

# Missouri Law Review

---

Volume 17  
Issue 3 June 1952

Article 3

---

1952

## Masthead and Comments

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

*Masthead and Comments*, 17 MO. L. REV. (1952)

Available at: <https://scholarship.law.missouri.edu/mlr/vol17/iss3/3>

This Masthead is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# MISSOURI LAW REVIEW

Published in January, April, June, and November by the  
School of Law, University of Missouri, Columbia, Missouri.

---

---

Volume XVII

JUNE, 1952

Number 3

---

---

If a subscriber wishes his subscription to the Review discontinued at its expiration, notice to that effect should be sent; otherwise it is assumed that a continuation is desired.

---

---

Subscription Price \$2.50 per volume

\$1.00 per current number

---

---

## EDITORIAL BOARD

HIRAM H. LESAR, *Faculty Chairman*

### STUDENTS

WILLIAM B. ANDERSON

WILLIAM H. BILLINGS

THOMAS J. DERLETH

MANUEL N. DRUMM, III

SAMUEL R. GARDNER

MARY F. GIBSON

RICHARD H. ICHORD

ROBERT P. KELLY

WALTER D. McQUIE, JR.

THOMAS B. MOORE

FRED A. MURDOCK

LEONARD O'NEAL

ROBERT F. PYATT

WILLIAM W. SHINN, *Chairman*

AUSTIN F. SHUTE

BERNARD SILVERMAN

MONTGOMERY WILSON

JOHN E. YOUNG

ROYAL M. MILLER

---

ESTHER MASON, *Business Manager*

---

---

Publication of signed contributions does not signify adoption of the views expressed by the REVIEW or its Editors collectively.

---

---

*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

FEDERAL AND MISSOURI ADMINISTRATIVE PROCEDURE ACTS: A COMPARISON

### INTRODUCTION

It is the purpose of this comment to compare the provisions of the Administrative Review Act of Missouri<sup>1</sup> with the provisions of the Federal Administrative Procedure Act,<sup>2</sup> adding a collateral footnote treatment of the Model State Adminis-

---

1. Hereafter referred to as the Missouri Act.

2. Hereafter referred to as the Federal Act.

trative Procedure Act.<sup>3</sup> Because the two acts are of recent enactment,<sup>4</sup> a large number of the sections have not been judicially construed as yet. However, an attempt has been made to collect the cases affecting and construing the provisions of the acts, that greater clarity may be had in comparing the provisions.

It should be noted at the outset that the Missouri Act does not purport to equal the Federal Act in scope or content. While the latter is quite exhaustive of the subject of administrative procedure, it was not intended that the Missouri Act be so.<sup>5</sup> In fact, a subsequent act was to have supplanted the procedural provisions of the Missouri Act.<sup>6</sup>

#### DEFINITION OF TERMS

The Missouri Act in terms makes no exceptions when defining what will be considered an agency within the meaning of the act.<sup>7</sup> The wording of the act compels the conclusion, however, that the class of individuals or bodies within the meaning of the term is quite restricted. Only those who are administrative officers or comprise administrative bodies are subject to the act and only such of those whose duties include making rules or adjudicating contested cases.<sup>8</sup> It should be noted that the act does not clearly define what an "administrative" body would be. A liberal construction of the term might broaden the definition of an agency.<sup>9</sup> The Federal Act defines an agency<sup>10</sup> most broadly, but sets out certain exceptions. An agency within the meaning of the act is "each authority . . . of the Government of the United States." The exceptions include the Congress and the courts, of course.<sup>11</sup>

3. The text of the Acts is set forth at the end of this comment.

4. The Missouri Act was approved March 20, 1946, and the Federal Act was approved June 11, 1946.

5. The Missouri Act "was never intended to be a complete or adequate statute on administrative review or procedure." 4 Mo. B. J., 161, 171 (1948).

6. The new act was designated as the "Administrative Procedure Act of Missouri," but did not become law because of the veto of the Governor. See 19 Kan. City L. Rev. 288 (1951) for discussion of the new act and the Governor's veto.

7. See § 1, Missouri Act.

8. It has been held that a county court's action in the exercise of its managerial discretionary powers and duties as the county's agent under the county budget law was not governed by the Missouri Act. It does not make rules nor adjudicate contested cases in this capacity. *Bradford v. Phelps County*, 357 Mo. 830, 210 S.W. 2d 996 (1948). See also, *State, ex rel. Missouri Baptist Hospital v. Nangle*, 230 S.W. 2d 128 (Mo. 1950), holding that an excise commissioner was not merely an administrative officer, but also had independent functions to perform and thus was not governed by the Missouri Act.

9. The Model Act is in substance the same as the Missouri Act here, except that it excludes those agencies whose functions are purely discretionary. Apparently Missouri would include these if they make rules or adjudicate cases.

10. See § 2a, Federal Act.

11. There is a further method of exemption from the act itself other than through definition, that is, by express statutory exemption. It was pointed out in 37 A.B.A.J. 641, 642 (1951), that this could become a method of removing the effectiveness of the act, that is, a continual removing from the operation of the act certain specified agencies or functions of agencies. The Defense Production Act of 1950, 64 Stat. 798, 50 U.S.C.A. § 2061 (1950), is such an example. The actions of a number of administrators, which in large part gave rise to the passage of the Federal Act, have now been expressly exempted from the act. See also, Gwynne,

In *Cohen v. Commissioner of Internal Revenue*,<sup>12</sup> it was contended that the Tax Court violated the provisions of section eight of the Federal Act. Without discussion on the point the court held that the act was not applicable. Perhaps it was because the body under consideration was a court.<sup>13</sup>

The Missouri legislature has left it to other sources to determine who is a party or person before an agency.<sup>14</sup> This has been set out specifically in the Federal Act.<sup>15</sup>

Rules and rule making are defined by the acts; the Federal Act<sup>16</sup> does so with more particularity than the Missouri Act.<sup>17</sup> The latter sets out that a rule is a standard, regulation, or statement of policy or interpretation of general application and future effect to implement or make specific the law enforced or administered by an agency or to govern its organization or procedure directly affecting the legal rights or privileges of, or procedures available to, the public.<sup>18</sup> The Federal Act declares a rule to be "the whole or any part of any agency statement of general or particular application and future effect." An interesting point concerning the definition of a rule was raised in *Willapoint Oysters, Inc. v. Ewing*.<sup>19</sup> The court there pointed out that the definition of terms in the act is addressed to the "clear case"; and that there is a "twilight region" in which the definitions are not altogether effective. In this latter case the courts use the so-called doctrine of "primary purpose."<sup>20</sup> As in the principal case, a proceeding may be determined rule making, although it contains elements of adjudication as well as rule making. The court said, "This is true even though the result of the order is of immediate and grave economic import to petitioner."

Beyond this rather broad definition of rule and rule making, the Federal Act specifically includes "the approved or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing." Though there is not such specificity in the Missouri Act, that, of course, does not mean that any one or all of these provisions might not be within the latter act by construction.<sup>21</sup>

The Federal Act includes a definition of "order and adjudication," which is

*Administrative Procedure Act: A Warning Against Impairment by Legislation*, 34 A.B.A.J. 9 (1948).

12. 176 F.2d 394 (10th Cir. 1949).

13. Would it make a difference whether a court is a legislative or a constitutional court? Often the former type court exercises administrative functions.

14. The Model Act does not have such provision.

15. See § 2b, Federal Act.

16. See § 2c, Federal Act.

17. See § 1b, Missouri Act.

18. Regulation of internal management is excluded in the Missouri Act.

19. 174 F.2d 676, 692 (9th Cir. 1949).

20. In this connection the court cited *United States v. Morgan*, 298 U. S. 468, 479 (1936).

21. The Model Act makes provision for definition of "rules" quite similar to the Missouri Act.

somewhat comparable to the definition of "contested cases" in the Missouri Act.<sup>22</sup> In substance, an order is the whole or any part of a final action by any agency that does not fall within the definition of rule or rule making. However, it expressly includes licensing, since licensing involves a pronouncement of present right; the major function of an order. Were it otherwise, there might be unnecessary litigation concerning the status of a licensing proceeding, insofar as licensing also includes the prescription of terms and conditions for future observance, a matter of rule making.<sup>23</sup> A contested case is defined by the Missouri Act to be a "proceeding before an agency in which legal rights, duties or privileges of specific parties are required by statute<sup>24</sup> to be determined after hearing."<sup>25</sup>

The Federal Act has also defined "license and licensing,"<sup>26</sup> "sanction and relief,"<sup>27</sup> and "agency proceeding and action,"<sup>28</sup> but ostensibly for the purpose of simplifying the language in subsequent provisions of the act.<sup>29</sup> This course would not preclude using the definitions in other connections.<sup>30</sup>

#### PUBLIC INFORMATION

One of the most practical problems to face the federal and state governments in past years is the method of effectively acquainting the public with the endless rules and regulations that the administrative agencies pass and effect in the course of their duties. The need was sharply observed in 1934, when a matter was litigated concerning an administrative order, unknown to both litigants and the court to have been eliminated by a subsequent administrative order.<sup>31</sup> For this reason, both the Federal and the Missouri Acts make detailed provision for public dissemination of the rules, the federal provision appearing to be the more adequate.<sup>32</sup> By act of Congress the *Federal Register* was created for this purpose and is utilized by the Federal Act. Under the later act, all rules must be published in the *Federal Register* except where secrecy is required in the public interest, matters pertaining solely to

22. See § 2d, Federal Act; § 1c, Missouri Act.

23. SEN. DOC. No. 248, 79th Cong., 2nd Sess., p. 197 (1946).

24. The Model Act is in terms more broad. A contested case there meaning a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." (Italics supplied)

25. Does this mean an agency hearing?

26. See § 2e, Federal Act.

27. See § 2f, Federal Act.

28. See § 2g, Federal Act.

29. SEN. DOC. No. 248, 79th Cong., 2nd Sess., p. 14, 15 (1946).

30. See *e.g.*, *Hearst Radio, Inc. v. Federal Communications Commission*, 167 F. 2d 225 (D. C. 1947), where it was alleged that the F. C. C. had printed a libel about the petitioner in the Commission's "Blue Book," a report to the public, and the petitioner sought relief under § 10a of the judicial review provisions of the Federal Act. The court held that a libel as alleged would be a legal wrong. But under § 10a it must be a legal wrong by "agency action within the meaning of any relevant statute." The court said the Federal Act is the relevant act and after examining the definition of "agency action" held that there was no legal wrong by agency action and relief under § 10a was denied.

31. See *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935).

32. See §§ 3a, 3b, and 3c, Federal Act; §§ 2 and 3, Missouri Act.

the internal management of any agency, and where the rules are addressed to and served upon named persons in accordance with law. At first glance, it appears that wide latitude is being given the agency in determining when secrecy is required in the public interest, but it was expressed that this exception is not to be used to defeat the reason for the adoption of the section.<sup>33</sup> With only these few exceptions, it would appear that the scope of this provision is quite broad.<sup>34</sup> What the attitude of the court is concerning this section presents somewhat of a problem.

In *Olin Industries v. National Labor Relations Board*,<sup>35</sup> the court pointed out that it would make little difference that the provisions of this section are violated so long as the complainants' rights are amply protected by the procedural provisions of the *National Labor Relations Act*. Beyond this, the court said in *Marzell v. Libby, McNeill and Libby*,<sup>36</sup> "Technicalities should not override equities in the absence of a clear warning that a particular procedure must be followed." It is difficult to see how there can be such disregard for the mandatory provisions of a statute. Perhaps the court in the *Marzell* case is being a little more conservative than the court in the *Olin* case in that technicalities *will* be a block in the proceedings in a case if the procedure is clearly set out in the *Federal Register*. Of course, there is always the question of prejudicial error, and this is expressly recognized by the Federal Act in Section Twelve.<sup>37</sup> There is another case<sup>38</sup> involving this section, and it leans more toward the proposition that the letter of the statute on public information should be followed. It was there said, "Section three does not say what the sanction is if such interpretation as that involved here (an administrative interpretation of a clause) is not published (in the *Federal Register*), and no other court as far as I am advised has had this question before it, but since the mandate of section three is clear, direct, and positive, the only way it can be enforced is to say that acts of administrative bodies not conforming to section three will not be recognized by the courts as official acts, leaving it undecided whether there might be interpretations which being classified as mere 'rulings' are not covered by section three (a)."

With just three cases decided on this particular section, it is impossible to determine which way the courts will go in deciding whether there has been compliance with the provisions of the section, that is, whether they will hold the agencies to a strict compliance or not. Again, the problem of prejudicial error is likely to play a large part in influencing the courts' decisions.

The Missouri provisions purport to make public the rules of the several administrative agencies without exception; but it appears that the definition of a

33. SEN. DOC. No. 248, 79th Cong., 2nd Sess., p. 198 (1946).

34. Presumably it includes matters of foreign policy.

35. 72 F. Supp. 225 (D. Mass. 1947).

36. 188 F.2d 1013 (D. C. Cir. 1951).

37. See also, *United States v. Morton Salt Co.*, 338 U. S. 632 (1950); *Union Starch and Refining Co. v. National Labor Relations Board*, 186 F.2d 1008 (7th Cir. 1951).

38. *Woods v. Benson Hotel Corporation*, 75 F. Supp. 743, 748 (D. Minn. 1948).

rule discloses two exceptions. The Public Information provision pertains only to rules and rules within the meaning of the act excludes those regulations concerning only internal management of the agency and not directly affecting the legal rights or privileges of, or procedure available to, the public. In this, then, the acts are similar. There is no provision for withholding matters of secrecy in the public interest in the Missouri Act.<sup>39</sup>

The Federal Act, unlike the Missouri Act,<sup>40</sup> further sets out with particularity what must be included in the *Federal Register*.<sup>41</sup> Not only those rules of substantive law are to be published, but also a clear and comprehensive description of each agency and its structure, including established places at which, and methods whereby, the public may secure information or make submissions or requests. There must further be published all formal or informal procedures, the nature and requirements thereof, and all forms and instructions as to the scope and contents of all paper reports, or examinations. This provision does not appear in the Public Information section of the Missouri Act. But, like the exception set out *supra*, it is quite likely that these requirements are within the Missouri Act through the definition of rule, which extends the term to those regulations, standards, or statements governing each agency' organization or procedure.

The Missouri Act creates a bulletin<sup>42</sup> which is roughly the equivalent of the *Federal Register*. It specifically states that it must be published monthly.

There are important differences in the Public Information provisions. A federal statute has set out how and under what direction the *Federal Register* is to be published and each agency is responsible for publishing its rules therein.<sup>43</sup> In the Missouri Act on the other hand, it is merely set out that "there shall be a monthly bulletin" and that "the proper state officer shall . . . compile, index, and publish all rules adopted by each agency and remaining in effect."<sup>44</sup> Further, the agency, under the Missouri Act, is required to file a certified copy with the Secretary of State, but is not required to publish them, as provided in the Federal Act. Another important difference is the precise effect of failure to publish the procedural or organizational rules. It is not known definitely what it would be under the Missouri Act, but the matter is expressly provided for in the Federal Act: "No person shall in any manner be required to resort to organization or procedure not so published [in the *Federal Register*]."<sup>45</sup>

A problem likely to give difficulty in the Missouri courts, if taken literally,

39. The Model Act is the same as the Missouri Act in this section.

40. The Model Act likewise has no such provision.

41. See § 3a, Federal Act.

42. See § 3a, Missouri Act.

43. The Federal Act sets no particular time for the rules to be published in the *Register*, but they must be published "currently." This is supplemented by § 4c setting out, *inter alia*, that the rules are not to be effective prior to thirty days after publication, except under certain circumstances.

The Model Act is essentially the same as the Missouri Act in this respect.

44. At the writing of this comment, four and one-half years after the effective date of the act, the proper state officer has not been selected.

45. See § 3a, Federal Act.

is found in Section Two (b). Each rule adopted is to become effective ten days after filing with the Secretary of State (*not* after publication) unless a later date is required by statute or specified in the rule.<sup>46</sup> The Federal Act provides that required publication or service of substantive rules must be made at least thirty days prior to the effective dates thereof unless provided otherwise by the agency upon good cause found and published with the rule. Further excepted are those rules granting or recognizing exemption or relieving restriction or interpreting rules and statements of policy.

It was seen *supra*, that the Missouri equivalent of the federal order and adjudication is the adjudication of contested cases. The Federal Act requires that there be provided by each *agency* a method of making available to the public inspection all final opinions or orders in the adjudication of cases, unless required for good cause to be held confidential and not cited as precedents.<sup>47</sup> This is, of course, separate from the publishing of rules and procedures. The Missouri Act makes no provision for the publication of adjudicated cases. Past adjudications are used as precedents, as specifically recognized in the Federal Act, and this would make it desirable to require a definite procedure for publication of final orders and opinions of the Missouri agencies.

Lastly, there is a separate provision in the Federal Act for making available to persons properly and directly concerned matters of official record. Although Missouri does not have this provision in its act, it is likely not a real problem. The relative size of one state and the accessibility to its public records is quite out of comparison with the federal government and its voluminous matters of public record.

#### RULE MAKING

There is a conspicuous absence of provision for administrative procedure in rule making in the Missouri Act.<sup>48</sup> In the absence of individual agencies making provision for it or through other statutory provision requiring it, there is no provision for public participation in rule making. The Federal Act is quite extensive in its treatment of this procedure.<sup>49</sup> Under the federal law, in the absence of personal service or actual notice to all persons subject to a proposed rule, there must be published in the *Federal Register* a general notice of the proposed rule making, including the time, place, and nature of the hearing; the legal authority and jurisdiction under which it is to be held; and the matters of fact and law asserted. As the Missouri Act has no provision for notice of proposed rule making, there is also no procedure set out for participation by interested parties in the rule making.

The obvious purpose of this notice provision is to simplify the issues involved for the benefit of all subject to the proposed rule. This subsection contains the provision so often found in the act allowing the agency a limited discretion: The agency may, in any situation in which good cause is found, disregard this sub-

---

46. Compare note 43, *supra*.

47. See *e.g.*, The Interstate Commerce Commission Reports.

48. The same is true of the Model Act.

49. See §§ 4a, 4b, 4c, 4d, Federal Act.



section. There must be a finding that notice and public procedure are impractical, unnecessary, or contrary to the public interest and such finding must be incorporated in the rules issued. Of course a particular statute may require notice or hearing and thereby preclude any discretion in the agency in disregarding the subsection.

The agency is required to incorporate a concise statement of the basis and purpose of the rules adapted by it under the Federal Act. And in the considerations leading to the basis and purpose the agency must afford interested persons opportunity, after the required notice, to participate in the rule-making. Participation may take the form of written data, views, or argument with or without opportunity of oral presentation. The agency is not required to adopt the arguments pressed by the interested persons, of course, but the act requires it to consider all relevant matters presented to it.

Considering these two subsections together [subsections (a) and (b)], where public rule-making procedures are not specifically required by statute, then there must be followed a public rule-making procedure by virtue of this section of the Federal Act, in the absence of the expected circumstances noted above. Subsection (a) governs subsection (b) and, therefore, the only application of either subsection is when a statute does not specifically require hearings before a proposed rule is adopted. When a statute does require a hearing, Sections Seven and Eight of the Federal Act apply, and not Section Four, subsections (a) and (b).<sup>50</sup>

Provision is made in the Federal Act whereby any interested person may petition any agency for the issuance, amendment, or repeal of a rule. The Missouri Act provides this also, with the exception that it does not in terms limit such application to *interested* persons.<sup>51</sup>

Under the Missouri Act one may choose not to apply for amendment or repeal of a rule, but may directly petition a circuit court of the state to render a declaratory judgment respecting the validity of the rule or the threatened application thereof.<sup>52</sup> The act does not specifically term this judicial review.<sup>53</sup> The Federal Act has the same provision but it is considered under the section providing for judicial review.<sup>54</sup>

#### ADJUDICATION

The Missouri Act has as fully treated the subject of adjudication as it has neglected the subject of public rule-making. The Federal Act confines this section

50. SEN. DOC. NO. 248, 79th Cong., 2nd Sess., p. 200 (1946).

51. The Model Act is the same as the Missouri Act here, but further provides that each agency shall prescribe by rule the form for such petitions and the procedure for their submittal, consideration, and disposition.

52. See § 5, Missouri Act.

53. As will be seen *infra*, it appears that the scope of the Missouri provisions for judicial review in terms is limited to review of decisions in contested cases. This is the only provision in the Act which provides for judicial review of rules, but particular statutes or the common law may provide for further relief, as indicated by the last sentence of the section: ". . . nothing herein contained shall be construed as a limitation on the declaratory or other relief which the courts might grant in the absence of this section."

54. See § 10b, Federal Act.

to cases of adjudication required by other statutes to be determined on the record after opportunity for an agency hearing.<sup>55</sup> This purported limitation has given rise to a serious question which was resolved by the Supreme Court in *Wong Yang Sung v. McGrath*.<sup>56</sup> In this case, a deportation proceeding, the petitioner argued that Section Five of the Federal Act applied to the case. This contention was sustained over the argument of the Attorney General that the section did not apply because there was no express statutory command for a hearing as required by Section Five.<sup>57</sup> The Court held that the clause "required by statute" ". . . exempts from the section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority." Thus, the Supreme Court has considerably broadened the introductory clause, which should now be read: "In every case of adjudication required by statute or the Constitution . . ." Section Five shall apply.

Following the *Wong* case, the case of *Cates v. Haderlein*<sup>58</sup> was decided. There the Postmaster General issued a mail fraud order against the petitioner, and the latter contended that Section Five of the Federal Act applied to his case. The court held that it did not apply since there was no statutory requirement for a hearing, and further that the doctrine of the *Wong* case did not apply to aid petitioner because the statute under which the order was issued was valid without a hearing.<sup>59</sup> The same conclusion was reached in *Riss & Co. v. United States*.<sup>60</sup> Petitioner in this case had filed an application with the Interstate Commerce Commission for a certificate of public convenience and necessity to extend its operation as a common motor carrier. It asserted that Section Five of the Federal Act applied, which assertion was overruled by the court since there was no express statutory requirement of a hearing in the Interstate Commerce Act. The petitioner then argued that the case came within the doctrine of the *Wong* case, that the "statutory scheme" provided by Congress for the issuance of the certificates of

---

The Model Act contains essentially the same provisions as the Missouri Act in this connection, except it must appear the plaintiff's legal rights or privileges are interfered with or impaired or about to be interfered with or impaired. Further, there is provision in the Model Act for a finding by the court that the rule is invalid if it finds a violation of constitutional provisions, an exceeding of statutory authority by the agency, or that a rule was adopted without compliance with statutory rule-making procedures.

55. All cases are, nevertheless, subject to §§ 2, 3, 6, 9, and 12 of the Federal Act insofar as they are relevant. See SEN. DOC. No. 248, 79th Cong., 2nd Sess., p. 202 (1946).

56. 339 U. S. 33 (1950).

57. See § 5a and 5b, Federal Act.

58. 189 F.2d 396 (1st Cir. 1951).

59. To the same effect, see *Bersoff, v. Donaldson*, 174 F.2d 494 (D. C. Cir. 1949).

60. 96 F. Supp. 452 (W.D. Mo. 1951).

necessity and convenience compels that Section Five apply. The court held that the doctrine is not applicable here. It said the “. . . compulsory hearings found essential to satisfy the essence of ‘due process of law’ involved in deportation proceedings is not to be found or read into all proceedings instituted by a motor carrier before the Interstate Commerce Commission. . . .”<sup>61</sup>

There is no limitation in the Missouri Act such as that just discussed.<sup>62</sup>

As in the public rule-making section, the Federal Act provides ample procedure for notice of adjudication. Not only must the time, place and nature of the proceeding be given, but there must also be set out the jurisdiction and legal authority under which the hearing is to be conducted and the matters of fact and law asserted. The Missouri Act sets out nothing in the way of what is to be contained in the notice; notice is merely required.<sup>63</sup> It confines the requirement of notice to “all parties,”<sup>64</sup> while the Federal Act extends the notice requirement to “persons entitled to notice,” which may or may not be more broad than in the Missouri Act.

The two acts are essentially identical as to the requirement of time allotted for effective notice. In the Missouri Act it is “reasonable notice” that is required<sup>65</sup> and in the Federal Act the persons must be “timely informed.”

The mechanics provided in the Missouri Act for procedure of notice are few. How will notice be given when the agency is not the moving party, and whether there must be a response by other interested persons by way of responsive pleading or otherwise in such cases is left to other sources. The Federal Act has sought to set a guide in this latter situation, by requiring the respondent parties to give notice of issues of law or fact which they controvert so that the moving parties will be informed of the issues for the benefit of all parties and the deciding authority. But in any case the agency may require responsive pleadings by established rule.<sup>66</sup>

The Federal Act further provides: “In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.” It has been argued that this section is mandatory on the agency to the extent that a denial of a request to change a place of hearings was error and

61. The Supreme Court reversed this decision, however. It offered no opinion, but merely cited the *Wong* case, so that the doctrine of that case is applicable here also. 341 U. S. 907 (1951).

See also, *Eastern Airlines, Inc. v. Civil Aeronautics Board*, 185 F.2d 426 (D. C. Cir. 1950).

62. The Model Act does not have this limitation. See § 6, Missouri Act.

63. See § 6, Missouri Act. The Model Act requires that notice shall contain the time, place, and issues involved.

64. The Model Act is the same.

65. The Model Act is the same.

66. The Model Act attempts to set a general guide as to notice of the issues involved. “. . . if, by reason of the nature of the proceeding the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable. . . .” Presumably this would include the situation observed in the Federal Act where the agency is not the moving party.

that an immediate appeal could be had. This view of the section was rejected, particularly in view of Section Ten (c) allowing review of final agency action.<sup>67</sup>

There is a provision in the Missouri Act allowing the parties to introduce facts and arguments before the agency in contested cases.<sup>68</sup> The Federal Act also provides for the submission and consideration of facts, and arguments; but a question arises as to whom it extends this opportunity. As observed *supra*, notice of adjudication is addressed to "all interested parties." Again, it is doubtful whether this difference is of any consequence.<sup>69</sup>

One of the purposes of the Acts is to facilitate the timely and orderly disposition of contested cases; therefore, it is not surprising that ample opportunity is offered for informal disposition of the cases. The Missouri Act clearly sets out that its provisions are not to preclude informal disposition of contested cases. Stipulation, consent order, default, and agreed settlement where such settlement is permitted by law are the means.<sup>70</sup> The Federal Act requires the agency to afford all interested parties opportunity for offers of settlement or proposals of adjustment where time, the nature of the proceeding, and the public interest permit.<sup>71</sup> The agency may in its discretion issue a declaratory order to terminate a controversy or remove uncertainty.<sup>72</sup>

Incorporated in the Federal Act is the quite important provision for separation of those persons prosecuting cases from those persons presiding at cases.<sup>73</sup> It was felt that it is "psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible" that there will be a fair and impartial hearing.<sup>74</sup>

Those officers presiding at the reception of evidence<sup>75</sup> pursuant to Section Seven may not consult any person or party on any fact in issue unless upon notice

67. *Eastern Utilities Associates v. Securities and Exchange Commission*, 162 F.2d 385 (1st Cir. 1947).

68. See § 8, Missouri Act. The Model Act requires that opportunity shall be afforded all parties to present evidence and agreement with respect to the issues involved. Beyond this, however, the section leaves the procedure up to the agency, requiring that each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

69. Both the Missouri and Model Acts are consistent in the use of terms in this section.

70. The Model Act provides for informal disposition by stipulation, agreed settlement, consent order, or default.

71. This provision is inserted in the 6th section of the Federal Act to provide for preliminary settlement of the whole or any part of the case. If it be that such settlement cannot be reached, or that the agency finds that time, the nature of the proceeding, or the public interest do not permit settlement the provision is inoperative. In its stead §§ 7 and 8 must be invoked. See SEN. DOC. No. 248, 79th Cong., 2nd Sess., p 203 (1946).

72. Neither the Missouri nor Model Acts has such provision.

73. See § 5c and 5d, Federal Act.

74. See note 56, *Supra*. In that case it was also held that this provision applies to deportation cases. *But see* note 106, *infra*.

75. See § 12, Federal Act.

and opportunity for all parties to participate therein.<sup>76</sup> Further, they are not subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. Also officers, employees, and agents who engaged in the performance of investigative or prosecuting functions may participate or advise in the decision of the case<sup>77</sup> to which they are assigned, or a factually related case, only to the extent or in the capacity of witness or counsel which is not dissimilar from a like participation by private parties or their representatives.<sup>78</sup> The presiding officers are further required to make the recommended or initial decisions required by Section Eight.<sup>79</sup>

It cannot be said that the Missouri Act has any provision comparable to this provision of the Federal Act.<sup>80</sup>

#### ANCILLARY MATTERS

The Missouri Act has no provision comparable to Section Six of the Federal Act on ancillary matters, except in certain and limited situations now to be considered.

This section in the Federal Act is meant to cover those rights and privileges and provide those safeguards not otherwise provided for in the act. Subsection (a) provides for representation before an agency and it is not limited to adjudication. Under this provision any *person* compelled to appear in person before an agency is accorded the right to be accompanied by counsel,<sup>81</sup> and every *party* is given the right to appear in person with counsel or appear by counsel in any agency proceeding. The question was raised in *United States v. Smith*,<sup>82</sup> whether the right

76. Attention is called to the inconsistent use of terms designating the individuals affected by the section.

77. This includes recommended decisions or agency reviews pursuant to § 8, Federal Act.

78. Section 5c, Federal Act, is limited in application to cases of adjudication as distinguished from cases of rule making. See note 19, *supra*.

79. There are certain situations excepted from § 5c. The disposition of *ex parte* matters as authorized by law is excepted to the extent required to dispose of such matters. The matters involved would consist of passing on requests for adjournment, continuances, filing of papers, et cetera.

Further excepted matters are those involving applications for initial licenses, or proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers. It is thought these should be exempt from the section on Adjudication because these situations are essentially included within the scope of rule-making. But even in these situations there are often nice matters of adjudication and this subsection would not preclude its application where its procedure is better applied.

The agency itself and any member or members of the board comprising the agency are excluded from the operation of the subsection. Though the agency itself is essentially a policy making body within the scope of its authority, it still must be the overall supervisor and in that capacity is responsible for all investigation, prosecution, hearings, and decisions in contested cases. A separation of functions of prosecutor and judge would thus be impractical, if not impossible. See SEN. DOC. No. 248, 79th Cong., 2nd Sess., p. 203, 204 (1946).

80. Nor does the Model Act.

81. Counsel may also represent and advise him.

82. 87 F. Supp. 293 (D. Conn. 1949).

to counsel is extended to witnesses summoned before an agency. The United States contended that the debates on the act did not infer that witnesses were intended to be included within this subsection and they should therefore be excluded. However, the court held for the petitioners<sup>83</sup> and allowed witnesses as well as parties to be accompanied by counsel. The court said, "The act is intended to establish uniform standards of fairness for the dealings of administrative bodies with the citizen." It went on to indicate that there were two possible interpretations in the case—narrow and broad—and it preferred the latter.

If the agency permits, any qualified representative may serve in the capacity of counsel, but the section admonishes that it is not to be construed as granting or denying to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding. This subsection supplements that considered *supra*, on informal disposition of adjudicated cases,<sup>84</sup> and here extends it, where applicable, to rule-making by providing that any interested person may appear before an agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding or in connection with any agency function.<sup>85</sup> The agency is further required to conduct its proceedings on those matters presented to it with reasonable dispatch. The Missouri Act makes no provision for these matter of representation.

There is a danger, when so many administrative officers are doing so many varied tasks, of recurring "fishing expeditions" under the guise of investigative process, and it is the office of subsection (b) to preclude this.<sup>86</sup> This provision is aided by certain inherent limitations on investigative process, as noted by the Supreme Court in *United States v. Morton Salt Co.*<sup>87</sup> where the court said, "The judicial subpoena power not only is subject to specific Constitutional limitations, which also apply to administrative orders, such as those against self incrimination, unreasonable search and seizure, and due process of law, but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution."<sup>88</sup> This was softened somewhat by another statement by the Court in which it might have been attempting to draw a line between "fishing expeditions" and the lawful use of administrative investigatory powers. The Court pointed out, "The only power involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. . . It is more analogous

83. The court thought it significant that the first sentence of this subsection uses the word "person" while a later sentence uses the word "parties."

84. See § 5b, Federal Act.

85. This includes proceedings interlocutory, summary, or otherwise.

86. See SEN. DOC. No. 248, 79th Cong., 2nd Sess., p. 205 (1946).

87. See note 37, *supra*.

88. The Court here was speaking of the need for a case or controversy in the federal courts. U. S. Const. Art. III, § 2.

to the Grand Jury." It would seem, therefore, that the Court was merely pointing out that the administrative agency has a certain power of investigation, but adding a note of warning that this power is not without limitation. This provision of the Federal Act helps to define that limitation.

Investigative process<sup>89</sup> is not to be issued or enforced except as authorized by law.<sup>90</sup> Further, there is provision for allowing every person compelled to submit data or evidence opportunity of assurance that their data or evidence is correctly set forth in the record by entitling such person to retain or procure a copy or transcript of the data or evidence submitted.<sup>91</sup> Here again, the Missouri Act is without equivalent provision. As will be seen *infra*, the Missouri Act has no general provision for formal investigatory process.

Liberality is provided in the Federal Act for obtaining formal process to aid investigation by way of agency subpoena. Any party may, by request, secure such subpoena authorized by law upon a statement of showing of general relevance and reasonable scope of the evidence sought. Thus the private parties are put in equal position with the agency as to adequate means of securing evidence. And as to persons subpoenaed, opportunity is given to contest the validity of such subpoena in the courts prior to subjection to any form of penalty for noncompliance. The courts are directed to sustain such subpoenas to the extent that they are found to be in accordance with law. And upon such finding it is the court that issues an order requiring compliance with the subpoena. Of course the usual provision of contempt is provided in case of wilful failure to comply.

The advantage of a uniform rule respecting the use and control of subpoenas will become apparent when the situation in Missouri is examined. Again, the Missouri Act has no provision in this regard, but has left it to individual statutes to provide for subpoenas. A random examination of these separate provisions indicates the lack of uniformity which has resulted in inconsistency and absence of safeguards.

The Public Service Commission is itself vested with power to issue subpoenas and a noncompliance with such subpoena without reasonable cause is a misdemeanor and, without more, is punishable. The statute fixes the penalty.<sup>92</sup>

The provision on Accountancy sets forth more nearly the same provision as the Federal Act in that it allows the Board to issue the subpoena and, on non-compliance by the witness, the Board may complain to the circuit court and it shall issue an order to comply, and a refusal to comply with that order may be punished "as for contempt" of court.<sup>93</sup>

The Dental Board may issue subpoenas "on application of any person in-

89. See § 6b, Federal Act.

90. This extends to process, requirement of report, inspection or other investigative act as well as demands issued, made, or enforced.

91. Where evidence is taken in closed session, *i.e.*, non-public investigatory proceedings, the witness may be limited to inspection of the official transcript of his testimony, upon good cause shown.

92. MO. REV. STAT. § 386.460 (1949).

93. MO. REV. STAT. § 326.170 (1949).

terested in the hearing of any matter pending" before the Board. On failure to comply, the Board may report such failure to the circuit court and the court shall punish the offender in the same manner as if he had refused to obey the process of the court.<sup>94</sup>

The Director of the Department of Public Health and Welfare ". . . shall have the power to make inquiries and investigations and to hold such hearings as may be necessary in pursuance of his duties, and for such purpose shall have authority to subpoena witnesses. . ."<sup>95</sup>

The Missouri Act has no provision whereby private parties may secure subpoenas.<sup>96</sup>

Also, there is no equivalent to the general provision of Section Six (b) which requires that prompt notice be given of a denial of any written petition, application, or other request of any interested person made in connection with any agency proceeding.<sup>97</sup>

#### HEARINGS

It will be recalled in connection with rule-making procedures under the Federal Act, that where there is a rule being formulated, then Section Four (b) on rule-making procedure applies; but if a statute specifically requires that there be a hearing in the rule-making process, then Section Seven, the section now under consideration is to be used. Thus Section Seven (a) applies to rule making as well as to adjudication. Its language purports that it applies only to the taking of evidence in cases. It will be seen, however, that Section Seven (b) broadens the application of Section Seven (a). The Missouri Act is not as specific in its treatment of the reception of evidence at hearings as is Section Seven (a), which requires that at the taking of evidence the agency, or one or more of the members of the body composing the agency or one or more of the examiners appointed pursuant to Section Eleven, shall preside. The only comparable provision in the Missouri Act is limited to adjudication of contested cases and sets out <sup>98</sup> that all of the officials who are to render the decision, before deciding the case, shall personally consider the whole record or such portions thereof as may be cited by the parties and shall personally consider any oral or written arguments presented

94. Mo. REV. STAT. § 332.340 (1949).

95. Mo. REV. STAT. § 191.050 (1949). The Workmen's Compensation Commission provision is essentially the same as the Public Service Commission provision. See Mo. REV. STAT. § 287.560 (1949). See also, Issuance by Arbitrators, Mo. REV. STAT. § 435.040 (1949); Issuance by Industrial Commission, Mo. REV. STAT. § 287.560 (1949); Issuance by Liquor Supervisor, Mo. REV. STAT. § 311.660 (1949).

96. Consult Discovery Statutes, Mo. REV. STAT. (1949).

97. Notice shall contain a simple statement of procedural or other grounds, except when action is to affirm a prior denial or where the denial is self-explanatory.

There is provision in the Missouri Act, § 9, though of limited application, requiring decisions and orders in contested cases to be in writing, certain situations excepted, accompanied by a statement of findings of fact and conclusions of law and notice thereof given to the parties. This provision will be discussed *infra*.

The Model Act provisions on this subject will be considered *infra*.

98. See § 8, Missouri Act.



by either of the interested parties. This at most requires only a review of the evidence thus taken by an agency official. There is still left the original question: "Who will preside at the taking of the evidence?" As a practical matter, there are trial examiners, but there is no provision for them in the act.<sup>99</sup>

It was considered *supra*, that Section Five (c) of the Federal Act requires, in adjudication of contested cases, that those hearing the evidence must make the initial or recommended decision. It often has been observed that those personally taking and considering evidence have the invaluable opportunity to observe the demeanor of the witnesses. This would add to the desirability of the provision concerning initial or recommended decisions. It is conceivable that one may receive one impression from the evidence when personally taking it, and another impression when he merely reviews the record. The Federal Act further provides as a safeguard that any presiding officer pursuant to Section Seven (a) on taking evidence may at any time withdraw if he deems himself disqualified. He is then to file a sufficient affidavit stating his personal bias or disqualification and the agency is to consider that as a part of the record and is to consider it in weighing the evidence theretofore taken by the presiding officer disqualifying himself. Such bias could, of course, color the proceeding held under him and such fact makes this provision of considerable importance.<sup>100</sup>

There is another provision in this section of the Federal Act that has given the courts considerable trouble. The act provides that nothing in it is to be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specifically provided for by or designated pursuant to other statutes. Whether administrative hearings in deportation cases conducted by the Immigration Service must conform to this section of the act was the question raised in *Azzollini v. Watkins*.<sup>101</sup> The court held that due to the statute giving the Inspector certain investigatory powers the case falls within the exception set out in Section Seven (a). In *Wolf v. Boyd*<sup>102</sup> the same question was involved and the court said, "In enacting the Administrative Procedure Act, Congress wrote in the act an exception to its application. That exception provided in effect that the Administrative Procedure Act should not apply to proceedings . . . by or before boards or other officers specially provided for by or designated pursuant to statute." There were numerous other cases giving effect to the exception and holding as did these cases.<sup>103</sup> Then came *Wong Yang Sung v.*

99. See *e.g.*, *Smith v. National Lead Co.*, 228 S.W. 2d 407 (Mo. 1950); *Williams v. Laclede-Christy Clay Products Co.*, 227 S.W. 2d 507 (Mo. 1950). See also, *Box v. Morrison*, 230 S.W. 2d 873 (Mo. 1950); *Moore v. R. C. Can Co.*, 229 S.W. 2d 272 (Mo. 1950); *Ross v. Joplin Corp.*, 229 S.W. 2d 303 (Mo. 1950); *Starchman v. Kansas Explorations, Inc.*, 225 S.W. 2d 354 (Mo. 1949).

100. The Model Act has no provision comparable to either the Missouri or federal provisions in this respect.

101. 172 F.2d 897 (2nd Cir. 1949).

102. 87 F. Supp. 906 (W.D. Wash. 1949).

103. See *e.g.*, *United States, ex rel. Saclaides v. Shaughnessy*, 180 F.2d 194 (D. C. Cir. 1950); *United States ex rel. Lee Wo Shing v. Watkins*, 175 F.2d 194 (2nd Cir. 1949), *reversed*, 339 U. S. 906 (1950); *Chow Kow v. Clark*, 83 F. Supp.

*McGrath*.<sup>104</sup> At the outset the Court indicated its attitude toward the act. It discussed at length the need for the act and its legislative history. *Inter alia*, the Court said the act was to remove a number of possible defects of the conflicting and numerous agency procedures, and that ". . . it settles long continued and hard fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." It further said, "One purpose was to introduce greater uniformity of procedure . . . any exception we may find to its applicability would tend to defeat this purpose." The Court also strongly indicated that it is its duty to give effect to the remedial purposes of the act where the evils at which it was directed appear, so far as the terms of the act warrant. With this it held that hearings before an immigration officer in deportation cases were not within the exception in Section Seven (a). Undoubtedly its declared attitude toward the act went far in causing the Court to reach this result.<sup>105</sup>

The final chapter was written by Congress later that year. It passed an act providing: "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections five, seven, and eight of the Administrative Procedure Act. . ."<sup>106</sup>

The court in *Kennedy Name Plate Co. v. Commissioner of Internal Revenue*<sup>107</sup> cited the clause with the exception now being considered and, comparing it with the relevant tax statutes, held that the Tax Court comes within the exception and that therefore Section Eight on administrative decisions does not bind the Tax Court. The court did point out, however, that it was not holding that *some* provisions other than those cited might not apply.

The hearing powers under the Federal Act<sup>108</sup> granted to the presiding officers of hearings are similar to the general powers granted to a trial judge. Subject to published rules and the powers of the agency, the presiding officer may administer oaths and affirmations, issue subpoenas, rule on offers of proof and receive relevant evidence, take or cause depositions to be taken, dispose of procedural requests or similar matters, and make decisions or recommended decisions in conformity with Section Eight. Although the Missouri Act has not made specific provision for the

969 (D. D. C. 1949); *Tung Shing v. Zimmerman*, 85 F. Supp. 270 (E.D. Pa. 1949); *Van Laeken v. Wixon*, 84 F. Supp. 958 (N.D. Cal. 1949); *Yrakoumic v. Hall*, 83 F. Supp. 469 (E.D. Va. 1949); *In re United States ex rel. Obum*, 82 F. Supp. 36 (S.D. N. Y. 1949); *Ex Parte Wong So Won*, 82 F. Supp. 60 (N.D. Cal. 1948); *Wong Yang Sung v. Clark*, 80 F. Supp. 235 (D. D. C. 1948); *Yanish v. Wixon*, 81 F. Supp. 499 (N.D. Cal. 1948).

104. See note 56, *supra*.

105. Mr. Justice Reed dissented, partly because of the holding that the case is not within the exception of Section 7a. See also, *United States ex rel. Stiffner v. Charmichael*, 183 F. 2d 19 (5th Cir. 1950); *Miller v. United States ex rel. Hunt*, 181 F. 2d 363 (5th Cir. 1950) both following the Wong case.

106. Public Law 843, 81st Con., 2nd Sess., 64 Stat. 1044 (1950). See *United States ex rel. Harisiades v. Shaughnessy*, 187 F. 2d 137 (2nd Cir. 1951), decided under this new amendment to the act and holding that the provisions of the act do not apply to deportation proceedings. Compare note 11, *supra*.

107. 170 F. 2d 196 (9th Cir. 1948).

108. See § 7b, Federal Act.

powers of the presiding officers of hearings, it does provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. No mention is made of incompetent evidence.<sup>109</sup> Further, the agencies of Missouri are to receive certain records and documents in evidence; they may take what amounts to, but is broader than, judicial notice of certain matters,<sup>110</sup> and provision is made for informal disposition of cases, as noted *supra*. Also, subpoenas are issued by the officers of the agency. Who, if not the presiding officer of the hearing, is to determine matters of informal disposition or rule on and receive evidence, and take official notice of certain matters? It would appear that the Federal Act is merely setting out what would otherwise be considered implicit in the act.<sup>111</sup>

As was observed in connection with Section Five (b) of procedure in adjudication under the Federal Act, the agency is to afford opportunity to parties for settlement of issues and to the extent that the issues are not so settled there should be hearing and decision under Sections Seven and Eight. It is to be noted, that when the more formal procedure of section seven is instituted in regard to hearings there is, even at this stage in the procedure, another opportunity for settlement of issues. Section Seven specifically provides that presiding officers have power to hold conferences for the settlement or simplification of the issues when consent of the parties is obtained. Thus, the Federal Act is replete with flexible provisions for rapid disposition of the agency's work.

The Federal Act <sup>112</sup> provides that, where statutes do not otherwise provide, the proponent of a rule or order shall have the burden of proof. It might be ventured that the word "proponent" includes the agency since the word "parties" is used extensively throughout the section to describe those persons before the agency. The Missouri Act has no such specific provision.<sup>113</sup>

The agency under both the Missouri and Federal Acts is precluded from deciding cases, or issuing a rule under the Federal Act, without first considering the whole record. Of course provision is made whereby only that portion of the record need be considered which is cited by the parties.<sup>114</sup>

The Federal Act further requires that no sanction be imposed, or rule or order be issued, except on a record supported by and in accordance with reliable, probative, and substantial evidence. It was pointed out in *Pittsburgh S. S. Co. v. National Labor Relations Board*<sup>115</sup> that the evidence provisions of Section Seven (c) were ". . . designed to eliminate the wholesale use of hearsay, the drawing of

109. The Model Act sets out in § 9 that the agency "may exclude incompetent, irrelevant, and unduly repetitious evidence," but the agency is not required to provide for such exclusion.

110. It is referred to as "official notice."

111. The Model Act is the same.

112. See § 7c, Federal Act.

113. Nor does the Model Act.

114. The Model Act does not have a similar provision. The draftsmen of the Missouri Act likely did not deem this provision too important, in that by written stipulation the parties may waive the whole of § 8. There is no provision for waiver of these provisions under the Federal Act.

115. 180 F. 2d 731 (6th Cir. 1950).

expert inferences not based upon evidence and the consideration of only one part or one side of the case." But, on the other hand, "The requirement that the administrative findings accord with the substantial evidence does not forbid administrative utilization of probative hearsay in making such findings."<sup>116</sup>

Extensive provision is made in the Federal Act for introduction of evidence in contested cases. Every party is given the right to present his case or defense by oral or documentary evidence. The Missouri Act states merely that a decision shall not be rendered until each party to the proceeding has had an opportunity to present arguments, either oral or written. It is not too clear in the Missouri Act whether the choice between presentation of oral or written argument lies with the private parties or the agency. Reading the section as a whole, it appears that the choice is that of the parties.<sup>117</sup>

The Federal Act further provides for the right of each party to submit rebuttal evidence and for cross-examination to the extent "required for a full and true disclosure of the facts." Again, the Missouri Act does not make provision for rebuttal or cross-examination.<sup>118</sup>

The Federal Act provides that in the case of rule making or determining claims for money or benefits or applications for initial licenses (which is similar to rule making) any agency may require submission of all or part of the evidence in written form; provided the interest of any party will not be prejudiced thereby. The Missouri Act does not provide for the introduction of evidence in rule making; the entire section is confined to adjudication of contested cases.<sup>119</sup>

Under the Federal Act the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding constitutes the exclusive

116. See note 19, *supra*.

117. See § 8, Missouri Act.

Though the Model Act has no such provision, presumably it is at least allowable that there be oral evidence since there is provision for cross-examination. See note 118, *infra*.

118. It is, of course, allowed in Missouri. See *Williams v. Laclede-Christy Clay Products Co.*, 227 S.W. 2d 507, 513 (Mo. 1950) where the court said, "If, at anytime before the evidence at the hearing was finally concluded, the employee desired to produce testimony or evidence that would constitute proper rebuttal of evidence or testimony introduced by the opposite party it would be within the discretion of the Referee to make an allowance of time for such testimony or evidence to be produced." See also, *Smith v. Smith*, 237 S.W. 2d 81, (Mo. 1951) where certain evidence was excluded by the Referee as having "no bearing on the issues of this case." The court, in deciding that the evidence did have a bearing on the issues, held that the parties have a right to introduce competent and material evidence in support of their claims, ". . . and it was the Referee's and the Commission's duty to receive, consider and weigh all of the competent and material evidence offered."

The Model Act provides that "every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence." It is curious that the Missouri Act has largely followed the Model Act concerning the matters treated in § 7 of the Missouri Act, but it specifically omitted subsection 3 of the Model Act just quoted.

119. The same applies to the Model Act.

record of the proceedings. And, as in the Missouri Act,<sup>120</sup> the parties may secure a copy of it upon the payment of prescribed costs. Both the Federal Act and the Missouri Act provide for the taking of "official notice" of certain facts. The Federal Act merely provides that where any agency decision rests upon official notice of a material fact not appearing in the evidence on the record, any party on timely request is given an opportunity to show that the contrary is true. Nothing there indicates what subjects may be officially noticed. In *National Labor Relations Board v. Townsend*,<sup>121</sup> the Board took official notice of a prior decision and respondent failed to object thereto. The court inferentially held that this is judicial notice, and compared it with the power of the district courts to take judicial notice. Perhaps this indicates the extent of the scope of official notice.<sup>122</sup> The Missouri Act has provided and defined the scope of official notice more adequately.<sup>123</sup> Any agency may take official notice of all matters of which the courts take judicial notice. In addition to this they may also take official notice of technical and scientific facts, not judicially cognizable, within their competence. The agency may take official notice only if it notifies the parties of the facts of which it proposes to officially notice.<sup>124</sup> The parties are then to be given a reasonable time in which to contest the facts in question.<sup>125</sup> It might be questioned what effect such notice of technical and scientific facts may have on the interested parties in making their case. It appears to make a prima facie finding by statement of the fact as a fact, and the burden is then on the contesting party to show that the true facts are to the contrary.

#### DECISIONS

The Missouri Act does not in terms provide that other officers than the immediate members of the agency may hear evidence or decide the cases, either initially or finally, in contested cases. The Federal Act does specifically provide for subordinate officers to preside over the reception of evidence and the making of initial, recommended<sup>126</sup> or tentative decisions. The only provision of the Missouri Act that may be said to imply that other than members of the agency may perform

120. See § 9, Missouri Act.

121. 185 F. 2d 378 (9th Cir. 1950).

122. The court also referred to the clause in § 7d whereby a party may timely request opportunity to show that a matter should not be officially noticed by the Board and concluded that respondent is bound by the official notice taken by the Board since it did not at the time object, nor request opportunity to show that the prior decision should not be officially noticed. See also, SEN. DOC. No. 248, 79th Cong., 2nd Sess., p. 209 (1946).

123. See § 7, Missouri Act.

124. This notice is to be either during a hearing or in writing before a hearing or tentative findings made after hearing.

125. There is a similar provision in the Model Act, but there is added the statement that the agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.

126. See *Western Union Division, Commercial Telegraphers' Union, A. F. of L. v. United States*, 87 F. Supp. 324 (D. D. C. 1949), where a "proposed report" on the hearing was issued by the subordinate officer in lieu of a recommended decision. The court held that this satisfied the requirement of § 8a.

duties comparable to those of the agency subordinates under the Federal Act is found in Section Eight, the section concerning the hearing of evidence. This section intimates that not all of the members of the agency (and it may not be limited to members) are required to render the final decision. It states in part: "When in a contested case, all of the officials of the agency *who are to render the final decision. . .*" (Italics supplied) The section uses the term "officials" and the act does not define what an official of an agency is. Also, the section is not clear as to who is to hear the evidence initially. Doubt is left whether a member of the agency is required to hear the evidence initially. The section continues: "Whenever in a contested case all of the officials of the agency who are to render the final decision do not hear or read the evidence, such decision shall not be rendered by the agency until each party. . ." has had an opportunity to present arguments to it. The question is open as to whether "officials" is meant to include subordinates, within the meaning of the Federal Act. If such be true, then it may be said by construction that not all of those comprising the agency are required to render a decision and that all who are to render a decision are not required to hear the evidence initially, and finally that one not a member of the agency itself may participate in the taking of evidence.<sup>127</sup> A part of this question is academic, however, since it is a matter of practice that the agencies in Missouri use trial examiners or referees.<sup>128</sup>

The Federal Act has broad provisions for the procedure to be used in deciding cases where subordinates preside at the hearings pursuant to Section Seven on hearings.<sup>129</sup> In such cases the officers who preside<sup>130</sup> are to make the initial decision in the case. In the alternative, the agency may require the entire record to be certified to it and it will make the initial decision. In the absence of appeal to the agency or review upon the motion of the agency, the initial decision by the presiding officer or officers without more is the final decision and thereby becomes the decision of the agency. Therefore, the agency is not absolutely required to make the decision in a contested case. The Missouri Act, on the other hand, does not in terms provide for a rehearing or appeal before the agency. Section Ten, concerning petition for judicial review, sets out in part that "such petition may be filed without first seeking a rehearing, but in cases where agencies *have authority to entertain* motions for rehearing. . ." (italics supplied) Thus if an agency has authority to rehear certain cases it must come from another source than the act. This being so, it may be that the act will not allow initial decisions by subordinates when there is an absence of provision for appeal from such decisions, as in the Federal Act. It is more than doubtful that there could be an appeal from an initial decision directly to a district court, as *might* be allowed under the Missouri Act. In *Sisto v.*

127. The Model Act does not have a section comparable to § 8.

128. See note 99, *supra*.

129. See §§ 8a and 8b, Federal Act.

130. Or any officer qualified to preside at hearings pursuant to § 7 and not disqualified by the separation of functions provisions of § 5c.

*Civil Aeronautics Board*,<sup>131</sup> it was objected that a full hearing was not provided before the trial examiner. The court held that "When there is an appeal to the Board, the findings, conclusions, and orders, of the examiners are only tentative or interlocutory in nature.<sup>132</sup> And in such cases it is the orders of the Board which are final and appealable. Thus as long as the requirements of a full hearing are satisfied at some time prior to the issuance of a final order there can be no complaint on that ground."<sup>133</sup>

An alternative procedure is provided for under the Federal Act in rule making or determining applications for initial licenses. The agency may use the intermediate procedure considered *supra*, of having the presiding officer make the initial decision, or it may issue a tentative decision or any of the agency officers may recommend a decision. Lastly, in its discretion it may omit any such procedure altogether if it finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires. The Missouri Act, of course, has no similar provision since it here deals only with adjudication of contested cases.

Because it often happens under the Federal Act that those hearing the evidence do not make the final decision, there is a gap to be bridged and the Act has sought to bridge it by the device of the presiding officer making the initial decision. And even where the agency uses the provision of Section Eight (a), providing that "on appeal from or review of the initial decision of such [presiding] officers the agency shall . . . have all the powers which it would have in making the initial decision," the agency would have use of the initial decision, which is a part of the record.<sup>134</sup>

Again the parties in any case are afforded opportunity to submit, prior to each recommended or other decision or review, proposed findings and conclusions or exceptions to the decisions or recommended decisions of subordinate officers participating in such decisions. Supporting reasons on the law and facts for such exceptions or proposed findings or conclusions are provided for. Further, provision is made for placing upon the record the ruling upon each finding, conclusion, or exception presented. The Missouri Act, as we have seen is not as extensive in this regard, but provides that a decision shall not be rendered, where all of the officials who are to render it have not heard or read the evidence, until each party to the proceeding has had an opportunity to present arguments, either oral or written, to all of the officials who are to so render the decision.<sup>135</sup> It is questionable, however, whether these latter two provisions may be said to be comparable.

The Federal Act requires that all decisions (including initial, recommended, or tentative decisions) are to become a part of the record, and they must include a statement of the findings and conclusions upon all the material issues of fact, law, or discretion presented. This latter clause is, perhaps, another safeguard on the

131. 179 F. 2d 47 (D. C. Cir. 1949).

132. The court cited § 8a, Federal Act.

133. *See also*, Kuhn v. Civil Aeronautics Board, 183 F. 2d 839 (D. C. Cir. 1950).

134. SEN. DOC. NO. 248, 79th Cong., 2nd Sess., p. 210 (1946).

135. There is no like provision in the Model Act.

use of discretion allowed the agency. The findings need not be thoroughly complete, as noted in *Capital Transit Co. v. United States*.<sup>136</sup> The court said, "And the Administrative Procedure Act does not require detailed findings of every subsidiary evidentiary fact. So long as the agency makes amply clear the factual basis upon which it has proceeded, there can be no ground for complaint." The court also indicated that a statement of the considerations of policy should accompany the factual basis.

In *Universal Camera Corp. v. National Labor Relations Board*<sup>137</sup> the Court pointed out that the examiner's report is a part of the "whole record" and is to be reviewed by the court as such when it is determining whether there is substantial evidence to support the finding of an agency.

The Federal Act further requires that there be set out in the record the appropriate rule, order, sanction, relief, or denial thereof. Similarly, the Missouri Act<sup>138</sup> requires every decision and order to be in writing, accompanied by findings of fact and conclusions of law. This provision is apparently not mandatory, though it is difficult to see how the plain wording of the statute indicates that it is otherwise than mandatory. In *Collins v. Reed Harlin Grocery Co.*,<sup>139</sup> the plaintiff filed a motion for "additional" findings of fact and law. The findings of fact and law were in the award of the Commission and consisted of a bare recital of a consideration by the Commission of the evidence and that plaintiff was entitled to no relief. The court said the Commission adopted the findings of fact of the Referee since it affirmed his award. The court then held that it would follow the rule announced in *Waring v. Metropolitan Life Ins. Co.*<sup>140</sup> to be: "This plain duty [making findings of fact and rulings of law] should be performed, and the commission should carefully distinguish and make clear in its award the findings of fact and rulings of law. But, if the findings of fact be absent, and merely a conclusion involving a question of law be stated, the appellate court will look to the record to determine for itself whether there is sufficient competent evidence to support the conclusion and to warrant the making of the award."<sup>141</sup>

There is no provision for setting forth matters of discretion in the Missouri Act.<sup>142</sup> The act provides that the findings be stated separately from conclusions of law and they be accompanied by a concise statement of the findings on which the

136. 97 F. Supp. 614 (D. D. C. 1951).

137. 340 U. S. 474 (1951).

138. See § 9, Missouri Act.

139. 230 S. W. 2d 880 (Mo. 1950).

140. 225 Mo. App. 600, 604, 39 S.W. 2d 418, 423 (1931).

141. It should be noted that the rule followed by the court was in effect sometime before the Missouri Act was enacted, and that the act was not considered in the principal case. As will be seen *infra*, the judicial review provisions of the act are not applicable to the Workmen's Compensation cases; but § 9 on findings of fact is not under the judicial review provision. It would seem to be applicable to this case. *But see* Mo. REV. STAT. § 286.090 (1949).

142. Decisions in default cases, cases disposed of by stipulation, consent order or agreed settlement are excepted from this section. They are not excepted from the Model Act, however.



agency bases its order. Orders refusing licenses are within the purview of this section.<sup>143</sup>

Provision is made for immediate written notice of any agency decision to each party in the Missouri Act<sup>144</sup> and upon request a copy of the decision, order, and findings of fact and conclusions of law will be furnished each party. The Federal Act has no provision for immediate notice, but Section Three (b) concerning public information does make provision for notice.<sup>145</sup>

#### JUDICIAL REVIEW

One of the more difficult problems involved in the field of Administrative Law is that of judicial review, and much consideration is given to the subject by both the Federal Act and the Missouri Act. In fact, the major portion of the text of the Missouri Act is given to judicial review, and most of the cases involving the two acts are on this subject.

Perhaps the most curious problem before the courts on this matter is the question of whether, and to what extent, the Federal Act has changed the existing law on judicial review. The courts are in complete discord as to the answer. In *Olin Industries v. National Labor Relations Board*<sup>146</sup> the court said, ". . . section ten is merely declaratory of the existing law of judicial review and . . . neither confers jurisdiction on this court above and beyond that which it already has, nor grants to aggrieved parties any rights they did not have under the National Labor Relations Act."<sup>147</sup> On the other side, it was said in *Snyder v. Buck*<sup>148</sup> ". . . every final agency action which is not in the realm of discretion, or in respect to which no statute precludes judicial review, and which adversely affects the legal rights of any person, is subject to judicial review under the Administrative Procedure Act. . . . This result necessarily subjects to judicial review a large group of administrative actions which previously could not have been re-examined or set aside by the courts." And in *Unger v. United States*<sup>149</sup> after considering the conflicting views on the question the court said, "Prior to the act, administrative orders such as the one with which we are concerned were not reviewable unless the statute

143. They are not in the Model Act. Except as otherwise indicated the Model Act is the same as the Missouri Act in this section.

144. See § 9, Missouri Act. The same is true of the Model Act.

145. In the Federal Act, the next section to be considered would be § 9 on Sanctions and Powers. Neither the Missouri Act nor the Model Act contains a similar provision, and a reading of it will indicate that it is self explanatory. For this reason little time will be devoted to it here. It should be noted, however, that it gives a licensee an opportunity to redeem himself if he has been using his license in violation of law, under certain circumstances.

146. 72 F. Supp. 225, 228 (D.C.D. Mass 1947).

147. To the same effect see *Brisbois v. Hague*, 85 F. Supp. 13 (D. Mass. 1949). In *Hearst Radio, Inc. v. Federal Communications Commission*, 73 F. Supp. 308 (N.D. Ohio 1947) the court said, "I do not think the Administrative Procedure Act . . . is intended to enlarge the methods or scope of such [judicial] review. . ."

148. 75 F. Supp. 902, 908 (D. D. C. 1948).

149. 79 F. Supp. 281, 286 (E.D. Ill. 1948).

so provided. Such orders are now reviewable unless the statute reflects an intent that they are not reviewable."

Though the question is still open, it does seem that Congress went to considerable extent to indicate that the act adopts the existing law on judicial review, if that were its intent.

As indicated by the introductory clause to the section, the act has excluded from the scrupulous eye of the courts that action which has been confined to agency discretion and, of course, that which by statute is excluded from judicial review. Professor Davis<sup>150</sup> points out that there are three situations where the question of whether judicial review is allowed or precluded by the limiting clause because of a federal statute comes up: 1) statutes containing no explicit provision concerning reviewability, 2) statutory provisions making administrative action "final and conclusive," 3) statutory provisions withdrawing the power or jurisdiction of courts to review.<sup>151</sup> It has been suggested, however, that Congress had reference to express statutory exemption and not to implied preclusion of judicial review.<sup>152</sup>

*Inter alia*, the Federal Immigration Act provides that ". . . in every case where any person is ordered deported from the United States under provisions of this Chapter or of any law or Treaty, the decision of the Attorney General shall be final."<sup>153</sup> The court in *Prince v. Commissioner of Immigration and Naturalization*<sup>154</sup> held that this statute precluded judicial review under the Federal Act by virtue of the introductory clause of Section Ten.<sup>155</sup> In another case<sup>156</sup> the pertinent statute provided that all decisions reached by the Administrator of Veteran's Affairs under the authority of the statute were not subject to review as to the law or facts by any court. The court held that Section Ten would not allow judicial review in view of this statute.<sup>157</sup>

150. Davis, *Judicial Review*, 96 U. OF PA. L. REV. 749 (1948).

151. See also 50 COL. L. REV. 559 (1950) on the scope of judicial review.

152. 37 A. B. A. J. 641, 704 (1951).

153. 8 U. S. C. A. 155 (A).

154. 87 F. Supp. 53 (N.D. Ohio 1949).

155. But see notes 56 and 106, *supra*.

156. *N. Y. Technical Institute of Maryland, Inc. v. Limburg*, 87 F. Supp. 308 (D. Md. 1949).

157. The Trading with the Enemy Act, 50 U. S. C. A. 1, *et seq.*, limited judicial review of seizure of property to the "relief and remedy" provided in the act. The act further placed considerable discretion in the handling of property with the Alien Property Custodian. Held, judicial review is precluded both because of the statute and the discretion involved, as provided in § 10 of the Federal Act. *McGrath v. Zander*, 177 F. 2d 649 (D. C. Cir. 1949). See also, *Great Lakes Steel Corp. v. United States*, 81 F. Supp. 450 (E.D. Mich. 1948), *reversed per curiam*, 337 U. S. 952 (1948); *United Electrical, Radio and Machine Workers of America, C. I. O. v. Lilienthal*, 84 F. Supp. 640 (D. D. C. 1949).

On cases involving only discretion, see *International Union, etc. v. International Labor Relations Board's order calling for an election* was by law committed to its discretion and was not subject to judicial review; *Transworld Airlines, Inc. v. Civil Aeronautics Board*, 184 F. 2d 66 (2d Cir. 1950), holding that orders subject

Section Ten under the Federal Act is not confined to adjudication; the section declares that one having suffered a legal wrong because of *any*<sup>158</sup> agency action may have judicial review. It was contended in *United States ex rel De Lucia v. O'Donovan*<sup>159</sup> that the petitioner was held under an illegal parole warrant issued by a member of the Parole Board. The court held that if the petitioner were illegally held it would certainly be a legal wrong and by agency action, allowing the petitioner judicial review under Section Ten (a). The court also pointed out that a habeas corpus proceeding was a proper proceeding.

In terms, at least, it is quite doubtful that the Missouri Act is broad enough to include review of rule making as well as adjudication. It expressly provided for judicial review only in final decisions in contested cases.<sup>160</sup> And certainly not all adjudication proceedings are under the act because of the provision qualifying the provision for judicial review: ". . . unless some other provision for judicial review is provided by statute." In *Scott v. Wheelock Bros.*,<sup>161</sup> it was held that Workmen's Compensation cases are exempt from the provisions of Section Ten of the act. The court said, "At the time that act [the Missouri Act] was passed the Workmen's Compensation Law not only prescribed the procedure to be followed by the Commission but also provided for judicial review of its decisions. Mo. R.S.A. Secs. 3722-3747.<sup>162</sup> And, Section 10 of the Administrative Review Act, Mo. R.S.A. § 1140.110,<sup>163</sup> applies to the decisions of administrative agencies '*unless some other provision for judicial review is provided by statute.*' Senate Bill 196 (The Administrative Review Act) was specially amended by the addition of the italicized clause (Senate Journal, 63rd General Assembly, 1945, Vol. II, p. 1998) and plainly, thereby, it was not intended that this provision of the act should apply to the review of decisions of the Workmen's Compensation Commission."

There are two general categories of persons who may come within the provisions of the Federal Act allowing judicial review. If one has suffered a legal wrong because of any agency action, as seen above, he may have judicial review.<sup>164</sup> The other category includes those adversely affected or aggrieved by such action within the meaning of any relevant statute. Unlike the former category, the act does not itself set out who will be entitled to judicial review in this latter category. This matter will necessarily be left to judicial interpretation of the relevant statute in a particular case. Certainly, it is not here confined to parties to controversies nor to those persons against whom a rule is specifically directed.<sup>165</sup>

---

to Presidential approval are immune from judicial review. The order there under consideration was an order involving foreign commerce.

158. See note 30, *supra*.

159. 82 F. Supp. 435 (N.D. Ill. 1948).

160. The declaratory judgment proceeding is extended to rule making under the act.

161. 351 Mo. 1096, 209 S.W. 2d 149, 150 (1948).

162. MO. REV. STAT. §§ 287.380-287.610 (1949).

163. MO. REV. STAT. § 536.100 (1949).

164. What is a legal wrong within the meaning of the act is set out in § 10e, Federal Act, to be considered *infra*.

165. See *e.g.*, *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407 (1942).

The only qualifications for judicial review under the Missouri Act<sup>166</sup> are that the person be aggrieved by a final decision and that he has exhausted all of his administrative remedies as provided by law.<sup>167</sup>

The Federal Act, rather than attempting to set forth a new procedure for the agencies and courts to follow, in matters of judicial review of agency action, simply states that the procedure and form shall be that of any special statutory review proceeding that is relevant but if there be none, or that available is inadequate, then any applicable form of action before a proper court is permissible.<sup>168</sup> This provision was relied upon in *Prince v. Commissioner*,<sup>169</sup> a deportation proceeding. In the review of a deportation order, the court held, “. . . Congress did not intend to perpetuate extraordinary legal remedies, requiring persons to submit to arrest in order to file a petition for a writ of habeas corpus in deportation proceedings—certainly an inadequate remedy—but, rather, to give them the adequate remedy of judicial review of such agency action. It follows that under the provisions of the Administrative Procedure Act, appellant was entitled to a judicial review by the district court of the order of deportation.” Thus the court was merely indicating that in this particular case the remedy of habeas corpus was inadequate and found that the Federal Act allowed it to substitute another.<sup>170</sup> The Act does specifically authorize declaratory judgments, writs of prohibition, mandatory injunctions<sup>171</sup> and habeas corpus.<sup>172</sup>

The Missouri Act makes rather extensive provision for the procedure to be used in judicial review.<sup>173</sup> The act also makes specific provision for use of the declaratory judgement and in terms extends it to rules of the agency as well as in adjudicatory proceedings. Beyond this the act specifically provides that “. . . nothing in this act contained shall prevent any person from attacking any void order of an agency . . . in any manner that would be proper in the absence of this [judicial review] section.”<sup>174</sup>

Reviewable acts of a federal agency are those acts made reviewable by statute and every final agency action for which there is no other adequate remedy in any court. Although one ordinarily may not have judicial review in an initial stage of an

166. See § 10a, Missouri Act.

167. Both the Missouri Act and the Model Act allow intervention.

168. “In other words, the Administrative Procedure Act does not in any way modify the existing forms of proceedings to review final action of administrative agencies, nor does it create any new remedies if an adequate remedy is in existence.” *United States v. Watkins*, 73 F. Supp. 216, 219 (S.D. N. Y. 1947), *reversed*, 164 F. 2d 457 (2d Cir. 1947).

169. 185 F. 2d 578, 581 (6th Cir. 1950).

170. Note that the amendment to the Federal Act cited note 106, *supra*, concerned only §§ 5, 7, and 8. This case is under § 10.

171. See note 148, *supra*.

172. See § 10b, Federal Act.

173. See § 10b, Missouri Act. It should be noted that both the Missouri and Model Acts specifically provide that there shall be no jury trials in judicial review of agency proceedings.

174. The Model Act does not make this provision.

administrative proceeding,<sup>176</sup> because there is not then the requisite final agency action, there is specific provision for review of any preliminary, procedural, or intermediate agency action or ruling when review is finally obtained. This clause emphasizes the doctrine of "exhaustion of administrative remedies," which has become of more importance in recent years with the continued growth of administrative adjudication. The leading cases on the doctrine<sup>176</sup> answered the contention that the administrative body did not have jurisdiction over the subject matter by pointing out the principle of the doctrine. It was said; "The rule requiring exhaustion of administrative remedy cannot be circumvented by asserting the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. *Law suits* also often prove to have been groundless, but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."<sup>177</sup> (Italics supplied) It might be well to consider here that the doctrine has been distinguished by the courts from the doctrine of "primary jurisdiction" or "primary determination." Though the two doctrines involve separate concepts they are often treated as a single doctrine, that of exhaustion of administrative remedies. The distinction should be made, however, when it is considered that the latter is largely a product of judicial self-limitation, similar to the requirement in equity courts that there must be a lack of adequate remedy at law before there can be assumed an equitable jurisdiction. The doctrine of "primary jurisdiction" on the other hand ". . . presupposes a complete absence of judicial power to deal with the matter because of a legislative grant of exclusive primary jurisdiction to an administrative body. The basis for the rule is the desire and need for expert administrative judgement on a technical question. The purpose is to prevent a party from bringing a controversy into court prior to the securing of this administrative judgement on a question usually involving complex evidentiary material."<sup>178</sup> Of course there is no distinction between the two doctrines under the act, but it undoubtedly incorporates them both.

There is ample leeway in the act for judicial discretion in the application of the doctrine of exhaustion of administrative remedies, and it has been the practice to

175. See *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290 (1923) where a state was enforcing confiscatory rates and petitioner was by law precluded from obtaining a stay until the state court "acting in a legislative capacity" had taken final action. The Supreme Court permitted resort to a district court for immediate equitable relief. See also, *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196 (1924); *Porter v. Investors Syndicate*, 286 U. S. 461 (1932).

176. *Myers v. Bethlehem Ship Building Corp.*, 303 U. S. 41 (1938). See also, *Dalton Adding Machine Co. v. State Corporation Comm'n.*, 236 U. S. 699 (1915); *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160 (1927); *Lawrence v. St. Louis-San Francisco Ry.*, 274 U. S. 588 (1927); *St. Louis-San Francisco Ry. v. Alabama Public Service Commission*, 279 U. S. 560 (1928).

177. *Goodyear Tire and Rubber Co. Inc. v. Federal Trade Commission*, 88 F. Supp. 789 (D. D. C. 1950) pointed out that it is regrettable that "some injury" may result from waiting for a final order, but that is not controlling when a premature review is sought by a party.

178. *United States v. Fritz Properties, Inc.*, 89 F. Supp. 772, 777 (N.D. Cal. 1950).

exercise such discretion, rather than consider it a mandate of the law. "At one time the Supreme Court seemed to feel that the exhaustion of remedies rule was one of judicial administration, and not merely a rule governing the exercise of discretion." But ". . . the Court seemed to refute any mandatory implications, in holding that Judicial review must be denied where a rehearing before an administrative body is authorized, but not sought. The implication is that orderly administrative procedure can be achieved as well through a discretionary rather than a mandatory application of the exhaustion doctrine."<sup>179</sup> However, when the doctrine is applicable, it must be precisely complied with, as the Court in *Aircraft and Diesel Corp. v. Hirsch*<sup>180</sup> noted: "The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention."

The Missouri Act does not provide, as does the Federal Act, for review of preliminary, procedural, or intermediate agency action on final review,<sup>181</sup> but it is surely within the requirement of review on the whole record. As a practical matter these earlier agency actions will likely be a part of the record. This subject is further extended in the Federal Act<sup>182</sup> by providing (except as otherwise expressly required by statute) that agency action otherwise final shall be final for the purposes of the act whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or for an appeal to superior agency authority.<sup>183</sup> It will be recalled in connection with Section Eight of the Federal Act concerning decisions by an agency and action by subordinates therein that an initial decision by such subordinate becomes final in the absence of appeal therefrom or review thereof by the agency. However, that section itself does not require either. The present section on judicial review does make provision whereby the agency may require by rule that there be presented an application for a declaratory order or other form of reconsideration or appeal to a superior agency authority. In the event that the agency does make such rule, there must further be provision that the action be inoperative pending the required procedure. This is perhaps in the nature of a show cause order, that is, the action has been taken and will be effective in the absence of a showing that it should not become effective. As to reviewable acts under the Missouri Act, it has already been observed, *supra*, that a final decision in a contested case is reviewable unless some other provision for judicial review is provided by statute.<sup>184</sup> As in the Federal Act, the proper person may institute proceedings for judicial review without first

179. *Id.* See also, note 175, *supra* and *Levers v. Anderson*, 326 U. S. 219 (1945).

180. 331 U. S. 752, 767 (1947).

181. Nor does the Model Act.

182. See § 10c, Federal Act.

183. See note 178, *supra*.

184. See *El Paso Building & Construction Trades Council v. Texas Highway Comm'n*, 231 S.W. 2d 538 (Tex. 1950), where it was held that the right to appeal from an order of an administrative board is implied where such right is not expressly provided by statute.

seeking a rehearing or other appeal to the agency rendering the decision.<sup>185</sup> It might appear that the doctrine of exhaustion of remedies is being violated both in the Missouri and federal situations by allowing an appeal to a court when there is provision for allowing an appeal to the administrative agency. However, it has not been so considered. The case of *Levers v. Anderson*<sup>186</sup> distinguishes statutes which indicate there *must* be a petition for a rehearing and those where it is merely allowed. The latter involves what is referred to as the formal type of motion for a rehearing, and the Court does not find that it is the intent of the legislators to make such application for a rehearing on an otherwise final order a condition precedent to judicial review.

Both of the acts expressly provide for interim relief,<sup>187</sup> setting forth that pending judicial review of agency action the agency may stay the enforcement or effective date of its action. Also, the reviewing court may stay such action or enforcement or order the agency to do so under either act.<sup>188</sup> Beyond this, the Federal Act merely provides that the reviewing court<sup>189</sup> may do what is appropriate to preserve the status quo or rights pending the conclusion of the review proceedings. The Missouri Act greatly expands this latter provision.<sup>190</sup> The agency may temporarily grant or extend relief denied or withheld or the reviewing court may do so or order the agency to do so; in either case such stay or other temporary relief may be conditioned upon such terms as shall appear to the reviewing court to be proper. To avoid irreparable injury, such action may be taken without first giving notice and provide a hearing as soon as practicable to determine whether such relief shall be continued. In any case as here considered under the Missouri Act, the court is not to grant or continue such relief unless it is satisfied that the public interest will not be prejudiced thereby.

The problem of scope of judicial review<sup>191</sup> is perhaps the most important subject incorporated in the provisions for judicial review, both in the Missouri Act and the Federal Act. Certainly of all the litigation involving the Acts, by far the greater bulk is directly concerned with scope of judicial review, and particularly with the provision requiring that there be "substantial evidence on the whole record."

Under the Federal Act the courts are to decide, in a rather loosely defined manner, all relevant questions of *law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. In the absence of such provision it is likely that it would fall to the courts to interpret constitutional and statutory provisions anyway, but the clause simply

185. See § 10b, Federal Act.

186. *Supra*, note 179.

187. See § 10d, Federal Act; see § 10c, Missouri Act.

188. The Model Act is substantially the same.

189. Including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court.

190. The Model Act does not.

191. See § 10e, Federal Act; § 10f, Missouri Act.

resolves any doubt. The Missouri Act does not<sup>192</sup> refer to interpretation of constitutional or statutory provisions, nor is there mention of the matter of having the courts determine the meaning or applicability of the terms of agency action, but the courts' jurisdiction extends to inquiry into violations of constitutional provisions and questions of excessive jurisdiction or statutory authority. Thus, a problem of interpretation and construction of both the constitution and statutes is surely before the Missouri courts in such cases.

The Federal Act requires the courts to compel agency action unlawfully withheld or unreasonably delayed; the Missouri Act provides that "unreasonable delay on the part of any agency in deciding any contested case shall be grounds for an order of the court *either* compelling action by the agency or removing the case to the court for decision."<sup>193</sup> It is obvious from this that a court in Missouri is given far greater power over the agency's action than a federal court. There is no intimation that a federal court can go further than compel the agency to act. However, the Federal Act is broader than the Missouri Act in another respect. In terms it extends the scope of judicial review to rule-making functions of a federal agency as well as to quasi-judicial functions. The Missouri Act specifically states that the jurisdiction of the court extends only to "deciding any contested case."<sup>194</sup>

The Federal Act further requires the courts to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Missouri Act simply begins: "The inquiry may extend to a determination of whether the action of the agency . . . is arbitrary or capricious; involves an abuse of discretion,"<sup>195</sup> or "is, for any other reason, unauthorized by law."<sup>196</sup> Therefore, the Missouri Act does not here purport to define the duties of the courts in such cases. However, a later subsection does provide, among other things, that "The court shall render judgment affirming, reversing, or modifying the agency's order. . . ."<sup>197</sup>

Beyond this the Federal Act extends the scope of judicial review to those situations found to be contrary to constitutional right, power, privilege, or im-

192. Nor does the Model Act.

193. See § 10a, Missouri Act.

194. But provision is made for declaratory judgment to determine the validity of rules of administrative agencies. The Model Act does not contain this latter proviso.

195. This clause is not in the Model Act.

196. In *Ross v. Joplin Corporation*, 229 S.W. 2d 303 (Mo. 1950), the court held that it would look to the record to determine whether the Commission acted "capriciously or arbitrarily or fraudulently." There was no reference to the Missouri Act, however. See also, *Dyche v. Bostian*, 361 Mo. 122, 233 S.W. 2d 721 (1950); *Mabry v. Tiffany Stand Co.*, 235 S.W. 2d 863 (Mo. 1950); *Douglass v. St. Joseph Lead Co.*, 231 S.W. 2d 258 (Mo. 1950).

197. The provision in the Model Act is more nearly the same as that of the Federal Act. "The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because of administrative findings, inferences, conclusions or decisions are: . . . (f) arbitrary or capricious."



munity. The relevant provision of the Missouri Act states simply that the inquiry may extend to violations of the constitutional provisions. Also, judicial review under the Federal Act includes agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitation, or short of statutory right, or without observance of procedure required by law.<sup>198</sup> The Missouri Act, essentially the same, extends the scope to whether agency action is in excess of statutory authority or jurisdiction, and whether it is made upon lawful procedure or without a fair trial. The Federal Act does not make use of the term "fair trial."

One of the more important provisions in either of the acts concerns the extent to which the court may inquire into the evidence taken in an agency hearing. The Missouri Act and cases concerning it have given considerably more attention to this one point than to any other single matter. Initially, the Federal Act sets out that the court shall hold unlawful and set aside agency action, findings and conclusions found to be unsupported by substantial evidence in any case subject to the requirements of Sections Seven and Eight of the Act<sup>199</sup> or otherwise reviewed on the record of an agency hearing provided by statute. The Missouri Act provides for a determination of whether the agency action is unsupported by competent and substantial evidence upon the whole record. There are, therefore, certain differences to be found in the basic provisions setting out the scope of review of the evidence. Sections Seven and Eight concern both rule making and adjudication, therefore this clause in the Federal Act applies as well to rule making as to adjudication. As for the Missouri Act on this point, it is not clear whether both functions are included within the clause. Probably only adjudication of contested cases is covered, considering the context in which the clause is found;<sup>200</sup> and yet there is absent in this connection the clause "adjudication of contested cases" so often found in the act limiting the scope of a particular clause which might otherwise have included both rule making and adjudication. It is to be noted that both acts specifically require substantial evidence upon the *whole* record.

One of the leading cases involving this clause is the *Universal Camera Corporation v. National Labor Relations Board*.<sup>201</sup> It was held there that Congress intended to place the same standard of proof on the National Labor Relations Board through the Taft-Hartley Act as is placed on the courts through the Administrative Procedure Act, and that is "substantial evidence on the whole record."<sup>202</sup> The Court said that the courts must "now assume more responsibility for the reasonableness and fairness of the Labor Board decisions than some courts have shown in the past." However, beyond pointing out the standard and holding

---

198. See note 159, *supra*.

199. The hearings and decisions sections.

200. See § 10, Missouri Act.

201. See note 137, *supra*.

202. In *capital Transit Co. v. United States*, 97 F. Supp. 614 (D. D. C. 1951), it was said that the court's "task is to see that requirements of the law have been observed in the conduct of the agency's proceedings, and that its conclusions as to public convenience and necessity has a rational basis in the facts found, facts which must be supported by substantial evidence on the record considered as a whole."

that it must be followed, the Court merely said that the standard is placed with the courts of appeals and that it will not interfere unless the standard appears to have been misapprehended or grossly misapplied. It was left to a later case to better define this rather vague standard emphasized in the *Universal Camera* case. That case was *Cream Wipt Food Products Company v. Federal Security Administrator*.<sup>203</sup> The court there interpreted the *Universal Camera* case as requiring "(1) 'that substantially be determined in the light of all that the record relevantly presents;' (2) that administrative findings must be set aside 'when the record before a Court of Appeals clearly precludes the . . . [administrative] decision from being justified by a fair estimate of the worth of the testimony of witnesses or . . . [the agency's] informed judgement on matters within its special competence or both,' and (3) that 'reviewing courts must by influenced by a feeling that they are not to abdicate the conventional judicial function'."

It is not an easy matter to define the term "substantial evidence." Several comments have been made by the courts to aid as a further guide in reviewing agency records. It has been said, "To be substantial, evidence must be strong enough to raise a presumption of fact and must be sufficient, when denied, to establish the fact. We conclude that 'substantial evidence' under the rule of administrative finality does not mean something less than prima facie evidence."<sup>204</sup> In *National Labor Relations Board v. Columbian Enameling & Stamping Company*<sup>205</sup> it was said that ". . . it (the evidence) must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."<sup>206</sup> Since the same phrase is present in the Missouri Act, a similar problem of definition of the phrase exists. For the most part the Missouri Courts' opinions on the matter are the same as those of the federal courts. In *State ex rel. Rice v. Public Service Commission*,<sup>207</sup> the court held that "By 'substantial evidence' is meant evidence which, if true, would have a probative force upon the issues. The term 'substantial evidence' implies and comprehends competent, not incompetent evidence." The court, after noting that evidence not credible is also evidence not substantial, stated, ". . . an appellate court as a matter of law, passes upon the matter of substance and not credibility. In other words an appellate court may say that particular evidence is substantial if the triers of the facts believed it to be true." And with more particularity, it was held in *State v. Morris*<sup>208</sup> ". . . hearsay evidence and conclusions based upon hearsay do not qualify as 'com-

---

203. 187 F. 2d 789, 790 (3rd Cir. 1951).

204. *Otis & Company v. Securities & Exchange Commission*, 176 F. 2d 34, 43 (D. C. Cir. 1949); *reversed per curiam*, 338 U. S. 43 (1949).

205. 306 U. S. 292, 300 (1939).

206. See also, *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197 (1938), where it was held that substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

207. 359 Mo. 109, 220 S.W. 2d 61 (1949).

208. 359 Mo. 194, 221 S.W. 2d 206 (1949).

petent and substantial evidence upon the whole record' essential to the validity of a final decision, finding, rule or order of an administrative officer or body. . . ."<sup>209</sup>

The Court in the *Universal Camera* case<sup>210</sup> recognized the high place of the trial examiner and said that their reports are entitled to the weight they merit.<sup>211</sup> This being true, perhaps a court will not as quickly affirm a decision of an agency which has overruled an examiner as where the agency has affirmed the examiner's decision.<sup>212</sup>

As to the federal courts' view of certain evidence as being substantial, it was held in *Willapoint Oysters, Inc. v. Ewing*,<sup>213</sup> "The act [Federal Act] also authorizes the agency to receive *any evidence*, although as a matter of policy it should exclude irrelevant, immaterial or unduly repetitious matter. However, the presence of such matter in the record does not call for a reversal of agency action where on the whole record the rule or order issued is supported by reliable, probative, and substantial evidence." But ". . . 'substantial evidence' includes more than 'uncorroborated hearsay' and 'more than a mere scintilla,' the findings, to be valid, cannot be based upon hearsay alone, nor hearsay corroborated by a mere scintilla. Founded upon these requirements, the test whether evidence is 'substantial,' is whether in the individual case before the court, there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'."<sup>214</sup>

209. Does the court here infer that § 10 applies to rule making as well as adjudication? *See also*, *Mississippi Valley Trust Company, v. Begley*, 310 Mo. 287, 275 S.W. 540 (1925).

210. See note 137, *supra*.

211. The Court observed that they have opportunity to observe witnesses' demeanor and are quite familiar with the evidence.

212. *Cf. Smith v. National Lead Co.*, 228 S.W. 2d 407 (Mo. 1950). The court said where a question is close and the evidence might justify a finding either way, and where the credibility of the witnesses is questioned, the courts should give regard and consideration to the fact that the referee is in a position to hear the witnesses testify and observe their demeanor and apparent willingness or reluctance to relate the facts truly. And that the courts should pay such deference to his opinion as it believes proper. Thus, the same conclusion should follow in a Missouri court as in a federal court, where the referee differs with the agency.

213. 174 F. 2d 676, 691 (9th Cir. 1949).

214. *See also*, *Pittsburgh S. S. Co. v. National Labor Relations Board*, 180 F. 2d 731 (6th Cir. 1950) where the court said the evidence provisions of the Federal Act were "designed to eliminate the wholesale use of hearsay, and the drawing of expert inferences not based upon evidence and the consideration of only one part or side of the case.

The question of allowing hearsay in administrative hearings was considered by the New York Court of Appeals in *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N.E. 507 (1916) and it held that hearsay evidence is admissible in the trial of a claim before an administrative agency; an award cannot be sustained on hearsay alone, but must be supported by a "residuum of legal evidence."

The Missouri courts have followed this doctrine as have many other state courts.

Maryland departed from the doctrine in *Standard Oil Co. v. Mealy*, 147 Md. 249, 127 Atl. 850 (1925) by allowing a finding based solely on hearsay, but hemmed the decision in by requiring that it apply only where the facts are simple and there is little chance for misunderstanding and where there are several witnesses to the hearsay.

As seen above, the judicial review provisions of the Missouri Act are not applicable to Workmen's Compensation cases. However, these cases are subject to the Missouri Constitution, particularly to Article V, Section Twenty-two,<sup>216</sup> and since, as pointed out in *Wood v. Wagner Electric Corporation*,<sup>216</sup> the "substantial evidence upon the whole record" provision of the Missouri Act was taken from the Constitutional provision, a number of Workmen's Compensation cases will be referred to when they cite this provision of the Constitution, to indicate by way of analogy what the law would surely be under the Missouri Act had the case been subject to that act.

Among other things, the *Wood* case held that "The provision in section 22<sup>217</sup> that administrative decisions 'shall be subject to direct review by the courts as provided by law' refers to the *method* of review to be provided (certiorari, appeal, etc.) and not to the scope of the review 'in cases in which a hearing is required by law.' For the latter, this stated minimum standard . . . substantial evidence upon the whole record') is mandatory and requires no legislation to put it into effect. This does not mean that the reviewing court may substitute its own judgement on the evidence for that of the administrative tribunal. But it does authorize it to decide whether such tribunal could have reasonably made its findings, and reached its result, upon consideration of all of the evidence before it, and to set aside decisions clearly contrary to the overwhelming weight of the evidence."<sup>218</sup> (Italics supplied)

Following the *Wood* case was the leading case, *Seabaugh's Dependents v. Garver Lumber Mfg. Co.*<sup>219</sup> Here the court referred to the Missouri rule that an award in compensation cases has the force and effect of a verdict of a jury and is to be reviewed in the light most favorable to the award, and all reasonable inferences are to be drawn to support it, and all evidence unfavorable to the award is to be disregarded. Of this rule the court said, "But these rules have been modified by provisions of the Constitution of 1945, Art. V, Sec. 22, Mo. R.S.A. to the extent that we are of the opinion that the award is now to be regarded as having more

Virginia also has departed from the Knickerbocker doctrine by allowing hearsay alone to sustain a finding. See *American Furniture Co. v. Graves*, 141 Va. 1, 126 S.E. 213 (1925).

California has departed from the doctrine, but by virtue of an amendment to the Workmen's Compensation statutes.

See also, DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 227, 236 (Commonwealth Fund, 1936).

215. Mo. CONST. 1945, Art. V, § 22 (1945), "All decisions, findings, rules and orders of any administrative officer or body existing under the Constitution or by law which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law and such review shall include the determination whether the same are authorized by law, whether the same are supported by competent and substantial evidence upon the whole record."

216. 355 Mo. 670, 197 S.W. 647, 649 (1946)..

217. See note 215, *supra*.

218. See *Harper v. Home Imp. Co.*, 235 S.W. 2d 558 (Mo. 1951).

219. 355 Mo. 453, 200 S.W. 2d 55 (1947).

nearly the force and effect of a judgement in a non-jury case under the new civil code. . . ."<sup>220</sup>

The rule as announced does not appear to have been followed in all quarters, however. In *Schmidt v. Rice-O'Neill Shoe Co.*<sup>221</sup> the court cited with approval two cases decided before the 1945 Constitution<sup>222</sup> and held, "In determining whether the commission's award is justified by the evidence, the reviewing court will look only to the evidence most favorable to the award, together with all reasonable inferences that may be drawn therefrom that seem to support the award and must disregard all opposing and unfavorable evidence, and this is true even though the finding of the commission to the contrary would also have been supported by the evidence; and that the weight of the evidence and the credibility of the witnesses are for the commission to determine." Also, in *Nabry v. Tiffany Stand Co.*<sup>223</sup> the court relied upon three cases decided before the 1945 Constitution for the rule that "The commission's finding based on substantial, competent evidence in the record is conclusive and binding on the appellate court" and ". . . the commission's finding for respondent is entitled to a consideration of the competent evidence most favorable to her together with all reasonable inferences to be drawn therefrom in support of finding." And one of the cases cited<sup>224</sup> seems to be in conflict with the *Seabaugh* case in that it held that the findings and award are to have the force and effect of a jury verdict. The court then concluded that, "The rule contended for by respondent is too well settled to require the citation of any more cases."<sup>225</sup>

However, on *Cheek v. Durasteel Co.*<sup>226</sup> the court cited *Doughton v. Marland Refining Co.*<sup>227</sup> and pointed out that that case was prior to the 1945 Constitution

220. See Mo. REV. STAT. § 510.340 (4) (1949), which sets forth in part, ". . . The appellate court shall review the case upon both the law and the evidence as in suits of an equitable nature. . . . The appellate court shall consider any evidence which was rejected by the trial court . . . also order any rejected evidence to be taken by deposition or under a reference and returned to said court."

Ross v. Joplin Corporation, 229 S.W. 2d 303 (Mo. 1950) pointed out that under the law prior to the 1945 Constitution the findings of fact by a commission had the same binding effect upon the appellate courts as the verdict of a jury, but now they are subject to direct as provided by law. The *Wood v. Wagner Electric Corporation* case held this means certiorari, etc. See note 216, *supra*.

221. 226 S.W. 2d 358 (Mo. 1950).

222. *King v. F. W. Woolworth*, 132 S.W. 2d 668 (Mo. 1939); *Hickman v. Metropolitan Life Ins. Co.*, 238 Mo. App. 588, 185 S.W. 2d 840 (1945).

223. 235 S.W. 2d 863 (Mo. 1951).

224. *Shroyer v. Missouri Livestock Commission Co.*, 332 Mo. 1219, 61 S.W. 2d 713 (1933).

225. In a later case, *Dittmeier v. Missouri Real Estate Commission*, 237 S.W. 2d 201 (Mo. 1951), the court cited Art. V, Sec. 22 of the 1945 Constitution and the *Wood v. Wagner Electric Company* case and then held, citing the *Schmidt v. Rice-O'Neill Shoe Co.* case, *supra*, that to determine "the sufficiency of the evidence it must be considered in the light most favorable to the finding, together with all reasonable inferences that may be drawn therefrom that seem to support it, and the court must disregard all opposing and unfavorable evidence." It is curious that this inconsistency has not been a ground for certification of a case to the Missouri Supreme Court.

226. 209 S.W. 2d 548 (Mo. 1948).

227. 331 Mo. 280, 53 S.W. 2d 236 (1932).

and the *Wood* and *Seabaugh* cases. That case held that if there were substantial evidence supporting the commission's award, the court, on appeal, would not set aside the award as being against the weight of the evidence. Of this the *Cheek* case said it ". . . is no longer the law when the court reviewing all of the evidence finds that the award is clearly against the overwhelming weight of the evidence."<sup>228</sup>

Beyond the "substantial evidence upon the whole record" provision, the Federal Act allows review of the whole record "or such portions thereof as may be cited by any party." This is the extent of the treatment by the Federal Act of the content requirement of a record. The Missouri Act is quite profuse on this point.<sup>229</sup> The record may consist of such parts of the record before the commission as the parties by written stipulation may agree upon; or an agreed statement of the case by all of the parties and approved by the agency; or the complete record as taken by the agency.<sup>230</sup> It will be recalled that the Act requires that records and documents of the agency used in the case be made a part of the record, and this section provides that such documents and any others may be abridged by omitting irrelevant and formal parts. Also, any matter not necessary to the disposition of the case may be omitted. The decision, order, and findings of fact and conclusions of law are, of course, required to be included in the record.<sup>231</sup> It is not made clear whether the agency is to delete those matters allowed by the act to be omitted. It is provided, however, that the agency shall decide the correctness of a record and certify it accordingly when any party fails or refuses to agree to the correctness thereof,<sup>232</sup>

228. See also, *Henderson v. Laclede-Christy Clay Products Co.*, 206 S.W. 2d 673 (Mo. 1948) where it was held that under Art. V, § 22 of the 1945 Constitution "the appellate court is not bound by the former rule that it must uphold the finding and award of the commission if there is *any* substantial evidence to support it."

For other Compensation cases see, *Coleman v. Brown Strauss*, 210 S.W. 2d 537 (Mo. 1948); *Crawford v. A. J. Sheahan Granite*, 211 S.W. 2d 52 (Mo. 1948); *Brown v. Weber Implement & Auto Co.*, 357 Mo. 1, 206 S.W. 2d 350 (1947); *Goetz, v. J. D. Carson Co.*, 357 Mo. 125, 206 S.W. 2d 530 (1947); *Laforge v. Coglizer Tent & Awning Co.*, 205 S.W. 2d 957 (Mo. 1947); *International Shoe Co. v. Moore*, 205 S.W. 2d 930 (Mo. 1947); *Buecker v. Roberts*, 200 S.W. 2d 529 (Mo. 1947); *Nick v. International Shoe Co.*, 200 S.W. 2d 590 (Mo. 1947); *Rogers v. Reorganization Inv. Co.*, 200 S.W. 2d 563 (Mo. 1947).

See also, *Brook's Inc. v. Claywell*, 215 Ark. 913, 224 S.W. 2d 37 (1949) ". . . The commission's finding on the question of fact will be given the same finality as the verdict of a jury and be affirmed, if there is sufficient competent testimony to support the finding." *Flatt v. Tennessee Handle Co.*, 190 Tenn. 190, 228 S.W. 2d 110 (1950) If the findings are supported by inferences fairly drawn from the evidence, the reviewing court will not disturb the award even though the evidence is susceptible of opposing inferences. *Frennie May Coal Co. v. Snow*, 312 Ky. 580, 229 S.W. 2d 56 (1950). By statute the findings of fact, present and foreseeable, must be given greater "consideration" by the courts than the verdict of a jury. *Hunt's Adm'x., v. Fugua*, 311 Ky. 497, 224 S.W. 2d 917 (1949); *Mechanics Lumber Co. v. Roak*, 216 Ark. 242, 224 S.W. 2d 806 (1949).

229. See § 10d, Missouri Act.

230. The Model Act provides that a copy of the entire record be certified; but, by stipulation of all parties to the review proceeding, the record may be shortened.

231. Not so in the Model Act.

232. The Model Act does not have a similar provision.

but also it is within the power of the reviewing court to require or permit subsequent corrections of or additions to the record.<sup>233</sup> It falls upon the plaintiff, where judicial review is allowed, to file the record, or the agency may file it at the request of the plaintiff.

It may be said that the Federal Act merely recognizes the existence of a trial de novo, rather than authorizes it. It simply provides that the agency shall hold unlawful and set aside agency action, findings, and conclusions found to be unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court. The Missouri Act, on the other hand, specifically provides for such inquiry into the facts when the action by the agency does not involve the exercise of discretion in the light of the facts.<sup>234</sup> This would be where the agency is allowed to apply the law to the facts. The court is not required to weigh the facts for itself, but it may do so. And there is provision for the further reception of new evidence during the review proceeding in such case, or in other cases where the court is entitled to weigh the facts for itself. There is a limitation on the reception of new evidence, however.<sup>235</sup> The court must find that, by the exercise of reasonable diligence, the evidence could not have been produced or was improperly excluded at the hearing before the agency.<sup>236</sup>

Where the court, under the Missouri Act, may not weigh the evidence for itself and it finds that there is competent and material evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded at the hearing before the agency, it may remand the case to the agency for reconsideration in the light of the new evidence.<sup>237</sup> The Federal Act does not have a similar provision. In any case the court is empowered to hear and consider the evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record.<sup>238</sup>

As seen *supra*, under the Missouri Act a court may render judgement affirming, reversing, or modifying the agency's order. Modification here does not mean an uncontrolled substitution of the court's opinion for that of the agency, for it is admonished not to substitute its discretion for the discretion legally vested in the agency. Beyond this, the court may remand the case for further consideration by the agency in the light of the court's opinion and judgement, and it may order the agency to take such further action as may be proper to require in the case.<sup>239</sup>

The Federal Act requires the courts to take "due account" of the rule of preju-

233. There is similar provision in the Model Act.

234. See § 10g, Missouri Act.

235. See § 10h, Missouri Act.

236. There is nothing in the Model Act concerning these matters of review where there is no discretion in the agency, or as to the reception of new evidence by the reviewing court.

237. The Model Act is the same to this extent.

238. The Model Act is the same and provision is made for a hearing of oral argument and reception of written briefs by the court.

239. The Model Act provides for the court's affirmance of the decision or it may remand the case for further proceedings. It may reverse or modify the decision on the ground of adverse action by the agency.

dicial error. In *United States, ex rel., Lindenau v. Watkins*<sup>240</sup> it was said, "The court understands this provision [on prejudicial error] to mean that unless an error is deemed prejudicial, the action of the administrative agency should not be set aside merely because an error was committed by it." The courts also hold that there can be no prejudice claimed when irrelevant or incompetent evidence is admitted by the examiner unless it is also shown that the agency relied upon it. Thus, there must be reliable, probative, and substantial evidence, but the presence of unreliable and incompetent evidence is not necessarily prejudicial.<sup>241</sup>

Unlike the Federal Act, the Missouri Act<sup>242</sup> provides for appeals from judgments of the reviewing court as in any other civil case.<sup>243</sup>

One other matter remains to be considered concerning the Federal Act. Section Eleven was enacted to provide a uniform rule for the appointment, compensation, et cetera of trial examiners. They are to be under the civil service laws, and not those involving individual agencies. "The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation, in which examiners are mere employees of an agency, and other proposals for a completely separate 'examiners pool' from which agencies might draw for hearing officers."<sup>244</sup>

Actual practice has not seen the wishes and intent of Congress carried out as yet, however. Charles S. Rhyne<sup>245</sup> observes, "In carrying out the Act's provisions on examiners, great controversy arose over whether incumbents should be 'covered in' or tested as to their integrity and ability. The Civil Service Commission shirked its responsibilities and the first year passed with nothing accomplished. Under prodding from the American Bar Association and Congress, the Commission finally issued regulations governing appointment, compensation and removal of hearing examiners. To insure elimination of incompetents among incumbents of examiner positions the Commission appointed an outstanding group of consultants. . . . This distinguished consultant group spent months of effort at this task only to have their recommendations so ignored by the Commission as to justify their resignation with the statement as to the Commission's actions that 'The result has dissipated the long and uncompensated services of the consultants.'

"The Civil Service Commission seems so imbued with the importance of administrators and prosecutors and so little acquainted with the high function performed by examiners in making decisions on whether the administrators and prosecutors have acted fairly in accordance with legal requirements that it either

240. 73 F. Supp. 216 (S.D. N. Y. 1947).

241. It was stated in H. R. REP. No. 1908, 79th Cong., 2nd Sess. (1946), in its discussion of § 10e of the Federal Act, that ". . . a procedural omission which has been cured prior to the finality of the action involved by affording the party the procedure to which he was originally entitled is not reversible error."

242. See § 10j, Missouri Act.

243. The Model Act is the same.

244. SEN. DOC. No. 248, 79th Cong., 2nd Sess., p. 215 (1946).

245. Rhyne, *The Erosion of the Administrative Procedure Act*, 37 A. B. A. J. 641, 703 (1951).



cannot or will not assign to hearing examiners the importance which their function demands. The Commission evidently let administrators talk it into allowing administrators to determine all matters relative to promotions of hearing examiners rather than carry out its duties under the Act. The Attorney General of the United States then rendered an opinion on February 23, 1951, in which he held in substance that this abrogation of duty by the Commission is a violation of the Act."

JACK L. BRANT

---

## APPENDIX I

### ADMINISTRATIVE PROCEDURE ACT

(Public Law 404, 79th Congress, 2d Session, Chapter 324)

#### TITLE

Section 1. This Act may be cited as the "Administrative Procedure Act."

#### DEFINITIONS

Section 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) PERSON AND PARTY.—"Person" includes individuals partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency names or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices facilities, appliances, services or allowances therefor or of valuations, costs, or accounting or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any

agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process limitation amendment, modification, or conditioning of a license.

(f) **SANCTION AND RELIEF.**—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) **AGENCY PROCEEDING AND ACTION.**—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

#### PUBLIC INFORMATION

Section 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency—

(a) **RULES.**—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its cultural and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests, (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and serve upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure so published.

(b) **OPINIONS AND ORDERS.**—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) **PUBLIC RECORDS.**—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

#### RULE MAKING

Section 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts—

(a) **NOTICE.**—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the

subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) **PROCEDURES.**—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **EFFECTIVE DATES.**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) **PETITIONS.**—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

#### ADJUDICATION

Section 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) **NOTICE.**—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) **PROCEDURE.**—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) **SEPARATION OF FUNCTIONS.**—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer,

employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommend decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) **DECLARATORY ORDERS.**—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

#### ANCILLARY MATTERS

Section 6. Except as otherwise provided in this Act—

(a) **APPEARANCE.**—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) **INVESTIGATIONS.**—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) **SUBPENAS.**—Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) **DENIALS.**—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

#### HEARINGS

Section 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) **PRESIDING OFFICERS.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in the decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) **HEARING POWERS.**—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement of simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) **EVIDENCE.**—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) **RECORD.**—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

#### DECISIONS

Section 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) **ACTION BY SUBORDINATES.**—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by

rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for the initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) **SUBMITTALS AND DECISIONS.**—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

#### SANCTIONS AND POWERS

Section 9. In the exercise of any power or authority—

(a) **IN GENERAL.**—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) **LICENSES.**—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

#### JUDICIAL REVIEW

Section 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) **RIGHT OF REVIEW.**—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) **FORM AND VENUE OF ACTION.**—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of

prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) **REVIEWABLE ACTS.**—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) **INTERIM RELIEF.**—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) **SCOPE OF REVIEW.**—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

#### EXAMINERS

Section 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally

or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purpose of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses of records, and pay witness fees as established for the United States courts.

#### CONSTRUCTION AND EFFECT

Section 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946.

---

#### APPENDIX II

#### MISSOURI ADMINISTRATIVE REVIEW ACT

[Mo. Rev. Stat. c.536 (1949)]

Section 1. Definition of terms.—For the purpose of this Act:

(a) "Agency" means any administrative officer or body existing under the constitution or by law and authorized by law to make rules or to adjudicate contested cases.

(b) "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the legal rights or privileges of, or procedures available to, the public.

(c) "Contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by statute to be determined after hearing.

Section 2. Rules to be filed in office of secretary of state—effective date of adopted rules.—(a) Each state agency shall file forthwith in the office of the Secretary of State a certified copy of each rule adopted by it, including all rules now in effect. The Secretary of State shall keep a permanent register of such rules open to public inspection.

(b) Each rule hereafter adopted shall become effective ten days after such filing unless a later date is required by statute or specified in the rule.

Section 3. Monthly bulletin setting forth rules—compilation of all rules—supplements and revisions every two years—payment of costs of publication and



mailing costs.—(a) For the state agencies there shall be a monthly bulletin in which it shall set forth the text of all rules filed during the preceeding month, excluding rules now in effect.

(b) The proper state officer shall, as soon as possible after the effective date of this act, compile, index, and publish all rules adopted by each agency and remaining in effect. Compilations shall be supplemented or revised as often as necessary, and at least once every two years.

(c) Bulletins and compilations shall be made available upon request to state and local officials free of charge, and to other persons at a price fixed by the proper state authority to cover publication and mailing costs. The costs of such printing and publication shall be paid out of the funds for the operation of the agency filing such rules.

Section 4. Repeal of rule by petition.—Any person may petition an agency requesting the promulgation, amendment, or repeal of any rule.

Section 5. Declaratory judgments respecting the validity of rules.—The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented. The venue of such suits against agencies shall, at the option of the plaintiff, be in the Circuit Court of Cole County, or in the county of the plaintiff's residence, or if the plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office. Nothing herein contained shall be construed as a limitation on the declaratory or other relief which the courts might grant in the absence of this section.

Section 6. Informal disposition of case by stipulation, consent order, or default, or by agreed settlement.—Prior to the final disposition of any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice, but this shall not preclude the informal disposition of such cases by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Unless otherwise agreed by all parties each agency shall cause all proceedings in hearings before it in contested cases to be taken down stenographically by a competent stenographer. Any party may have a copy of all or any part thereof upon paying the proper charges therefor.

Section 7. Records and documents of agency may be presented as evidence—presentation of technical or scientific facts in contested case.—In contested cases:

(a) Records and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence.

(b) Agencies shall take official notice of all matters of which the courts take judicial notice. They may also take official notice of technical or scientific facts, not judicially cognizable, within their competence, if they notify the parties, either during a hearing or in writing before a hearing or in tentative findings made after hearing of the facts of which they propose to take such notice and give the parties reasonable opportunity to contest such facts or otherwise show that it would not be proper for the agency to take such notice of them.

Section 8. Evidence to be heard by all officials of the agency—exception.—Whenever in a contested case, all of the officials of the agency who are to render the final decision do not hear or read the evidence, such decision shall not be rendered by the agency until each party to the proceedings has been afforded an opportunity to present arguments, either oral or written, to all of the officials who are to render the decision. All of the officials who are to render the decision shall, before deciding the case, personally consider the whole record or such portions

thereof as may be cited by the parties and shall personally consider any oral or written arguments presented by either of the interested parties. The parties may by written stipulation waive compliance with this section.

Section 9. Decisions in writing.—Every decision and order in a contested case shall be in writing, and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order. Immediately upon deciding any contested case the agency shall give written notice of its decision by delivering or mailing such notice to each party, or his attorney of record, and shall upon request furnish him with a copy of the decision, order, and findings of fact and conclusions of law.

Section 10. Appeal from decision—court may order action by the agency—petition for review of proceedings—record of case to be filed in reviewing court—no jury—additional evidence—power of court in decision.—(a) Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in this section, unless some other provision for judicial review is provided by statute; *provided, however*, that nothing in this act contained shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section. Unreasonable delay on the part of any agency in deciding any contested case shall be grounds for an order of the court either compelling action by the agency or removing the case to the court for decision.

(b) Proceedings for review may be instituted by filing a petition in the circuit court or court of common pleas of the county of the plaintiff's residence within thirty days after the mailing or delivery of the notice of the agency's final decision. Such petition may be filed without first seeking a rehearing, but in cases where agencies have authority to entertain motions for rehearing and such a motion is duly filed, the thirty-day period aforesaid shall run from the date of the delivery or mailing of notice of the agency's decision on such motion. No summons shall issue in such case, but copies of the petition shall be delivered to the agency and to each party of record in the proceeding before the agency or to his attorney of record, or shall be mailed to the agency and to such party or his said attorney by registered mail, proof of such delivery or mailing shall be filed in the case. The venue of such cases shall, at the option of the plaintiff, be in the Circuit Court of Cole county, or in the county of the plaintiff or of one of the plaintiff's residence, or if any plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office. The court, in its discretion, may permit other interested persons to intervene.

(c) Pending the filing and final disposition of proceedings for review under this section, the agency may stay the enforcement of its order and may temporarily grant or extend relief denied or withheld. Any court in which such proceedings for review may be pending may issue all necessary and appropriate process to stay or require the agency to stay the enforcement of its order or temporarily to grant or extend or require the agency temporarily to grant or extend relief denied or withheld, pending the final disposition of such proceedings for review. Such stay or other temporary relief by a reviewing court may be conditioned upon such terms as shall appear to the court to be proper. No such stay or temporary relief shall be granted by a reviewing court without notice, except in cases of threatened irreparable injury; and when in any case a stay or other temporary relief is granted without notice the court shall then make an

order, of which due notice shall be given, setting the matter down for hearing as promptly as possible on the question whether such stay or other temporary relief shall be continued in effect. No such stay or other temporary relief shall be granted or continued unless the court is satisfied that the public interest will not be prejudiced thereby.

(d) Within thirty days after the filing of the petition or within such further time as the court may allow, the record before the agency shall be filed in the reviewing court. Such record shall consist of any of the following: (a) such parts of the record, proceedings and evidence before the agency as the parties by written stipulation may agree upon; (b) an agreed statement of the case, agreed to by all parties and approved as correct by the agency; (c) a complete transcript of the entire record, proceedings and evidence before the agency. Evidence may be stated in either question and answer or narrative form. Documents may be abridged by omitting irrelevant and formal parts thereof. Any matter not essential to the decision of the questions presented by the petition may be omitted. The decision, order and findings of fact and conclusions of law shall in every case be included. The record filed in the reviewing court shall be properly certified by the agency, and shall be typewritten, mimeographed, printed or otherwise suitably reproduced. In any case where papers, documents or exhibits are to be made a part of the record in the reviewing court, the originals of all or any part thereof, or photostatic or other copies which may have been substituted therefor, may, if the agency permits, be sent to the reviewing court instead of having the same copied into the record. In any case where any party fails or refuses to agree to the correctness of a record, the agency shall decide as to its correctness and certify the record accordingly. If any party shall be put to additional expense by reason of the failure of another party to agree to a proper shortening of the record, the court may tax the amount of such additional expense against the offending party as costs. The record to be filed in the reviewing court shall be filed by the plaintiff, or at the request of the plaintiff shall be transmitted by the agency directly to the clerk of the reviewing court and by him filed; *provided* that when original documents are to be sent to the reviewing court they shall be transmitted by the agency directly, as aforesaid. The court may require or permit subsequent corrections of or additions to the record.

(e) The court shall hear the case without a jury and, except as otherwise provided in subsection (h) of this section, shall hear it upon the petition and record filed as aforesaid.

(f) The inquiry may extend to a determination of whether the action of the agency

- (1) is in violation of constitutional provisions;
- (2) is in excess of the statutory authority or jurisdiction of the agency;
- (3) is unsupported by competent and substantial evidence upon the whole record;
- (4) is, for any other reason, unauthorized by law;
- (5) is made upon unlawful procedure or without a fair trial;
- (6) is arbitrary or capricious;
- (7) involves an abuse of discretion.

(g) Whenever the action of the agency being reviewed does not involve the exercise by the agency of administrative discretion in the light of the facts, but involves only the application by the agency of the law to the facts, the court may weigh the evidence for itself and determine the facts accordingly. The law applied by the agency as aforesaid may include the agency's own rules. In making such determination the court shall give due weight to the opportunity of the agency to observe the witnesses, and to the expertness and experience of the particular agency.

(h) Wherever under subsection (g) of this section or otherwise the court is entitled to weigh the evidence and determine the facts for itself, the court may hear and consider additional evidence if the court finds that such evidence in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the agency. Wherever the court is not entitled to weigh the evidence and determine the facts for itself, if the court finds that there is competent and material evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded at the hearing before the agency, the court may remand the case to the agency with directions to reconsider the same in the light of such evidence. The court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record.

(i) The court shall render judgment affirming, reversing, or modifying the agency's order, and may order the reconsideration of the case in the light of the court's opinion and judgment, and may order the agency to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in the agency.

(j) Appeals may be taken from the judgment of the court as in other civil cases.

Section 11. Effective date of act.—This Act shall take effect on July 1, 1946. Approved March 20, 1946.

---

### APPENDIX III

#### MODEL STATE ADMINISTRATIVE PROCEDURE ACT

##### Section 1. (Definitions.)

For the purpose of this Act:

(1) "Agency" means any state [board, commission, department, or officer], authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and except . . . [here insert the names of any agencies such as the parole boards of certain states, which, though authorized to hold hearings, exercise purely discretionary functions].

(2) "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public.

(3) "Contested case" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

##### Section 2. (Adoption of Rules.)

In addition to other rule-making requirements imposed by law:

(1) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this act. Such rules shall include rules of practice before the agency, together with forms and instructions.

(2) To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules with descriptive statements of its procedures.

(3) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall so far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing.

## Section 3. (Filing and Taking Effect of Rules.)

(1) Each agency shall file forthwith in the office of the [Secretary of State] a certified copy of each rule adopted by it, including all rules now in effect. The [Secretary of State] shall keep a permanent register of such rules open to public inspection.

(2) Each rule hereafter adopted shall become effective upon filing, unless a later date is required by statute or specified in the rule.

## Section 4. (Publication of Rules.)

(1) The [Secretary of State] shall, as soon as practicable after the effective date of this act, compile, index, and publish all rules adopted by each agency and remaining in effect. Compilations shall be supplemented or revised as often as necessary [and at least once every two years.].

(2) The [Secretary of State] shall publish a [monthly] bulletin in which he shall set forth the text of all rules filed during the preceding [month], excluding rules in effect upon the adoption of this act.

(3) The [Secretary] may in his discretion omit from the bulletin or the compilation rules the publication of which would be unduly cumbersome, expensive or otherwise inexpedient, if such rules are made available in printed or processed form on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(4) Bulletins and compilations shall be made available upon request to [officials of this state] free of charge, and to other persons at a price fixed by the [Secretary of State] to cover publication and mailing costs.

## Section 5. (Petition for Adoption of Rules.)

Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for their submission, consideration, and disposition.

## Section 6. (Declaratory Judgment on Validity of Rules.)

(1) The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the [District Court] of . . . County, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(2) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

## Section 7. (Petition for Declaratory Rulings by Agencies.)

On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. Such a ruling is subject to review in the [District Court] in the manner hereinafter provided for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

## Section 8. (Contested Cases; Notice, Hearing, Records.)

In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated

in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purposes of rehearing or court review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

Section 9. (Rules of Evidence: Official Notice.)

In contested cases:

(1) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

Section 10. (Examination of Evidence by Agency.)

Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. [This section shall not apply to the following agencies. . .].

Section 11. (Decisions and Orders.)

Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or to his attorney of record.

Section 12. (Judicial Review of Contested Cases.)

(1) Any person aggrieved by a final decision in contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act [but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief or trial de novo, provided by law].

(2) Proceedings for review shall be instituted by filing a petition in the [District Court] within [thirty] days after the service of the final decision of the agency. Copies of the petition shall be served upon the agency and all other parties of record. [In the manner provided by . . .]. The court, in its discretion, may permit other interested persons to intervene.

(3) The filing of the petition shall not stay enforcement of the agency decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(4) Within [thirty] days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(6) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedures before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(7) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

#### Section 13. (Appeals.)

An aggrieved party may secure a review of any final judgment of the [District Court] under this act by appeal to the [Supreme Court]. Such appeal shall be taken in the manner provided by law for appeals from the [District Court] in other civil cases.

#### Section 14. (Constitutionality.)

If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

#### Section 15. (Repeal.)

All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed, but such repeal shall not affect pending proceedings.

#### Section 16 (Time of Taking Effect.)

This act shall take effect. . . .

## POWER OF THE APPELLATE COURTS OF MISSOURI TO ORDER REMITTITURS IN UNLIQUIDATED DAMAGE CASES

The doctrine of remittitur is basically this: After the plaintiff has received a jury verdict in an action at law for damages, and after the defendant has asked for a new trial on the ground that the jury award was excessive, the court, if it believes the verdict *was* excessive, may order the plaintiff to remit the amount believed to be excessive, or submit to a new trial. This power of the court to reduce the award by consent of the plaintiff is another of the discretionary powers of the court; and it is exercised in both the *nisi prius*<sup>1</sup> and appellate courts of Missouri at the present time.<sup>2</sup> The primary reason set forth for its use is the expediency in court procedure which it affords.<sup>3</sup> In short, it is claimed to save the parties money, and the courts time. Thus, it is evident that the doctrine is procedural in nature and not substantive.<sup>4</sup>

The growth of the doctrine of remittitur in Missouri, as in other states, has been accompanied with heated controversies as will be seen. In view of the fact that the doctrine is used rather broadly, and in various types of cases, a full treatment here is impractical. Since the most contested aspect of remittitur has arisen out of unliquidated damage actions when the appellate courts order remittiturs, that aspect is chosen here for discussion. To narrow the scope of the article a bit more (but still keeping it representative of the most controversial aspect of remittitur), the discussion will be based mainly on the power of the Supreme Court of Missouri to order remittiturs in personal injury cases. This narrow aspect of the doctrine is also believed to be not only the most controversial, but also one of the most important, since cases of that nature are numerous and involve rather large damages in most cases.

The present attitude of the supreme court is that the appellate courts of Missouri have a very broad power to order remittiturs when they believe the damages awarded by the jury are excessive. This present attitude came about with no little difficulty,<sup>5</sup> and its soundness is not without question. In fact, when the action is on an unliquidated claim, there is serious doubt as to the constitutionality of remittitur when the constitution provides "that the right of trial by jury shall

1. *Williamson v. Wabash R. R.*, 355 Mo. 248, 196 S.W. 2d 129 (1946); *Jones v. Pennsylvania R. R.* 353 Mo. 163, 182 S.W. 2d 157 (1944); *Chitty v. St. Louis I. M. & S. Ry.*, 148 Mo. 64, 49 S.W. 868 (1899); *Loyd v. Hannibal & St. Joseph R. R.*, 53 Mo. 509, 514 (1873); *Schilling v. Speck*, 26 Mo. 489 (1858); *Hoyt v. Reed*, 16 Mo. 294, 301 (1852).

2. *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S.W. 332 (1910); *King v. Kansas City Life Insurance Co.*, 350 Mo. 75, 164 S.W. 2d 458 (1942); *Hemminghaus v. Ferguson*, 358 Mo. 476, 215 S.W. 2d 481 (1948); *Steuernagel v. St. Louis Public Service Co.*, 361 Mo. 1066, 238 S.W. 2d 426 (1951); *Counts v. Thompson*, 359 Mo. 485, 222 S.W. 2d 487 (1949); *Smiley v. St. Louis-San Francisco Ry.*, 359 Mo. 474, 222 S.W. 2d 481 (1949); *Chitty v. St. Louis, I. M. & S. Ry.*, 166 Mo. 435, 65 S.W. 959 (1902); *Nicholds v. Crystal Plate-Glass Co.*, 126 Mo. 55, 28 S.W. 991 (1894); *Burdick v. Mo. Pac. Ry.*, 123 Mo. 221, 27 S.W. 453 (1894).

3. *Chitty v. St. Louis I. M. & S. Ry.*, 148 Mo. 64, 49 S.W. 868 (1899).

4. *Counts v. Thompson*, 359 Mo. 485, 222 S.W. 2d 487 (1949).

5. *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S.W. 332 (1910).



remain inviolate."<sup>6</sup> This was not overlooked in the growth of remittitur in Missouri. In fact, in the early decisions around 1900, the court was very much in doubt as to the validity of such power in unliquidated damage actions.<sup>7</sup>

It is believed that the validity of any doctrine today is no stronger than its foundation, and the foundation of remittitur in personal injury actions is at least somewhat questioned. To illustrate some of the inconsistencies and doubts cast on the doctrine in its growth, a brief review of some of the more important early cases related to remittitur is in order.

In *Carr & Co. v. Edwards*,<sup>8</sup> a jury verdict was rendered in assumpsit for more than was sued for. The court reversed the judgment stating: "According to the uniform decisions at common law, if the jury find greater damages than the plaintiff has counted for, and the court render judgment according to such finding, it is error." This was a perfect place for the doctrine of remittitur to have been used, had it existed at common law; but it was not even mentioned. This is some indication at least that remittitur did not exist at common law even for liquidated claims.

In *Johnson v. Robertson*,<sup>9</sup> the jury gave more than sued for in an action in assumpsit. The court allowed a remittitur here, citing 2 Sellon's *Practice* 408, which seems to indicate the common law allowed remittitur around 1800 when the jury gave more than asked for.

In *Hayton v. Hope*,<sup>10</sup> the jury again gave more than sued for in an action on a liquidated claim. The court followed *Carr & Co. v. Edwards*, *supra*, stating that that decision represented the common law. Thus, again remittitur is questioned even in liquidated damage cases. At least it is apparent that there was some question as to the existence of the doctrine of remittitur at common law.

In *Atwood v. Gillespie*,<sup>11</sup> there was a 20c error by the jury which made the verdict that much in excess of what plaintiff asked for. The court there held that the practice in the past had been to reverse the judgment when it exceeded the demand, then allow the plaintiff to remit, then to enter judgment for the remainder. The court then held that the remittitur could be ordered before reversal when the verdict is higher than the claim. Note that this was still in the nature of a liquidated

6. Mo. CONST. Art. 13, § 8 (1820) provides: "That the right of trial by jury shall remain inviolate." Mo. CONST. Art. 1, § 17 (1865) provides: "That the right of trial by jury shall remain inviolate." Mo. CONST. Art. 2, § 28 (1875) as amended Nov. 6, 1900, provides: "the right of trial by jury, as heretofore enjoyed, shall remain inviolate;" Mo. CONST. Art. 1, § 22(a) provides: "the right of trial by jury, as heretofore enjoyed, shall remain inviolate;"

7. *Rodney v. St. Louis S.W. Ry.*, 127 Mo. 676, 30 S.W. 150 (1895); *Gurley v. Mo. Pac. Ry.*, 104 Mo. 211, 16 S.W. 11 (1891); *Hamilton v. Boggess*, 63 Mo. 233, 252 (1876); *Dorsey v. Barba*, 226 P. 2d 677 (Calif. 1951); *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S.W. 332 (1910), *dissent*; *Burdick v. Mo. Pac. Ry.*, 123 Mo. 221, 27 S.W. 453 (1894), *dissent*.

8. 1 Mo. 137 (1821).

9. 1 Mo. 615 (1826).

10. 3 Mo. 53 (1831).

11. 4 Mo. 423 (1836).

claim, in that plaintiff certainly was limited in his recovery to the amount he claimed.

In *Pratt v. Blakely*,<sup>12</sup> an action on a contract which contained no agreed price was reviewed by the court. The court held that the verdict was excessive and reversed the judgment for a new trial. It is submitted that this was an ideal place for the doctrine of remittitur to have been used, but again it was not mentioned. The court merely said that an excessive verdict was reversible error. It is suggested that the court in that case did not feel that remittitur could be used because no contract price had been fixed. The action was on an unliquidated claim, and the court might well have thought that remittitur would be usurping the function of the jury, for they sent it down for a new trial by jury.

In *Backwith, Adm'r of Smith v. Boyce*,<sup>13</sup> the jury again gave more than sued for, and the court reversed the judgment with no mention of remittitur. The court cited *Carr & Co. v. Edwards*, *supra*. This at least shows the hesitation of the supreme court to use the doctrine, for there was authority existing on which it could be used.

In *Hoyt v. Reed*,<sup>14</sup> the jury allowed an item for damages for which it was understood that defendant was not liable. This was clearly a mistake on the part of the jury. The court allowed a remittitur in the trial court level instead of a new trial. This is the first case located in which the supreme court held that the trial court could order a remittitur. The court cited *Johnson v. Robertson*, *supra*.

In *Woodson v. Scott*,<sup>15</sup> the court reviewed an action for slander in which the plaintiff received a verdict in the trial court. Defendant claimed the verdict was excessive, but the court said, "The juries of the country are the most appropriate judges of the amount of injury sustained; and to them is properly assigned the authority and right to assess the consequent amount of damages therefor." The court refused even to reverse on that ground. This case emphasizes the feeling of the court that the jury is better qualified than the court to determine damages when they are unliquidated, is in an action for slander. Although no mention is made of the constitutional guarantee of the right to a trial by jury, it is evident that the supreme court believed that right was here relevant. They refused to review the jury verdict as to excessiveness.

In *Goetz v. Ambs*,<sup>16</sup> the supreme court reviewed an action for assault and battery for the second time. Plaintiff received a jury verdict in the first trial which was remanded for a new trial on the ground that the verdict was excessive. Plaintiff received a larger verdict on the second trial, and defendant again urged excessiveness. The supreme court refused to order a new trial the second time even though the verdict was larger than the first one. The court indicated that verdicts from two juries meant something and said it would refuse to remand the case again unless

---

12. 5 Mo. 205 (1838).

13. 12 Mo. 440 (1849).

14. 16 Mo. 294 (1852).

15. 20 Mo. 272 (1855).

16. 27 Mo. 28 (1858). Previously remanded in 22 Mo. 170 (1855).

the verdict was so excessive as to indicate prejudice, passion or corruption.<sup>17</sup> It did not so find.

In *Whalen v. St. Louis, Kansas City & Northern Railway*,<sup>18</sup> plaintiff sued for personal injuries and received \$8000 in the trial court. Defendant alleged excessiveness on appeal, and the court said, "The plaintiff was awarded \$8000 as damages and we would have been better satisfied, under all the circumstances, if the amount had been less; but we still do not think that we would be justified in interfering." This appeal at least shows the attitude of the court concerning alleged excessiveness. It again indicated its hesitation in interfering with the jury verdict.

In *Smith v. Wabash, St. L. & P. Ry.*,<sup>19</sup> the supreme court in reviewing a personal injury case, held that a remittitur cured the claim of excessiveness. They relied on *Miller v. Hardin*,<sup>20</sup> which was an action for ejectment where the jury gave no damages, but the trial court did. This was error, but cured in the supreme court by a remittitur. It is submitted that the court failed to see the difference in the two cases. The case relied on was one where the trial judge erred in awarding damages himself, and the court held a remittitur cured such error. Such a holding had nothing to do with excessiveness, nor with interference with a jury verdict. Yet the court used that case as authority to order a remittitur in a personal injury case where the claim was excessiveness on the part of the jury. It certainly appears that the former case is very poor authority for this case. This illustrates the failure of the court in the early stages of the growth of remittitur to distinguish the different types of cases. It is believed that had the court been careful to review the precedents before using them for authority, they also would have seen that

---

17. "Passion, prejudice and bias" is closely related to remittitur, but must be carefully distinguished, because the treatment is different. Remittitur is held to cure an excessive verdict in that the jury is said to have made a "mistake." However, remittitur will not cure passion, prejudice and bias, for the jury verdict is based on "misconduct" rather than "mistake." Misconduct on the part of the jury can be cured only by a new trial. *Counts v. Thompson*, 359 Mo. 485, 222 S.W. 2d 487 (1949); *Chitty v. St. Louis I. M. & S. Ry.*, 148 Mo. 64, 49 S.W. 868 (1899); *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S.W. 332 (1910); *Burdick v. Mo. Pac. Ry.*, 123 Mo. 221, 27 S.W. 453 (1894). The danger of confusion is apparent when we find that passion, prejudice and bias can be inferred from the excessiveness of the verdict alone—(of course there are other ways in which it can be found). Remittitur, then, will cure excessiveness, but when the verdict is so excessive that passion, prejudice or bias can be inferred, remittitur no longer will cure the "misconduct." Rather a new trial is required. Earlier the supreme court held that both the trial courts and the appellate courts could infer passion, prejudice and bias merely from excessiveness. *Jones v. Pennsylvania R. R.*, 353 Mo. 163, 182 S.W. 2d 157 (1944); *Chitty v. St. Louis I. M. & S. Ry.*, 148 Mo. 64, 49 S.W. 868 (1899); *Hollenbeck v. Mo. Pac. Ry.*, 141 Mo. 97, 38 S.W. 723 (1897); *Goetz v. Ambs*, 27 Mo. 28 (1958). But of recent years, the court has held that *only* the trial court can so infer, and that the appellate courts can only review possible abuse of the trial court's use of its discretion in inferring same merely from the excessiveness of the verdict. *Naylor v. St. Louis Public Service Co.*, 235 S.W. 2d 72 (Mo. 1950); *Jones v. Pennsylvania R. R.*, 353 Mo. 163, 182 S.W. 2d 157 (1944).

18. 60 Mo. 323 (1875).

19. 92 Mo. 359, 4 S.W. 129 (1887)

20. 64 Mo. 545 (1877).

remittitur in a liquidated case is substantially different from the same in an unliquidated case. Thus, even though remittitur might have been allowed in liquidated cases at common law at the time our Constitution preserved the right to jury trial, that fact would not justify use of remittitur in unliquidated cases, for the two uses are different. In an action on a liquidated claim it is true that both parties have a right to a jury determination of the amount, but it can never be for more than is sued for or more than is owing. However, in the unliquidated claim, both parties have a right to jury determination of the amount due, because the jury determination of that amount is the *only* figure available. Thus, allowing a remittitur in both cases involves entirely different concepts and rights.

*Gurley v. Mo. Pac. Ry.*<sup>21</sup> was an action for personal injuries where the court very definitely declared that it had no power to order a remittitur in personal injury cases. It is believed that in this case the court fully recognized the distinction between liquidated and unliquidated claims with respect to ordering a remittitur on the ground of excessiveness. It is a well-reasoned decision and reviews the power of remittitur thoroughly. Up to this point the doctrine of remittitur was allowed to grow without much consideration, and certainly without any accuracy in distinguishing precedents. Here the court affirmatively reviews the problem, recognizing that the use of the doctrine has serious ramifications on the right to trial by jury. The court refused the doctrine in unliquidated claims where remittitur was requested at the appellate level. It is submitted that this decision is one which stirred up the conflict which followed shortly thereafter, since it was the first case to question seriously the doctrine and refuse it.

Three years later, *Burdick v. Mo. Pac. Ry.*<sup>22</sup> came before the court *en banc*. That decision held that the supreme court did have the power to order remittiturs in personal injury cases. However, the soundness of that decision is questioned. The decisions on which the court relied are not believed to support the holding. The decision tries rather unsuccessfully to distinguish *Gurley v. Mo. Pac. Ry.*, *supra*, which refused the doctrine. The authority cited consisted of *Loyd v. Hannibal & St. Joseph R. R.*,<sup>23</sup> *Waldhier v. Hannibal & St. Joseph R. R.*,<sup>24</sup> *Smith v. Wabash, St. L. & P. Ry.*, *supra*, and *Furnish et ux v. Mo. Pac. Ry.*<sup>25</sup> The *Loyd* case, *supra*, involved an order of remittitur at the trial level, and the supreme court held that cured the excessiveness. That case was not in point. The *Waldhier* case, *supra*, was one in which a trial court instruction was in error, and the supreme court ordered a remittitur to cure it. That case was not in point either, for the remittitur was not based on mistake of the jury, but rather of the judge. The *Smith* case, *supra*, as indicated above, was not a sound decision in that the decision which it used as authority was not in point, and entailed an entirely different

---

21. 104 Mo. 211, 16 S.W. 11 (1891).

22. 123 Mo. 211, 27 S.W. 453 (1894).

23. 53 Mo. 509 (1873).

24. 87 Mo. 37 (1885).

25. 102 Mo. 438, 13 S.W. 1044 (1890).

aspect of remittitur. Since that case was poorly reasoned, it is doubtful that it makes good authority for this case.

The court firmly indicated that the question was seriously controversial at the time, yet refused to review the authorities on both sides.

The dissenting opinion attacked the doctrine with as much fervor as the majority opinion had in affirming it, and is believed to contain somewhat better reasoning. It took the position that remittitur violated the constitutional provision that "the right of a trial by jury shall remain inviolate."<sup>26</sup> Further, the dissenting opinion stated that the court had consistently held that it could not review the facts as found by the jury.<sup>27</sup> Injury is a fact, thus the court could not review the amount thereof. In order to hold that the verdict was excessive, the court had to review the fact of amount of injury found by the jury. This could not be done.

Since the majority opinion relied on cases which were either unsound or not in point, it is believed that this case is not a good decision, especially so in view of the further fact that it was a 4-3 decision of the court *en banc*. The dissenting opinion would appear to be the better of the two. Yet, this case seems to represent the backbone of our remittitur doctrine today. It was used as sole authority in several cases. There are shifts back and forth later on, but this case was the first one really to affirm the doctrine.

Then one year after the *Burdick* case, *supra* came *Rodney v. St. Louis S.W. Ry.*<sup>28</sup> That was an *en banc* review of a holding of one of the divisions of the supreme court which had ordered a remittitur. The *en banc* decision affirmatively held that the supreme court did not have the power to order a remittitur in personal injury cases merely on the ground of excessiveness.

The foregoing decisions indicate the controversial group of cases with which our present supreme court must cope. It is not easy to bring those early decisions into accord, because some of them were not well-reasoned cases, nor did many of them recognize the subtle but important distinction between liquidated and unliquidated claims; and, as indicated, the court often used decisions affirming the power of the trial court to order remittitur as authority for the appellate court to order it. The supreme court must be commended for its adoption of a definite stand on the matter so that the practicing attorney will know what the law is. However, it is submitted that perhaps the court has inadvertently carried the doctrine too far. As a practical matter, the appellate courts today act as a reviewing jury when a personal injury case comes before them on appeal. They now hold that

26. Note 4, *Supra*.

27. *Jones v. Pennsylvania R. R.*, 353 Mo. 163, 182 S.W. 2d 157 (1944); *Smock v. White*, 27 Mo. 163 (1858); *Goetz v. Ambs*, 22 Mo. 170 (1855); "the juries of the country are the most appropriate judges of the amount of injury sustained; and to them is properly assigned the authority and right to assess the consequent amount of damages therefor"—*Woodson v. Scott*, 20 Mo. 272 (1855); "we wish it to be understood that it is not our province to determine facts, or review the findings of juries or courts on them, except in chancery cases"—*Hamilton v. Boggess*, 63 Mo. 233, 252 (1876).

28. 127 Mo. 676, 30 S.W. 150 (1895).

they can review the weight of the evidence, and that they can review facts as a result thereof.<sup>29</sup> They state that the parties should be afforded the experience of the court in determining the award for injuries.<sup>30</sup> They state it is their duty to keep the damages uniform by the use of remittitur.<sup>31</sup> In this respect the court has even gone so far as to *chart* injuries with amounts allowed therefor,<sup>32</sup> and to allow plaintiff no more than has been allowed in similar injuries before. This dangerously approaches putting a price on an arm or leg if lost, or an eye if damaged. Even if the loss of an arm, leg or eye results in the amount of pecuniary loss to every person (which it certainly does not), this practice is extremely poor in that no two persons *suffer* the same in the loss of an arm, leg, or an eye. Suppose two cases, each where a man loses a leg. In one, the man's leg is crushed between two freight cars. Plaintiff then has complications involving serious and painful infections and is hospitalized for some 18 months trying to save the leg. Finally, it must be amputated, and more infection brings added pain and suffering to plaintiff and required a series of subsequent amputations. Now in another case suppose plaintiff's leg is severed completely by a high-speed machine; he is treated with great success, and suffers very little pain following the accident. He is discharged from the hospital in some few months, having no complications. Can anyone say that these two men suffered *equally*, and that they should receive the same amount of money for their pain and suffering? I think not, yet the court has, as a practical matter, approached this result when it attempts to chart injuries and allow no more in the case before it than has been allowed before for similar injuries. Also we might ask if the leg of a man 90 years old, who is unable to work, is worth the same amount of money as the leg of a man 26 years old who has his life before him and is earning say \$350 a month. It certainly would be inequitable to limit the young man's recovery to the amount allowed the older man. Another aspect of trying to keep decisions uniform is that the rising cost of living has not been taken account of, even though lip service has been rendered it. When charting injuries 20 years ago, it is certainly not fair to limit similar injuries today to the amount allowed then. An extremely frank and factual article by Melvin Belli,<sup>33</sup> a very distinguished member of the California Bar, stresses the fact that the courts are slow in allowing larger verdicts to stand as the living expenses and wages go up.

29. *Hemminghaus v. Ferguson*, 358 Mo. 476, 215 S.W. 2d 481 (1948).

30. *Burdick v. Mo. Pac. Ry.*, 123 Mo. 221, 27 S.W. 453 (1894).

31. *Smiley v. St. Louis-San Francisco Ry.*, 359 Mo. 474, 222 S.W. 2d 481 (1949); *Joice v. Missouri-Kansas-Texas R. R.*, 354 Mo. 439, 189 S.W. 2d 568 (1945); *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W. 2d 603 (1945); *Willis v. Atchison, T. & S. F. Ry.*, 352 Mo. 490, 178 S.W. 2d 341 (1944); *Chitty v. St. Louis, I. M. & S. Ry.*, 166 Mo. 435, 65 S.W. 959 (1902); *Jones v. Thompson*, 353 Mo. 730, 184 S.W. 2d 407 (1944)—"It is very difficult for an appellate court to determine the amount to compensate plaintiffs in personal injury cases. . . . However, appellate courts should and do attempt to keep the amounts of verdicts somewhat uniform." (italics added)

32. *Chitty v. St. Louis, I. M. & S. Ry.*, 166 Mo. 435, 65 S.W. 959 (1901).

33. BELL, THE MORE ADEQUATE AWARD (1952). This edition is a sequel to Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951). The data will be kept current in the NACCA L. J.

The foregoing are some illustrations of the many dangers and inequities which accompany any attempt to keep the decisions uniform; therefore, it is submitted that this practice should not be followed dogmatically by the courts lest their attempt to deliver even justice will often result in gross injustices.

To illustrate the present attitude of the supreme court toward remittitur in personal injury cases, the following are arguments against remittitur with the answers the supreme court makes to them:

1. Remittitur violates the constitutional provision for a jury trial. (Under this argument, remittitur can be valid only if it existed at common law prior to our first constitution in 1820, because the right to trial by jury at that time was declared to remain "inviolable."<sup>34</sup> Likewise a procedural doctrine as remittitur cannot infringe on a substantive rule such as trial by jury.)<sup>35</sup>

*Court's Answer:* A. That remittitur existed at common law. (This, as indicated, is seriously questioned with respect to its use in unliquidated damage cases.)<sup>36</sup>

B. That the court isn't interfering with the jury since the court only sets maximum amount which the evidence will support.<sup>37</sup>

2. Remittitur should not be used if additur<sup>38</sup> is refused.

*Court's Answer:* Additur is different. To raise the amount on consent of defendant would be to allow something outside jury verdict while to lower it includes the valid part of what the jury has already allowed. The former would be acting as a jury, the latter not.

3. Remittitur is unduly coercive on the plaintiff.

*Court's Answer:* A. Plaintiffs originally wanted the doctrine of remittitur so as to prevent expense and delay of a new trial.<sup>39</sup>

B. Plaintiff must consent to remittitur before he is affected by it, thus no coercion. (Query)

To indicate the amount of use of remittitur in the supreme court from August 17, 1938 to March 12, 1951, the following figures are interesting by way of comparison:<sup>40</sup>

Total cases reversed .....	49
Total cases reversed and remanded .....	103
Total cases affirmed for defendant .....	129
Total cases affirmed for plaintiff .....	139

34. Note 4, *supra*.

35. CONST. Art. 5, § 5 (1945)—"The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination or witnesses, juries, the right of trial by jury, or the right of appeal."

36. *Steuernagel v. St. Louis Public Service Co.*, 361 Mo. 1066, 238 S.W. 2d 426 (1951).

37. *Counts v. Thompson*, 359 Mo. 485, 222 S.W. 2d 487 (1949).

38. Although additur has never been seriously pressed in Missouri, it is basically this: Plaintiff receives a verdict which is not adequate, and appeals for a new trial. The court raises the verdict on consent of defendant so that it is adequate.

39. Note 37, *supra*.

40. Figures obtained from the newly formed Missouri Association of Claimant's Attorneys, (MACA).

Total cases affirmed on remittitur	
(Not included in above figures) .....	59
Amount involved in cases reversed .....	\$ 794,273.90
Amount involved in cases reversed and remanded .....	1,292,911.00
Amount involved in cases affirmed .....	1,521,257.15
Amount involved in cases affirmed on remittitur .....	1,674,028.10
Total amount of remittitur ordered .....	496,675.10

These figures include only supreme court holdings. Since the decisions of that court influence the three courts of appeals, and also untold settlements, it is evident that the doctrine of remittitur has a profound influence in personal injury actions. It is of interest also to know that there is only *one* personal injury case in Missouri in which the appellate courts have allowed over \$50,000 to stand.<sup>41</sup>

In view of the questionable growth of remittitur, and the still existing doubts as to its validity in unliquidated actions,<sup>42</sup> it would seem that the court would be rather hesitant in using the doctrine. However, as the figures above indicate, the supreme court uses remittitur with ever increasing frequency, and for huge reductions of the jury verdicts.<sup>43</sup> One wonders how so many juries could be so badly mistaken in awarding damages.

SAMUEL R. GARDNER

---

A COMPARISON OF THE MODEL PROBATE CODE AND THE MISSOURI STATUTORY  
PROVISIONS FOR THE SURVIVING SPOUSE OF AN INTESTATE

Vernier has described the Missouri statutes providing for the surviving spouse of an intestate as "needlessly confused and complex" and "archaic."<sup>1</sup> This warrants a comparison of the Missouri statutes providing for the surviving spouse with those of the Model Probate Code. The Code was formulated "to meet the rapidly increasing demand for a coherent, efficient and economical probate system."<sup>2</sup> The authors of the Code did not intend for states to adopt it *in toto*. Uniformity was not its objective.<sup>3</sup> Professor Simes describes the Code as "a well to draw from."<sup>4</sup> One of the basic methods<sup>5</sup> used to arrive at model provisions to be included in the Code was to classify the various statutes on each subject, break them down, and then "pour the honey into one jug."

---

41. Note 37, *supra*.

42. "Personally, I think that the doctrine of remittitur in tort cases is without foundation in law or logic; but, being the established doctrine of the court, I bow to it." (italics added) Cook v. Globe Printing Co., 227 Mo. 471, 127 S.W. 332 (1910) (dissenting opinion).

43. \$100,000 ordered remitted from a verdict of \$150,000 in Cook v. Globe Printing Co., *supra* note 42.

1. 3 VERNIER, AMERICAN FAMILY LAWS § 189, p. 369, fn. 13, p. 370, fn. 14 (1935).

2. SIMES, MODEL PROBATE CODE 9 (1946).

3. SIMES, MODEL PROBATE CODE 10 (1946); Simes, *The Model Probate Code and Wisconsin Probate Laws*, 1948 Wis. L. Rev. 433, 436.

4. Simes, *The Model Probate Code and Wisconsin Probate Laws*, 1948 Wis. L. Rev. 433, 436.

5. SIMES, *op. cit. supra* note 2, at p. 10.



The Code is liberal in providing for the surviving spouse. The surviving spouse takes by descent under the Code:

Section 22. *General rules of descent.* The net estate of a person dying intestate shall descend and be distributed as follows:

(a) *Share of the surviving spouse.* The surviving spouse shall receive the following share:

(1) One-half of the net estate if the intestate is survived by issue; or

(2) The first five thousand dollars and one-half of the remainder of the net estate, if there is no surviving issue, but the intestate is survived by one or more of his parents, or of his brothers, sisters or their issue; or

(3) All of the net estate, if there is no surviving issue nor parent nor issue of a parent.

Section 3(r). "Net estate" refers to the real and personal property of a decedent exclusive of homestead rights, exempt property, the family allowance and enforceable claims against the estate.

Section 31 abolishes dower and curtesy. Section 42 provides that homestead shall be set apart "to the persons entitled thereto," and that it shall not be subject to the debts of the deceased except for liens thereon at the decedent's death. The Code does not suggest model maximum amounts and values of homestead. These are left to the determination of each state according to its local conditions. The Code merely points out that it is desirable to reserve a residence for the use of the intestate's family. Section 43 provides that the surviving spouse is entitled absolutely to whichever of the following is greater: (1) personalty which is exempt in the adopting state from execution or forced sale as to the head of a family, or (2) such other personalty as the surviving spouse may select not exceeding \$2000 in value, any portion or all of which may be taken in money. Section 44 provides that in addition to the right to homestead and exempt property the surviving spouse and children shall be entitled to a sum of money sufficient for their support and maintenance in the style to which they are accustomed during the period of administration. The allowance for support and maintenance is payable to the surviving spouse for the use of himself and the minor children, but if the surviving spouse and any minor child are not living together, the court may divide the allowance as it deems just and equitable. However, the allowance may not continue for more than one year if the estate is insolvent. Only administration and funeral expenses have priority over this allowance.<sup>6</sup>

In Missouri all of an intestate's real and personal estate undisposed of at his death will pass by descent to his surviving spouse, subject to the payment of his debts, if there be no children, or their descendants, father, mother, brother or sister, nor their descendants.<sup>7</sup> The surviving spouse is well provided for should he not take as heir of the intestate. The widow is usually entitled to dower which consists of a life estate in the third part of all the *lands*, including leaseholds of 20

6. SIMES, *op. cit. supra* note 2, § 142, p. 148.

7. MO. REV. STAT. § 468.010 (1949).

years or more, of which the deceased husband was seised at any time during the marriage, to which she has not relinquished her right to dower.<sup>8</sup> Curtesy has been abolished by statute in Missouri.<sup>9</sup> The widower is entitled to dower in lands of which his deceased spouse was seised at death.<sup>10</sup> Dower is subject only to liens on the realty for payment of the purchase price.<sup>11</sup> In lieu of dower the surviving spouse may elect to take a fee interest in the real estate of which the deceased spouse was seised at the time of his death. This is referred to as the statutory share. If the deceased leaves descendants and the spouse elects he will be entitled to a share in fee in the realty equal to the share of a child of the intestate.<sup>12</sup> The statute provides that if the intestate leaves descendants the spouse must have a child by such intestate living before he is entitled to elect, but the statute is construed so as to allow the spouse to elect if descendants of such child be living, although the child may not be living.<sup>13</sup> If there are no descendants, the spouse, if he elects, will be entitled to one-half of the realty in fee.<sup>14</sup> The statutory share is subject to the debts of the deceased spouse.<sup>15</sup> The widow, but not the widower, is entitled to homestead until she dies or remarries.<sup>16</sup> Homestead may not exceed the following amounts and values: 160 acres of land or \$1500 where the land is situated in the country; 18 sq. rods or \$3000 in cities having a population of 40,000 or more; 30 sq. rods or \$1500 in cities of 10,000 but less than 40,000 inhabitants; 5 acres or \$1500 in cities or incorporated towns and villages of less than 10,000 inhabitants.<sup>17</sup> Homestead is deducted from the widow's dower, and if homestead exceeds dower the widow gets no dower.<sup>18</sup> If the widow elects to take her statutory share she also gets homestead.<sup>19</sup> Homestead is not subject to the debts of the deceased husband or the widow.<sup>20</sup> The surviving spouse is entitled to the following allowances: books to the value of \$200; all the wearing apparel of the family, all implements and articles or domestic industry, all cloth-

8. *Id.* § 469.010.

9. *Id.* § 469.020.

10. Mo. REV. STAT. § 469.020 (1949) provides that the widower shall have the same share in the real estate of his deceased wife that is provided by law for the widow in the real estate of her deceased husband, with the same rights of election and the same limitations thereto. But, notwithstanding Mo. REV. STAT. § 469.020, a married woman's deed conveys a fee unincumbered by the inchoate rights of her husband even though the husband fails to join in the conveyance. *Scott v. Scott*, 324 Mo. 1055, 26 S.W. 2d 598 (1930); *Brook v. Barker*, 287 Mo. 13, 228 S.W. 805, 14 A. L. R. 347 (1921).

11. Mo. REV. STAT. § 469.040 (1949).

12. *Id.* § 469.080.

13. *Keeney v. McVoy*, 206 Mo. 42, 103 S.W. 946 (1907).

14. Mo. REV. STAT. §§ 469.090(2), 469.110, 469.130 (1949).

15. *Id.* §§ 469.080, 469.090(2).

16. *Id.* § 513.495.

17. *Id.* § 513.475. It is suggested that the Missouri homestead amounts and values are out of date today. Hess, *Homestead, Personal Property, and Wage Exemptions in Missouri and In Other States*, 12 Mo. L. Rev. 21 (1947).

18. Mo. REV. STAT. § 513.505 (1949).

19. *McFadin v. Board*, 188 Mo. 688, 87 S.W. 948 (1905).

20. Mo. REV. STAT. §§ 513.475, 513.495 (1949).

ing of the family, all household, kitchen and table furniture, including beds, bedsteads, and bedding, not to exceed the value of \$500; a sum of money for a year's support in the style to which the spouse is accustomed<sup>21</sup>; and other personal property which he may choose not to exceed the value of \$400.<sup>22</sup> Allowances are not subject to the debts of the deceased.<sup>23</sup> These provisions for allowances are comparable to Section 43 of the Code regarding exempt property and Section 44 regarding support and maintenance during the period of administration. In addition, the surviving spouse is entitled to a share in the personalty which belonged to the intestate at his death, subject to the payment of his debts, regardless of whether the spouse takes dower or elects the statutory share in lieu of dower. If the intestate leaves descendants, the surviving spouse is entitled to the same share as a child of the deceased;<sup>24</sup> if there are no descendants, the spouse takes one-half of the personalty.<sup>25</sup> The spouse's \$400 personal property allowance is deducted from his share in the personalty.<sup>26</sup> If the husband dies without leaving any descendants, and if the widow elects to take her statutory share, she is also entitled to "all the real and personal estate which came to the husband in right of the marriage, and to the personal property of the husband which came to his possession with the written assent of the wife, remaining undisposed of, absolutely, not subject to the payment of the husband's debts."<sup>27</sup> When the husband dies leaving issue of a former marriage only, the widow "may, in lieu of dower elect to take, in addition to her real estate, the personal property in possession of her husband that came to him in right of the wife by means of the marriage, or by her consent in writing, subject to the payment of the husband's debts."<sup>28</sup> It is with reference to these latter provisions that Vernier says, "Why such archaic provisions remain in the statutes is difficult of explanation."<sup>29</sup>

In order that they may be compared more readily, the substance of the Model Code provisions and the Missouri statutes in various situations is set forth in the table below.

As regards these provisions for the surviving spouse, the Code differs from the Missouri statutes in two main respects, one a matter of substance and the other a matter of form.

First, while Missouri has retained dower in the case of the widow and extended it to the widower in place of curtesy, the Code has abolished dower and curtesy and substituted therefor Sections 22(a)(1) and (2). The suggestion of abolishing dower might perhaps be shocking to many Missouri lawyers. Dower has always been a part of the law of Missouri. It was even a part of the law of the Missouri

---

21. *Id.* § 462.450.

22. *Id.* § 462.460.

23. *Id.* § 462.470.

24. *Id.* § 469.070.

25. *Id.* §§ 469.090(2), 469.130.

26. *Id.* § 462.470.

27. *Id.* §§ 469.090(1), 469.110.

28. *Id.* § 469.100.

29. *Supra*, note 1.

THE SHARE OF A SURVIVING SPOUSE IN THE ESTATE OF HIS INTTESTATE SPOUSE

<i>Where deceased is survived by:</i>	MODEL PROBATE CODE	MISSOURI STATUTES	
I. Descendants and surviving spouse.	(1) ½ of the net estate. Subject to debts of deceased. (2) Homestead. Not subject to debts of deceased. (3) Allowances. (a) personalty exempt from execution or forced sale as to head of a family, or in lieu thereof \$2000 in other personalty or in money or in personalty and money. (b) a sum of money for support and maintenance during period of administration—cannot extend more than one year if estate is insolvent. Not subject to debts of deceased.	<i>Spouse not electing</i> (1) Dower (life estate in ⅓ of realty) less homestead. Not subject to debts of deceased. (2) Homestead (if widow). Not subject to debts of deceased. (3) Allowances. (a) books—\$200 (b) furniture and clothes—\$500 (c) other personal property—\$400 (d) year's support in money. Not subject to debts of deceased. (4) Personal property—same share as child of the deceased, less the \$400 personal allowance of (3) (c) above. Subject to debts of deceased.	<i>Spouse electing</i> (1) Statutory share—a child's share in fee in the realty. Subject to debts of deceased. (2) Homestead (if widow). Not deducted from statutory share above. Not subject to debts of deceased. (3) Allowances. Same as where spouse does not elect. (4) Personal property. Same as where spouse does not elect. (5) If husband dies leaving issue of former marriage only, the widow also gets the personal property remaining undisposed of that came to the husband in right of the wife by means of the marriage, or by her consent in writing, subject to husband's debts.

1952]

## COMMENTS

353

II. No descendants, but there are parents, brothers and sisters as well as surviving spouse.	<p>(1) First \$5000 of the net estate. Subject to debts of deceased.</p> <p>(2) <math>\frac{1}{2}</math> of the remainder of the net estate. Subject to debts of deceased.</p> <p>(3) Homestead. Same as where descendants.</p> <p>(4) Allowances. Same as where descendants.</p>	Same as where there are descendants, spouse not electing, except that the spouse always takes $\frac{1}{2}$ of the personalty (less the \$400 allowance) instead of a child's share.	<p>(1) Statutory share <math>\frac{1}{2}</math> share in fee in the realty. Subject to debts of deceased.</p> <p>(2) Homestead (if widow). Not deducted from statutory share above. Not subject to debts of deceased.</p> <p>(3) Allowances. Same as where descendants, spouse not electing.</p> <p>(4) Personal property. Always <math>\frac{1}{2}</math> of the personalty (less the \$400 allowance). Subject to debts of deceased.</p> <p>(5) The widow also gets all the estate remaining undisposed of which come to the husband in right of the marriage, and all personalty which came to the husband with the written assent of the wife. Not subject to debts of deceased.</p>
III. No descendants, nor parents, brothers or sisters—only the surviving spouse.	All of the net estate. If estate insolvent, homestead if widow, and allowances.	All personalty and realty. If estate insolvent, dower, homestead if widow, and allowances.	All personalty and realty. If estate insolvent, homestead if widow, allowances, and provisions of paragraph (5), Division II above.

territory nine years before the English common law was adopted and thirteen years before the Missouri territory was admitted to statehood.<sup>30</sup> But eight states have in fact abolished dower.<sup>31</sup> This seems to be the modern trend. *Query* whether dower has outlived its usefulness.<sup>32</sup> One argument in favor of the abolition of dower is that dower in the majority of cases does not provide satisfactorily for the surviving spouse because the wealth of the decedent today is more likely to consist of personalty than realty.<sup>33</sup> This argument is not too strong in Missouri because the surviving spouse is entitled to a substantial share in the personalty in addition to dower. However, if there is more than one child of the deceased, the surviving spouse's share in the personalty decreases proportionately. There seems to be no good reason for varying the spouse's share of the personalty according to the number of children of the deceased. Another argument for abolition of dower is that real and personal property should descend and be distributed in exactly the same way and to the same persons.<sup>34</sup> This is the effect of Section 22(a)(1) and (2) of the Code. The strongest argument is that the widow's dower<sup>35</sup> tends to clog titles to real estate and make alienation more difficult.<sup>36</sup> No one would seriously suggest the abolition of dower without making a substitute provision for the surviving spouse. It is submitted that Section 22(a)(1) and (2) of the Code is a very adequate substitute for dower.

Secondly, the Code very clearly and concisely presents what the surviving spouse shall be entitled to take. With but few exceptions, the spouse takes under the Code substantially the same amount of property as he would be entitled to take under the Missouri statutes. Yet it is quite a struggle to ascertain what any particular surviving spouse is entitled to take under the Missouri statutes. Furthermore, some of the Missouri statutes have (justifiably) undergone rather strained constructions by the courts, making it dangerous to rely on the wording of the statutes without looking to the cases to ascertain the right of a surviving spouse. A vivid example is the statute heretofore mentioned providing that a spouse may not elect the statutory share where the intestate leaves descendants unless the surviving spouse has a child of the intestate living.<sup>37</sup>

There are other differences worth noting. The spouse takes property under Section 22 of the Code as an heir, whereas neither dower nor the statutory share in Missouri constitutes inheritance. Section 33(a) of the Code provides that property conveyed by one spouse with the intent to defraud the other spouse of

30. *Riddick v. Walsh*, 15 Mo. 519 (1852).

31. SIMES, MODEL PROBATE CODE 256 (1946).

32. Professor Simes believes that dower has outlived its usefulness. Simes, *The Model Probate Code and Wisconsin Probate Laws*, 1948 WIS. L. REV. 433, 438.

33. *Ibid.*; SIMES, MODEL PROBATE CODE 68 (1946).

34. Simes, *The Model Probate Code and Wisconsin Probate Laws*, 1948 WIS. L. REV. 433 at 444, 445.

35. A married woman's deed conveys her real estate free of her husband's dower even though the husband does not join in the conveyance or otherwise relinquish his dower. See note 10, *supra*.

36. *Supra*, note 33.

37. *Supra*, notes 12 and 13.

his marital rights will be deemed a testamentary disposition and may be recovered and applied to payment of the surviving spouse's share. Missouri case law is in agreement with Section 33(a) of the Code.<sup>38</sup> However, Section 33(b) provides that any gift made within two years of the time of the intestate's death raises a rebuttable presumption that the transfer or conveyance was made with intent to defraud the surviving spouse of his marital rights, Missouri has no such presumption.<sup>39</sup>

If the deceased spouse leaves a will, the Code provides that the surviving spouse may elect to take against the will. Missouri is in accord.<sup>40</sup> Section 32(a) of the Code provides as follows:

The surviving spouse may elect to receive the share in the estate that would have passed to him had the testator died intestate, until the value of such share shall amount to [\$5,000], and of the residue of the estate above the part from which the full intestate share amounts to [\$5,000], one-half the estate that would have passed to him had the testator died intestate.

Section 32(b) provides that the surviving spouse electing to take under Section 32(a) will be deemed to take by descent. Assume that the surviving spouse would be entitled to receive \$10,000 under Section 22(a) if the decedent died intestate. Further assume that the decedent died testate, but the surviving spouse elected to take against the will. In such a case, the surviving spouse would be entitled to take only \$7,500 instead of the \$10,000 to which he would have been entitled had the testator died intestate. The surviving spouse's share percentage wise is smaller the larger the net estate. The theory of Section 32 is that each spouse ordinarily contributes equally in the accumulation of small estates, but large estates are likely to be acquired from an ancestor. Therefore, in the case of large estates, the testator should have a free right of disposition after adequate provision is made for his spouse.<sup>41</sup> The Code also presents alternate provisions which may be substituted for Section 32.<sup>42</sup> The alternate provisions, which are more complicated, are offered for jurisdictions which, like New York, frequently handle estates of considerable size.<sup>43</sup> Under the Missouri statutes<sup>44</sup> and case law,<sup>45</sup> a spouse electing to take against the will is entitled to the same share he would be entitled to had the testator died intestate. The surviving spouse's share percentage wise is the same whether the decedent's estate is large or small. Hence in the case of large estates

38. *Dyer v. Smith*, 62 Mo. App. 606 (1895).

39. *Rice v. Waddill*, 168 Mo. 99, 67 S.W. 605 (1902).

40. *Register v. Hensley*, 70 Mo. 189 (1879); *Bretz v. Matney*, 60 Mo. 444 (1875).

41. SIMES, MODEL PROBATE CODE 71, 72 (1946).

42. *Id.* § 32, p. 70 (1946).

43. Simes, *The Model Probate Code and Wisconsin Probate Laws*, 1948 WIS. L. REV. 433, 438.

44. MO. REV. STAT. §§ 469.140, 469.150 (1949).

45. *Andrews v. Brenizer*, 230 S.W. 2d 787 (Mo. 1950); *Manufacturers Bank & Trust Co. of St. Louis v. Kunda*, 353 Mo. 870, 185 S.W. 2d 13 (1945); *Peugh v. McKinney*, 211 S.W. 83 (Mo. App. 1919); *Schuster v. Morton*, 187 S.W. 2 (Mo. 1916); *Egger v. Egger*, 225 Mo. 116, 123 S.W. 928 (1910); *Register v. Hensley*, 70 Mo. 189 (1879).

Section 32 of the Code gives the testator a freer right of disposition of his estate after adequate provision is made for his surviving spouse. Section 32 has another advantage over the Missouri rule in that it goes further in indirectly compelling a surviving spouse to take under the will of the deceased spouse where the testator makes adequate provision for the surviving spouse though perhaps not devising or bequeathing him more than he would get or as much as he would get had the testator died intestate. This minimizes the tendency of a surviving spouse to upset his deceased spouse's testamentary scheme.

In conclusion it may be said that three sections of the Code offer substantial improvement over the Missouri statutes providing for the surviving spouse—Sections 31, 22(a), and 32. Section 31 abolishes dower. The abolition of dower eliminates a prevalent clog on titles to real estate and enhances alienability. Section 22(a) provides a substitute for dower. It follows the policy of Missouri in liberally providing for the surviving spouse. Its clear and concise language is something to be hoped for in all statutes. Its scheme greatly simplifies the ascertainment of what any particular surviving spouse is entitled to take. Section 32 sets forth the share a surviving spouse electing against a will shall be entitled to take. It makes adequate provision for the surviving spouse, yet allows the decedent of a large estate to dispose of it pretty much as he chooses; furthermore, it minimizes the chance that a surviving spouse will upset his deceased spouse's testamentary scheme. It is suggested that Missouri "dip into the well" for Sections 31, 22(a), and 32 of the Model Probate Code.

LEONARD A. O'NEAL