 1950); Kasten v. St. Louis Public Service Co., *supra* note 109; Frye v. Baskin, *supra* note 15; Sigmund v. Lowes, *supra* note 73; Fenimore v. Potashnick Local Truck System, 239 S.W. 2d 362 (Mo. App. 1951).

184. Widener v. St. Louis Public Service Co., *supra* note 109; Smithpeter v. Wabash R.R., *supra* note 162; Conner v. Neiswender, 232 S.W. 2d 469 (Mo. 1950); Dye v. St. Louis-San Francisco Ry., *supra* note 104; Mitchell v. Pla-Mor, Inc., *supra* note 106; Steuernagel v. St. Louis Public Service Co., *supra* note 109; Cruce v. Gulf, Mobile & Ohio R.R., 238 S.W. 2d 674 (Mo. 1951); Kasten v. St. Louis Public Service Co., *supra* note 109; Cacioppo v. Kansas City Public Service Co., *supra* note 167; Smith v. St. Louis Public Service Co., 235 S.W. 2d 102 (Mo. App. 1951); Bray v. St. Louis-SanFrancisco Ry., *supra* note 100.

185. Narens v. St. Louis Public Service Co., 238 S.W. 2d 37 (Mo. App. 1951).

186. Thompson v. Railway Express Agency, 236 S.W. 2d 36 (Mo. App. 1951).

187. Burkland v. Starry, 234 S.W. 2d 608 (Mo. 1950). In *accord*: Smithpeter v. Wabash R.R., *supra* note 162; Stone v. Farmington Aviation Corporation, 232 S.W. 2d 495 (Mo. 1950); Nance v. Atchison, T. & S. F. Ry., *supra* note 162; Silvey v. Herndon, *supra* note 36; Brungs v. St. Louis Public Service Co., 235 S.W. 2d 81 (Mo. App. 1950); Rauch v. Gas Service Co., 235 S.W. 2d 420 (Mo. App. 1950); Lemonds v. Holmes, *supra* note 97; Johnson v. Thompson, *supra* note 166; Hays v. O'Dell, 236 S.W. 2d 367 (Mo. App. 1951); Martini v. St. Louis Public Service Co., 237 S.W. 2d 213 (Mo. App. 1951); Simon v. Terminal R.R. Ass'n. of St. Louis, 237 S.W. 2d 244 (Mo. App. 1951); Murphy v. Kresge Co., 239 S.W. 2d 573 (Mo. App. 1951).

in determining whether a verdict has been excessive,[188] and whether a directed verdict[189] or an after-trial motion, similar to a motion for a judgment notwithstanding the verdict, was properly granted.[190] However, this test does not permit an appellate court to assume facts upon which the record is silent nor to draw speculative inferences.[191]

(2) Regard for Trial Court's Attitude

An appellate court must give due regard to the attitude of the trial judges who had the opportunity personally to observe what transpired at the trial.[192]

(3) Influence on Trial Court

In a trial before a court alone, the appellate court will not assume that the trial court was influenced by incompetent evidence.[193]

(4) Liberality of Appellate Court

When a motion for a new trial is sustained, an appellate court will be more liberal in upholding such action than it might be in reversing a judgment on the same ground on appeal, since an appellate court tends to follow the judgment of the trial court as to the prejudicial effect of errors at a trial, as that court has a better knowledge of what occurred at the trial than the appellate court has.[194]

k. *Judgment of Appellate Court*

(1) Harmless Error

The appellate court will not reverse a judgment because of a harmless error.[195]

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188. Osburn v. Kansas City Southern Ry., 230 S.W. 2d 856 (Mo. 1950); Smith v. St. Louis Public Service Co., *supra* note 184; Cooley v. St. Louis Public Service Co., *supra* note 45.

189. Dickinson v. Eden Theatre Co., 231 S.W. 2d 609 (Mo. 1950); Brawley v. Harwell, 236 S.W. 2d 419 (Mo. App. 1951); Doran v. Kansas City, 237 S.W. 2d 907 (Mo. App. 1951).

190. Marshall v. St. Louis-San Francisco Ry. Co., 234 S.W. 2d 524 (Mo. 1950); Hawkins v. Laughlin, 236 S.W. 2d 375 (Mo. App. 1951).

191. Osbourn v. Kansas City Southern Ry., *supra* note 188.

192. Smith v. St. Louis Public Service Co., *supra* note 184.

193. Ramos v. Ramos, 232 S.W. 2d 188 (Mo. App. 1950).

194. Hicks v. Shanabarger, *supra* note 98.

195. Hoock v. S. S. Kresge Co., 230 S.W. 2d 758 (Mo. 1950); Smithpeter v. Wabash R.R. *supra* note 162; Davidson v. Haggard, 236 S.W. 2d 405 (Mo. App. 1950); De Voto v. St. Louis Public Service Co., 238 S.W. 2d 66 (Mo. App. 1951).

(2) Direction of Judgment Though New Trial Granted by Trial Court

An appellate court has authority to direct the judgment that should be entered, even though the trial court has ordered a new trial. For example, after a case had been in the courts for some time where the plaintiff by a motion to modify had requested a final disposition of the case, and where the defendant had not contended in its brief that there was any ground, other than an excessive verdict, which would sustain the granting of a new trial, the appellate court passed on the issue of damages and gave directions for a final disposition of the case.[196]

(3) Reduction of Judgment

Even though an appellant in its original brief did not ask the appellate court to order a remittitur in addition to the one ordered by the trial court, where the appellant in that brief cited cases involving excessive verdicts in which the supreme court had ordered remittiturs and in its reply brief specifically asked that, if a new trial should be denied, the appellate court should order a further remittitur, the court examined the question of whether the amount of the verdict, as reduced by the trial court, was still excessive.[197]

(4) Correction of Transcript

An inadvertent misstatement in the transcript of a record may be corrected at the direction of the appellate court so as to show the correct date on which a motion for a new trial was overruled and the correction will be certified to the clerk of the trial court.[198]

(5) Remand

The question of whether a case shall be remanded for retrial only arises where the judgment is to be reversed, and a judgment is only reversed where the record reveals that error was committed at the trial. Hence, where a trial is free from error in the only respect in which plaintiff suggests that error was committed, the case will not be reversed and remanded.[199]

On the other hand, where the appellate court determined that the plaintiff was entitled to legal relief, but the record did not sustain the equitable

196. Steuernagel v. St. Louis Public Service Co., *supra* note 4.
197. Abernathy v. St. Louis-San Francisco Ry., 237 S.W. 2d 161 (Mo. 1951).
198. Starr v. Mitchell, *supra* note 82.
199. Bowzer v. Singer, 231 S.W. 2d 309 (Mo. App. 1950).

claims upon which the trial court originally assumed jurisdiction, the upper court decided that it could not grant legal relief and remanded the case to the trial court for determination of the plaintiff's legal remedies.[200]

Where issues involved in the claim under the plaintiff's petition and the defendant's counterclaim was so interrelated and interdependent that trial of one necessarily involved the trial of the other, and where, on appeal, the plaintiff's claim was required to be remanded for retrial, the defendant's counterclaim was also required to be sent back for a new trial, though there were no assignments of errors and no briefing by the defendant with respect to the counterclaim.[201] Further, where the trial court in a personal injury action held that the verdict of $9,500 was excessive and required that amount be reduced by a remittitur to $6,000, and the judgment for the plaintiff was reversed because of the giving of an erroneous instruction, the case was ordered retried on all of its issues, including the issue of the proper amount of damages.[202]

TRANSFER

When a case is transferred to the supreme court from a court of appeals the supreme court considers the case as if it had come to it upon an original appeal.[203]

200. Welborn v. Rigdon, *supra* note 81.
201. Vogelgesang v. Waelder, 238 S.W. 2d 849 (Mo. App. 1951).
202. Kelly v. Lahey, 232 S.W. 2d 177 (Mo. App. 1950).
203. Marshall v. St. Louis-San Francisco Ry., *supra* note 190; In re Adoption of Sypolt, 237 S.W. 2d 193 (Mo. 1951).