Missouri Law Review

Volume 20
Issue 4 *November 1955*

Article 1

1955

Work of the Supreme Court for the Year 1954 - Statistical Survey, The

Leo E. Eickhoff Jr.

Missouri Law Review

Volume XX November, 1955 Number 4

THE WORK OF THE SUPREME COURT FOR THE YEAR 1954

STATISTICAL SURVEY

LEO E. EICKHOFF, JR.*

The statistical survey for 1954 shows that during the year 274 majority opinions were written by the judges and commissioners of the Supreme Court of Missouri.[1] This number has been exceeded only once since 1945, when 291 opinions were filed in 1952. The year's total showed an increase of four opinions from the preceeding year. Opinions on four appeals were rendered in the same opinion with four other appeals.[2]

In addition to the 274 majority opinions, there were 4 opinions concurring in result, 10 opinions dissenting from the majority and 1 opinion dissenting from the majority in part. There were 20 concurrences in result without opinion, 10 dissents without opinion, 2 dissents in part without opinion and 1 judge signified *dubitante* to a decision without a written opinion. There were 11 opinions written on motions and attached to case opinions. The court was able to all concur in 164 decisions.

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*Chairman, Board of Student Editors.

1. The Supreme Court list of majority opinions for 1954 showed that 292 opinions were written. Eleven of those opinions because of rehearing or transfer to the court *en banc* were not published in 1954. Seven divisional opinions that were written were transferred to the court *en banc* and were rewritten by another justice.

2. Total majority opinions for the preceeding years is as follows: 1935, 331; 1936, 369; 1937, 277; 1938, 303; 1939, 290; 1940, 282; 1941, 336; 1942, 293; 1943, 306; 1944, 264; 1945, 197; 1946, 181; 1947, 244; 1948, 254; 1949, 244; 1950, 265; 1951, 259; 1952, 291; 1953, 270.

During the year seven justices wrote 114 majority opinions, 7 dissenting opinions, and 1 opinion dissenting in part, and 4 concurring opinions. The six commissioners wrote 135 majority opinions and 3 dissenting opinions. Six special justices wrote 25 majority opinions. Court of Appeal Judges Lyon Anderson, Walter E. Bennick, James W. Broaddus, Nick T. Cave, Samuel A. Dew, and A. P. Stone, Jr. served as Special Judges for brief periods. Chief Justice Roscoe P. Conkling died October 28, 1954. Commissioner Henry J. Westhues became a Judge in Division One on December 20, 1954. Mr. Alden A. Stockard was appointed a Commissioner for Division Two on December 23, 1954.

TABLE I

NUMBER OF OPINIONS WRITTEN BY EACH DIVISION

En Banc	47
Division Number One	122
Division Number Two	105
Total	274

Table II represents a classification of the opinions according to their dominant issue. The selection of the most important issue was somewhat arbitrary, since nearly every case contained several issues.

TABLE II

TOPICAL ANALYSIS OF DECISIONS

Abatement and Revival	1
Administrative Law and Procedure	1
Adoption	2
Appeal and Error	11
Assault and Battery	1
Attorney and Client	1
Automobiles	3
Bail	1
Brokers	2
Carriers	4
Charities	2
Conflicts of Laws	1
Constitutional Law	5
Contempt	1
Contracts	4
Corporations	2

Counties	2
Courts	11
Criminal Law	18
Damages	4
Declaratory Judgment	3
Easements	2
Elections	3
Eminent Domain	5
Equity	1
Evidence (Rules)	17
Evidence (Sufficiency)	15
Executors and Administrators	2
Fraudulent Conveyances	1
Guaranty	1
Husband and Wife	1
Infants	1
Injunctions	1
Insurance	1
Interpleader	1
Joint Adventure	1
Judges	1
Judgments	3
Jury	1
Labor Relations	1
Landlord and Tenant	3
Libel and Slander	1
Malpractice	1
Mandamus	3
Master and Servant	12
Mortgages	1
Municipal Corporations	5
Navigable Waters	1
Negligence	8
Negligence (Automobiles)	19
New Trial	3
Officers	1
Parties	1
Pleading	1
Quo Warranto	3
Real Property	13
Res Ipsa Loquitur	3
Res Judicata	2
Schools and School Districts	1
Specific Performance	3
Statutes of Fraud	4
Statutes of Limitation	3

Street Railways	1
Taxation	1
Theaters and Shows	1
Trial	15
Trust	3
Vendor and Purchaser	1
Venue	2
Warehousemen	1
Wills	11
Witnesses	3
Workmen's Compensation	6
Total	274

Table III shows the disposition made of each case for which an opinion was written. The particular wording is basically that of the judge or commissioner writing the opinion. These figures include the disposition of the original proceedings handled by the court.

TABLE III

Disposition of Litigation

Alternative Writ Made Peremptory	2
Alternative Writ of Manadmus Made Premptory	2
Alternative Writ Quashed	1
Appeal Dismissed	5
Cause Transferred to Court of Appeals	14
Decree Affirmed	4
Decree Modified and as Modified Affirmed	1
Decree Reversed and Cause Remanded with Directions	2
Judgment Affirmed	136
Judgment Affirmed in Part, Reversed in Part and Remanded	1
Judgment Affirmed in Part, Reversed in Part and Remanded with Directions	3
Judgment Affirmed on Condition of Remittitur	10
Judgment and Decree Affirmed	1
Judgment of Disbarment Ordered	1
Judgment of Dismissal Affirmed	3
Judgment Modified and Affirmed as Modified	1
Judgment Reversed	5
Judgment Reversed and Cause Remanded	31
Judgment Reversed and Cause Remanded with Directions	16
Judgment Reversed and Defendant Ordered Discharged	1

Judgment and Decree Reversed and Cause Remanded with Directions	1
Order Affirmed	2
Order and Decree Affirmed	1
Order and Judgment Affirmed	1
Order Granting New Trial Affirmed and Cause Remanded	8
Order Granting New Trial Affirmed in Part and Reversed in Part	1
Order Granting New Trial Set Aside and Cause Remanded with Directions	3
Order Granting New Trial Set Aside and Judgment Reinstated	4
Order and Judgment Reversed and Cause Remanded with Directions	1
Ouster Denied	1
Peremptory Writ Issued	1
Preliminary Rule in Prohibition Made Absolute	3
Preliminary Rule in Prohibition Discharged	2
Provisional Rule in Prohibition Made Absolute in Part and Discharged in Part	1
Writ Ordered Quashed	1
Writ of Mandamus Ordered Quashed	1
Writ of Quo Warranto Ordered Quashed	1
Total	274

Table IV shows how the court disposed of motions which were presented subsequent to the decision, so far as may be ascertained from the reported opinions. Cases wherein rehearings or transfers were granted are not included.

TABLE IV

Motions Subsequent to Decision

Motion for Rehearing and to Correct Opinion Denied	1
Motion for Rehearing or to Modify Opinion Denied	2
Motion for Rehearing or to Modify Opinion or to Transfer to Court *En Banc* Denied	1
Motion for Rehearing or to Transfer to Court *En Banc* Denied	55
Motion for Rehearing or to Transfer to Court *En Banc* Denied and Opinion Modified	5
Motion for Rehearing or to Transfer to Court *En Banc* or to Reverse and Remand Denied	1

Motion to Modify Opinion Denied	1
Opinion Modified on Court's Own Motion	2
Rehearing Denied	25
Rehearing Denied and Opinion Modified	2
Total	95

APPELLATE PRACTICE

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

The troublesome question of appellate juridiction is still with us. The record for the year under review is eleven cases transferred to the court of appeals, two of them being retransfers after the court of appeals had first received the appeals and had transferred them to the supreme court. In one of them, *Heuer v. Ulmer*[1] where the claim of plaintiffs was for approximately $3,000.00 and defendant, by counterclaim, sought a judgment against plaintiffs for over $12,000.00, the jury found for defendant on plaintiffs' petition and for plaintiffs on defendant's counterclaim, and both parties appealed. When the record reached the court of appeals they filed a joint motion asking for transfer to the supreme court because the combined amount on the plaintiffs' claim and on the counterclaim was in excess of the monetary jurisdiction of the court of appeals. That motion was sustained;[2] but when the case reached the supreme court the defendant, by brief, informed the court that he was making no point on the counterclaim but had appealed only in order to protect the record in case the issues on plaintiffs' suit should be remanded for a new trial. Consequently, since the issue adversely ruled on the counterclaim was not presented in the supreme court on appeal it was regarded as abandoned, leaving the amount in dispute only the amount of plaintiffs' claim which was less than the monetary jurisdiction of the supreme court. Accordingly, the case was retransferred to the court of appeals.

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1. 273 S.W.2d 169 (Mo. 1954).
2. 264 S.W.2d 895 (Mo. App. 1954).

It is, of course, the rule that the amount in dispute must affirmatively appear from the record in order to give the supreme court, rather than the court of appeals, appellate jurisdiction. That is illustrated in *Baer v. Baer*,[3] a divorce decree, where the trial court allowed monthly alimony and the wife, on appeal, contended that the discussion of the trial court was abused in not ordering the wife alimony in gross in the sum of $75,000.00. Notwithstanding the fact that while the judgment is subject to modification by the court, or termination on the death of either party, or upon appellant's remarriage, the court holds that "none of these things may happen until after the installments accruing under the judgment appealed from equals or exceeds the amount claimed by appellant. Accordingly, we cannot say that definitely and certainly and regardless of contingencies the difference in the money value of the alimony claimed and the alimony granted exceeds the necessary jurisdictional amount." As a result, the case was transferred to the court of appeals for decision. Upon similar reasoning, the court also transferred the case of *State* ex rel *v. Drainage District*[4] where, although the District appealed from a condemnation award of $10,000, it was clear that the minimum amount conceded to be due on the condemnation left an amount in dispute less than that required to support the jurisdiction of the supreme court. So, also, in *Kansas City v. National Engineering Company*[5] and *State* ex rel *State Highway Commission v. Schade*,[6] appeals from condemnation awards where the appellant claimed less than $7500.00 more than had been awarded him did not involve the requisite jurisdictional amount and those cases, also, were transferred.

The existence of a constitutional question as the basis for appellate jurisdiction in the supreme court must also be firmly established by a record showing that such question was raised at the first available opportunity, that the constitutional provision claimed to have been violated was then specifically designated, that the facts are such as to show such violation, and that the question has been preserved throughout the record for appellate review. None of those requirements were met in the case of *State* ex rel *Thompson v. Roberts*,[7] and that case was transferred to the court of appeals. In the opinion it is pointed out that

3. 274 S.W.2d 298 (Mo. 1954).
4. 271 S.W.2d 525 (Mo. 1954).
5. 265 S.W.2d 384 (Mo. 1954).
6. 265 S.W.2d 383 (Mo. 1954).
7. 264 S.W.2d 314 (Mo. 1954).

"this is not to place undue emphasis upon the technicalities involved in jurisdictional problems, the courts of appeal are courts of general jurisdiction, and this court has such limited jurisdiction as is specifically conferred." Again, in *McClard v. Morrison*[8] an appeal from a judgment awarding the landowners no damages in an action to establish a private roadway across the property of an adjoining landowner, the court held that it was too late to complain, for the first time in the motion for new trial, that constitutional rights were violated; and further held that the claim that the statute permitting an easement to be established across appellant's land without monetary compensation was taking property for public or private use without just compensation was, in reality, not a question of the constitutionality of the statute but only of an erroneous result in the very judicial procedure in which they joined without objection. Holding, further, that the action did not involve title to real estate in the jurisdictional sense, the case was transferred to the court of appeals.

In *Stewart v. Stewart,*[9] the court again applies the well established rule that for the supreme court to have jurisdiction on the ground that title to real estate is involved "the title must be in dispute, that is, there must be a title controversy to be settled", and held that title to real estate is not involved in the jurisdictional sense where the suit is one in partition and the question to be determined is the manner in which the partition is to be accomplished. The court also held that where the object of the suit is not to obtain a money judgment, but other relief, the amount in dispute for jurisdictional purposes is determined by the value in money to the plaintiff of the relief sought, or the loss to the defendant should the relief be granted and that unless there is an affirmative showing in the record that such amount is in excess of the monetary jurisdiction of the supreme court it is without jurisdiction on that ground. The Court also held, in *Reece v. VanGilder*[10] that it does not have jurisdiction of a suit in equity to recover a money judgment and to have that judgment declared a special lien against the real estate and for foreclosure of the lien, on the ground that title to real estate is involved. That appeal had been transferred to the supreme court by the Kansas City Court of Appeals[11] on the ground that the decree appealed

8. 273 S.W.2d 225 (Mo. 1954).
9. 269 S.W.2d 49 (Mo. 1954).
10. 272 S.W.2d 177 (Mo. 1954).
11. 264 S.W.2d 893 (Mo. App. 1954).

from granted to the plaintiff a life estate in the house and an easement over the lands to a well on defendant's property, and that these elements of the case involved title to real estate. The supreme court, however, did not agree because, under the record, plaintiff's did not appeal from the decree which gave them a life estate only in the land on which the house they built was situated, and defendant conceded in answer, and also in her brief, that the plaintiff had a life estate. The fact that the money judgment was, by the decree, secured by lien on the real estate did not convert the action into a title controversy. The case was re-transferred to the court of appeals.

In *State v. Mattingly*[12] the appeal was in a quo warranto proceeding where it was contended that the town or Exeter was not properly incorporated and the persons holding the offices of Aldermen of the City of Exeter had no title to such office. The court points out that title to an office under the state is not in issue in the constitutional sense in such a case because only the title to a city office is involved and a city office is not an "office under this State" within the meaning of the constitution. That case, accordingly was transferred to the court of appeals. Upon somewhat similar reasoning the court transferred the case of *State v. American Telephone and Telegraph Company*[13] because the action did not involve the County of St. Louis but only involved the County Judges, or those performing their functions. The fact that the action was against them in their official capacity and character "does not make the County, as such, a party to the action and the appeal is not, for this reason in this Court". The case was retransferred to the St. Louis Court of Appeals.

Right of Appeal

In *Lawrence County v. Johnson*,[14] the defendants appealed from an order overruling their motion to dismiss a petition in condemnation to establish a roadway over their lands. The court held that there was no final judgment in the case because the motion to dismiss presented a number of issues which could not be decided upon matters appearing upon the face of the petition but required evidence to support them. Consequently, and because appeals may be taken only when the right

12. 268 S.W.2d 868 (Mo. 1954).
13. 273 S.W.2d 286 (Mo. 1954).
14. 269 S.W.2d 110 (Mo. 1954).

to do so is authorized by statute, the court held that an appeal does not lie from the overruling of a motion to dismiss a petition in a condemnation suit and dismissed the appeal.

An interesting situation is presented in the case of *Adair County v. Urban.*[15] That was an action by Adair County for breach of contract on a contractor's performance bond. There were two trials. The first resulted in a judgment for plaintiff for $5,000, which judgment was set aside on plaintiff's motion for new trial on the sole ground that the sum awarded was inadequate. On the first appeal[16] it was decided that plaintiff made a case for the jury and the cause was returned to the trial court for a trial on damages only. Before the second trial, defendant moved for a change of venue, the judge of the trial court disqualified himself, and called in another circuit judge in Adair County to try the case as special judge. In the second trial, before the special judge, the jury rendered a verdict for $4,000 and judgment for that amount was entered. Defendant did not file a motion for new trial or any after trial motion. Plaintiff did file a motion for new trial only as to the amount of damages sustained. Within thirty days after the entry of the judgment the special judge overruled plaintiff's motion and, of his own motion, entered an order setting aside the verdict on the sole ground that the motion for change of venue had divested the Circuit Court of Adair County of jurisdiction and that the special judge did not have jurisdiction to try the case. Judge Conkling, in the opinion for the majority of the court *en banc,* first held that the motion for change of venue did not deprive Adair County of jurisdiction and that the special judge was wrong in setting aside the judgment on that ground. Having so decided, the court remanded the case to the circuit court with directions to reinstate the judgment setting aside the $4,000 verdict. The principal question before the court was whether or not the defendant was an aggrieved party and entitled to appeal from the order of the special judge setting aside the judgment and granting a new trial. When the appeal was before Division Number 2, Barrett, Commissioner, wrote an opinion holding that defendant was not aggrieved, and not entitled to appeal, because the effect of the order granting a new trial was such that defendant was not immediately injured thereby and therefore not presently aggrieved in his legal

15. 268 S.W.2d 801 (Mo. 1954).
16. 250 S.W.2d 493 (Mo. 1952).

rights by the particular judgment complained of. When the case reached the court *en banc,* however, Judge Conkling, speaking for the majority of the court, pointed out that the circumstances of the case were such that defendant had a right to accept the verdict against him for $4,000 and terminate the litigation and that, when the special judge ordered a new trial on grounds which the defendant had not presented by motion for new trial, the defendant was aggrieved within the meaning of the statute relating to appeals.[17] It is pointed out that the new trial compelled by the order was neither sought nor asked nor desired by the defendant and, because that order was founded upon an invalid and erroneous basis, defendant had the right to appeal therefrom and have the order set aside and have the judgment against him reinstated. Judges Leedy and Tipton dissented, adopting the divisional opinion as their dissent.

Records and Briefs

Among the requirements of the rule of the supreme court with respect to the contents of briefs[18] is the provision that the briefs of appellant must set out the points relied upon, specifying the allegations of error with citations of authority. That rule has now been in existence for more than ten years. The court, in *Ambrose v. M.F.A. Cooperative Association,*[19] in an opinion by Tipton, J., for the court *en banc,* supplemented by separate concurring opinions of Judges Hyde and Conkling, applied the extreme penalty of dismissal of the appeal where there was a total failure to comply with the rule both in the statement of facts, the specifications of error, the citations of authority, and in the argument. Judge Tipton, in the opinion for the court states:

> "In order for us to determine if the trial court erred in granting a new trial and entering a judgment for respondent, it would be necessary for this Court to study the transcript and, also, to brief the various issues we find in the record, thereby this Court becoming an advocate as well as a Court. We do not think that the interest of justice imperatively requires us to perform this labor in this case as balanced against the importance of keeping this Court abreast of its docket."

In dismissing the appeal the hope was again expressed that the

17. Mo. Rev. Stat. § 512.020 (1949).
18. Sup. Ct. Rule 1.08.
19. 266 S.W.2d 647 (Mo. 1954).

briefs filed in the court in the future will be an aid to the court, as they will be if the rule is followed. Judge Hyde, in his concurring opinion, states that it is the primary duty of the court to respect the rights of litigents and to minimize the number of cases disposed of on procedural questions but states "there must be limits to our undertaking to do work that counsel should have done on his brief." Judge Conkling, in concurring, states that because of the volume and character of the litigation now coming before the court it is more imperative than it ever has been that counsel should comply with the rule and that the time has come to dismiss appeals where the rule is violated. This appeal is, indeed, a stern warning to the Bar to prepare briefs in accordance with the simple and well founded of the rules of the court with respect to their contents.

The same result was reached in *Schoenhals v. Pahler*,[20] where the appeal was dismissed because appellant's brief did not contain a fair and concise statement of the facts, and the assignments of error under points and authorities were wholly unsustained by the record and were not within the issues made by the pleadings. Notwithstanding these dismissals, however, the court, in *Wilt v. Waterfield*,[21] refused to dismiss the appeal on the ground that the statement was not a fair statement of the facts and omitted page references, the court commenting that the transcript was short and that the defendant in his reply had substantially corrected the omission mentioned. Again in *Conser v. Atchison, T. & Sf. Ry.*,[22] the brief of appellant did not comply with the rule, but the court declined to dismiss the appeal and ruled the case on its merits because it was "able to determine from the whole brief the allegations of error and the points made under them, which present important questions, and because we have decided other recent cases on the merits where the situation was similar."

Questions Reviewable

In *Hall v. Brookshire*,[23] where the case had been transferred to the court *en banc* after it had first been decided in division, one of the parties filed additional briefs. The court denied the motion of opposing parties to strike such additional briefs, pointing to the rule that, when

20. 272 S.W.2d 228 (Mo. 1954).
21. 273 S.W.2d 290 (Mo. 1954).
22. 266 S.W.2d 587 (Mo. 1954).
23. 267 S.W.2d 627 (Mo. 1954).

a case has reached the court *en banc* its status is as though briefs had never been filed and the parties are at liberty to file entirely new briefs or permit the court to decide the case on the briefs filed in division. Consequently, the motion to strike the additional brief was overruled.

In *Hammond v. Crown Coach Company*,[24] the trial court had entered an order sustaining the motion for new trial without specifying the grounds therefore; but, on the same day, filed in the case a six page document headed "findings of fact and opinion". On the same day the notice of appeal from the order sustaining the plaintiff's motion for new trial was filed. The court held that the so-called findings of fact and opinion were no part of the record in the case and that the order sustaining the motion for new trial, because it did not specify the ground upon which the motion was sustained, could not be affirmed upon the ground that the trial court exercised its discretion and power. The conclusion reached by the court was that an instruction, which was the principal complaint on appeal, was not patently erroneous as a matter of law and that the new trial could not be sustained upon the theory that the trial court, in its discretion, had ordered the new trial because of the instruction.

CRIMINAL LAW

WILLIAM J. CASON*

Again the cases in the field of Criminal Law were a large percentage of the work of the Supreme Court of Missouri for the year 1954. Most of the cases considered well settled questions of law with only slight variation from unquestioned principles. However, there are a number of cases construing statutes never before construed by the court which should be considered along with several cases in which the ingenuity of counsel presented the court with unique and interesting propositions.

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24. 263 S.W.2d 362 (Mo. 1954).

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I. Specific Offenses

A. *Grand Larceny*

No Missouri appellate court prior to this year has ruled on the question of whether a person could commit larceny by an innocent third party agent. The situation was presented to the supreme court in *State v. Patton.*[1] Oliver Patton verbally informed one Andy Weisner that certain concrete blocks stored on a farm on which Patton resided were Pattons and that he wished to sell the same. Weisner desired to purchase the blocks and did pay Patton $35.00 for them. Patton informed Weisner of the location of blocks and told him he could pick them up at his convenience but that he would not be home when he got them. Weisner did in fact pick up the blocks and take them to his farm. The blocks were the property of Irvin De Woskin. Defendant was charged with larceny[2] in an information which charged that he "unlawfully and feloniously did steal take and carry away with intent to deprive the owner of the use thereof and to convert the same to his own use" 465 concrete building blocks.

Defendant was convicted of the charge and sentenced to two years in the penitentiary. On his appeal he asserts that he can not be guilty of larceny because he did not "steal take and carry away" the blocks in question. Defendant's theory analyzed apparently is that though he may have had the intent that the owner of the blocks be permanently deprived of the use thereof, nevertheless, he himself did no "taking" and he cannot be guilty of larceny since there was no criminal act coupled with his intent.

There is a division of authority concerning the question presented. Many states hold that under the above circumstances a fraud has been committed but the defendant is not guilty of larceny or theft because the essential element of asportation is lacking, the defendant not having obtained at any time actual or constructive possession of the property. Other states have held that under the above circumstances the theft or larceny is complete on the theory that the innocent purchaser is the agent of the defendant. The Missouri Supreme Court adopted the latter view in the instant case.

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1. 271 S.W.2d 560 (Mo. 1954).
2. Mo. Rev. Stat. § 560.155 (1949).

B. *Embezzlement*

An interesting question was raised in a prosecution for embezzlement.[3] Defendant had rented a car from a car rental firm and failed to return it. The rental period was supposed to end before August 1, 1952. The information charged the time of the crime as on or about August 1, 1952. Defendant took the position on the appeal that since he did not have possession of the car on August 1, 1952 with permission of the owner, the rental period having expired, his possession at that time was tortious and he could not be guilty of an embezzlement but larceny, if anything. The court recognized the distinction raised by the defendant but held that larceny, embezzlement and obtaining money under false pretenses stand on an equal footing, the distinction resting in the time of forming the criminal intent, and that where the criminal acts of a defendant would support a conviction on any of the theories the court would not draw fine hair-splitting distinctions and go into the question of at just what moment the criminal intent was formed.

C. *Exposing Poisonous Substance To Domestic Animals*

It would appear that the legislature at its earliest convenience should legislate to fill a gap created by the case of *State* v. *Getty*[4] concerning an interpretation of Section 560.380, Missouri Revised Statutes (1949), which is commonly referred to as the animal poisoning law. There have been a great number of persons prosecuted under this law who have paid fines and even served jail sentences for poisoning dogs. The statute was probably used more to prosecute persons who poisoned dogs than any other animal. The statute provides in part as follows: "or shall maliciously expose any poisonous substance, with intent that the same shall be taken or swallowed by any cattle, hog, sheep, goat, horse, mule, ass or *other domestic animal* or domestic fowl." It has heretofore been assumed by prosecutors and attorneys for the defendants alike that a dog was a domestic animal within the meaning of the statute. The court in the above case ruled that though dogs were animals and were domesticated it did not believe the legislature intended to punish the poisoner of dogs by the statute and that the information charging as it did the exposing of the poisonous substance to a dog did not charge that a crime had been committed.

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3. State v. Russell, 265 S.W.2d 379 (Mo. 1954).
4. 273 S.W.2d 170 (Mo. 1954).

D. *Possession Of Obscene Publication*

One Harold Becker was apprehended with a quantity of magazines of a type not infrequently found on any large city news stand concerning nudism. He was charged under Sec. 563.280, Missouri Revised Statutes (1949), with possession of obscene publications for the purpose of selling the same. The question presented to the court on review was whether these publications were of the type prohibited by the statute. The court stated that the test to be applied was whether the material being sold was of such a nature to arouse the lustful desire of those open to such influence and into whose hands the publication might come. Since the magazines in question had photographs of naked men and women of mature years they were thought by the court to meet the requisite test. Defendants conviction and penalty were sustained.[5]

E. *Tampering With A Motor Vehicle*

A broken down 1937 Chevrolet bus was parked behind a garage. The owner and garage operator stated that he merely used the vehicle to obtain parts therefrom and that it would not propel itself and that he never intended to use the bus for driving again at any time. There was no license on the bus so that it could be driven on the highway. Orville Ridinger was charged with "tampering" with the motor vehicle in question in violation of Section 560.175, Missouri Revised Statutes, (1949), because it was alleged that he removed a tire and wheel from the bus.[6] The defendant after conviction and on the appeal took the position that the vehicle in question was not a "motor vehicle" within the meaning of that term as used in the above mentioned statutes since it was not self propelled and the owner never intended that it should ever be. The court noted that if vehicles such as this were not "motor vehicles" a great many of similar type vehicles which were in junk yards and parked around garages would be without the protection of the "tampering" section and held such was not the legislative intent. Under this decision, if the object in question was once or ever could be a motor vehicle it is apparently within the protection of the "tampering" section above noted.

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5. State v. Becker, 272 S.W.2d 283, 286 (Mo. 1954): "Even judges may know what falls within the classification of the decent, the chaste and the pure in either social life or in publications, and what must be deemed obscene and lewd and immoral and scandalous and lascivious."

6. State v. Ridinger, 266 S.W.2d 626 (Mo. 1954).

F. *Bribery*

In *State v. Brown*[7] the defendant was a city councilman of Springfield, Missouri. After having voted favorably for a proposal that would be of considerable benefit to an engineering firm the defendant accepted a gift of $1000.00 from the firm. Absolutely no showing of a prior agreement to pay the money for the vote was shown. Defendant was filed on under Section 558.020 (2) for accepting a bribe. Defendant on the appeal contends that the acceptance by a public officer of a gift after an official act is consummated without any prior corrupt understanding does not constitute the acceptance of a bribe. The court ruled otherwise and indicated that even if the defendant had cast his vote with the purest of intentions and had no intent at the time to solicit a gratuity from the engineering firm he would still be guilty if he later accepted the gratuity. The decision in one sense is difficult to analyze from the point of view of finding the criminal act and criminal intent coinciding at a given time, but is certainly justified under the wording of the particular statute in question.

II. TRIAL

A. *Evidence*

1. Proof Of Prior Convictions Under Habitual Criminal Act

In *State v. Abbott*[8] the defendant was charged by information with the offense of larceny of a motor vehicle of the value of more than $30.00,[9] together with four prior convictions under the habitual criminal act.[10] The punishment assessed by the jury was 25 years imprisonment in the penitentiary which is the maximum punishment fixed for the crime. The verdict of the jury stated that:

> "We, the jury find the defendant guilty and assess his punishment at twenty five years in the Missouri Penitentiary."

There was no specific finding by the jury that the defendant has been convicted and discharged of a prior felony even though the maximum penalty was assessed. Defendant assigns that as error, asserting that a verdict finding the maximum penalty as directed by the instruc-

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7. 267 S.W.2d 682 (Mo. 1954).
8. State v. Abbott, 265 S.W.2d 316 (Mo. 1954).
9. MO. REV. STAT. § 560.165 (1949).
10. MO. REV. STAT. § 556.280 (1949).

tion concerning the habitual criminal act should also state a finding of the prior conviction. The court held that the defendant has not been prejudiced since the jury could have assessed the penalty which was assessed without in fact believing and finding that defendant had been convicted of the prior felony and discharged.

2. Confessions and Admissions

An interesting and unique question was presented concerning the propriety of allowing the state to present evidence of admissions of a person other than the defendant being tried in the case of *State v. Swindell.*[11] Swindell was originally charged jointly along with one Olin Ward with forcible rape.[12] A severence was taken and Swindell was tried separately. During the trial of Swindell evidence was presented concerning statements of Ward which were admissions against interest and which were not made in the presence of Swindell. This was objected to by defendant's counsel. The court held that there was a reasonable inference of a conspiracy between Swindell and Ward and even though no conspiracy was charged between the two that under these circumstances the admissions were properly admitted.

The court reaffirmed previous holdings to the effect that, even though a defendant is in custody and has not been notified of his constitutional rights and that any thing he might say might be used against him, admissions of guilt made freely and without coercion are admissable.[13]

B. *Argument Of Counsel*

There were several cases treating of the argument of counsel which should be considered. In one situation[14] the defendant was charged with forcible rape.[15] He alleged insanity as a defense. The evidence showed that the defendant had actually been committed to an institution in another state and discharged therefrom prior to the commission of the instant offense. Insanity was submitted to the jury as defendant's defense. The prosecuting attorney in his final argument to the jury stated:

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11. 271 S.W.2d 533 (Mo. 1954).
12. Mo. Rev. Stat. § 559.260 (1949).
13. State v. Mayberry, 272 S.W.2d 236 (Mo. 1954).
14. State v. Johnson, 267 S.W.2d 642, 645 (Mo. 1954).
15. Mo. Rev. Stat. § 559.260 (1949).

"What good would it do you gentlemen to send him—to find him not guilty by reason of insanity and send him to another hospital. he would be out in two months."

The supreme court found that prosecutor was in fact urging the jury to convict the defendant even though they might find that he was insane at the time of the commission of the offense and that this was reversible error.

In *State v. Sanchez*[16] the prosecuting attorney in his argument said of the defendant that he was a bloodsucker, pimp, lice of our society and the lowest form of humanity. It was held not to be reversible error to discharge the jury in light of such argument.

The prosecuting attorney in one case[17] argued that:

"When the state closed the evidence, what did the defense offer. They offered no evidence at all."

Counsel for defense moved for a mistrial on the ground that this was an improper comment of the defendants failure to testify.[18] The court held that if the prosecuting attorney in fact, either directly or indirectly refers to the defendants failure to testify he is entitled to a new trial but that the statute is limited to its express terms and if the argument did not in point of fact refer to his failure to testify the statutory prohibition has not been violated. Constitutional rights of the defendant were not discussed. This case goes about as far as any have in allowing the states counsel to infer some guilt from the defendants failure to testify.

Referring to defendant in argument in a manslaughter case as a "drunken killer" was held to be not error.[19]

The prosecuting attorney in *State v. Charles*[20] in his argument likened the defendant to a cancer and the jury as a doctor and said "These lawless individuals, they are cancerous growths and you are taking them out of the community." The court admitted the remarks were severe but thought they were not so prejudicial as to call for a reversal.

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16. 269 S.W.2d 46 (Mo. 1954).
17. State v. Hayzlett, 265 S.W.2d 321 (Mo. 1954).
18. Mo. Rev. Stat. § 546.270 (1949).
19. State v. Eison, 271 S.W.2d 571 (Mo. 1954).
20. 268 S.W.2d 830 (Mo. 1954).

C. *Conduct of Jury*

While being interrograted on voir dire in a larceny prosecution[21] a juror remarked in answer to a question put to him and in the presence of the panel "I don't think I can give a theif a fair trial." Defendant's counsel promptly asked that the panel be quashed and a mistrial declared. The trial court refused to do this but did instruct the jury panel to disregard the statement. The supreme court held that defendant was not prejudiced because the panel was not quashed.

D. *Instructions*

An instruction given on behalf of the state in a forcible rape case concerning the defense of insanity which had been interposed by the defendent was held to be reversible error.[22] The instruction was in part as follows:

> "The Court instructs the jury that insanity is interposed by counsel of the defendant as an excuse for the charge set forth in the information . . ."

Defendant assigned error in the giving of the instruction on the ground that it disparaged his defense of insanity when the word "excuse" was used. The appellate court agreed with defendants view of the use of this word and stated that the instruction might readily be understood by the jury as a disparaging comment on the defendants defense of insanity and as such was highly prejudicial to defendant and reversible error.

A burden of proof instruction concerning the proof of insanity as a defense was held to be error because it required the defendant to prove his insanity to the "reasonable satisfaction" of the jury.[23]

In a prosecution for tampering with a motor vehicle[24] the defendant's counsel stated "I want the record to show that I requested an instruction defining 'tampering' ". However, defendant did not offer such an instruction. The supreme court noted that there is a duty upon the trial court to instruct the jury in writing upon all questions of law arising in the case as to which the jury must have information to reach their verdict. It might seem that if the jury must find that a defendant "tampered" with

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21. State v. Weidlich, 269 S.W.2d 69 (Mo. 1954).
22. State v. Johnson, 267 S.W.2d 642 (Mo. 1954).
23. State v. Johnson, 267 S.W.2d 642 (Mo. 1954).
24. State v. Wood, 266 S.W.2d 632 (Mo. 1954).

a motor vehicle perhaps the jury should be advised as to what constitutes tampering under the law. The court held otherwise but with no apparent discussion of the precise question presented.

III. Procedure Before Trial

The tendency of some trial judges at times to indicate their feeling concerning the defendant's guilt or what the verdict should be was denounced by the court in one case.[25] The court, prior to the actual trial of the cause and during the selection of the jury, informed the jury panel that the information filed was originally against three defendants and that one had already pleaded guilty. This was objected to by counsel for the defendant and properly preserved and assigned as error in the supreme court. The court held this action by the trial judge to be reversible error and stated that:

> "The rule is well settled that a fair trial exacts absolute impartiality on the part of the judge as to both his conduct and remarks . . . A judge must not say anything that can be construed by the jury to the prejudice of a defendant."

Even though the record on appeal from a burglary conviction was entirely silent as to whether the defendant has been arraigned properly or at all the court found this not to be grounds for a reversal in the case of *State v. Turner*.[26] The record did show the trial as if the defendant had entered a plea of not guilty. The court ruled that the failure of a showing of a formal arraignment under these circumstances was not prejudicial to the defendant.

IV. Appeals

Again in numerous cases the supreme court has emphasized that the defendant's motion for new trial must state specifically and with particularity the alleged error.[27] In *State v. Weed*[28] the defendant stated in his motion for new trial that an instruction was confusing, argumentative, assumed facts, commented on the evidence and submitted evidence

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25. State v. Castino, 264 S.W.2d 372 (Mo. 1954).
26. State v. Turner, 272 S.W.2d 266 (Mo. 1954).
27. Sup. Ct. Rule 27.20, § 547.030; State v. Mayberry, 272 S.W.2d 236 (Mo. 1954); State v. Gerberding, 272 S.W.2d 230 (Mo. 1954); State v. Weed, 271 S.W.2d 557 (Mo. 1954); State v. Eison, 271 S.W.2d 571 (Mo. 1954).
28. 271 S.W.2d 557 (Mo. 1954).

erroneously admitted. This allegation was held too general to preserve any error for review.

An interesting analysis of the state's right and method of appeal is found in *State v. Getty*,[29] wherein the prosecuting attorney followed the procedure outlined in Supreme Court Rule 28.06 in appealing from an order of the trial court quashing an information filed. The defendant moved to dismiss the appeal for the reason that the prosecutor did not follow the statutory provision[30] for the state taking an appeal which is a completely different method than that provided by the above noted rule of court. Defendant relied upon Article 5, Section 5 of the Constitution which provides in effect that the court can establish for all courts rules of practice and procedure that do not change substantive rights or effect the right of appeal. The court held that the rule in question did not change the "right of appeal" but only the "mode"of appeal and that the prosecutor could elect to follow the procedure outlined in the rule rather than the statutory provision.

THE HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.

[*Editor's Note.* Mr. Becker has already reviewed most of the 1954 cases in this field in the January issue of the *Review* (20 *Missouri Law Reveiw* 38). A summary of more recent development will appear in the January 1956 issue.]

INSURANCE

ROBERT E. SEILER*

During 1954, the Supreme Court dealt with only a few cases primarily involving insurance law. *Old Reliable Atlas Life Society v. Leggett*[1] is a case which appears to be of limited interest to the profession

29. 273 S.W.2d 170 (Mo. 1954).
30. MO. REV. STAT. § 547.210 (1949).

*Attorney, Joplin, Missouri. L.L.B. University of Missouri, 1935.
1. 265 S.W.2d 302 (Mo. 1954).

generally. It was a declaratory judgment action relating to the operation of stipulated premium life insurance and the extent of the supervisory powers of the Superintendent of Insurance over such insurance companies. The Supreme Court affirmed the declaration of the trial court to the effect that Sections 377.200-460, *Missouri Revised Statutes* (1949) relating to stipulated premium plan life insurance companies, are not a complete code, but that such companies are subject to the general regulatory powers of the Superintendent of Insurance. The death losses for the first year on the limited payment policies were not to be paid out of the insurance fund prescribed by Section 377.260, *Missouri Revised Statutes* (1949), and the initial premium was not a part of such fund but constituted a trust or reserve fund. It was also held that policy fees exacted by the agent from the insured when application was made for the insurance were a part of the premium for the first policy year and were sufficient, along with the first year's premium, to carry the insurance over into the second year, so that a portion would become part of the insurance fund. Plaintiff had assumed certain "membership and benefit certificates" issued by its predecessors. These were held to be limited payments life insurance policies, as to which the Superintendent of Insurance was authorized to compel plaintiff to provide the funds necessary for the reserve provided for by Section 377.270, which plaintiff had contended it need not do.

State ex rel. *Farmers Mutual Automobile Insurance Company v. Weber*[2] is a case where a liability insurance company attempted to intervene in a circuit court damage suit and, the case coming to the Missouri Supreme Court upon application for a writ of mandamus, the supreme court held the insurance company had no right to intervene. The insurance company had issued a garage liability policy to an automobile dealer and garage owner, who had sold a truck to an individual, who in turn permitted his son to drive the truck, as a result of which an automobile accident occurred, injuring the plaintiff in the damage suit. For some reason or on some grounds which do not appear in the opinion, the operator of the truck took the position that he was an "additional insured" under the terms of the garage liability policy, and hence the insurance company attempted to intervene and engraft onto the circuit court action a declaratory judgment action seeking a

2. 273 S.W.2d 318 (Mo. 1954).

declaration as to the rights to the parties in the policy and a decree that the insurance company was not obligated to defend the truck driver in the damage suit.

The supreme court took the position that inasmuch as the insurance company could later litigate the question of whether it was liable for any judgment that might be obtained against the truck driver in the damage suit, its interest in the damage suit was only "remote and contingent". The terms and provisions of the garage liability policy do not appear in the opinion, but if it was a standard type policy, then the insurance company would have the right to defend, through its representatives, a suit brought against an "additional insured". Perhaps this point should have been brought to the attention of the court. It is quite possible that the insurance company might make a much more vigorous defense of the damage suit than would the individual who was claiming to be an "additional insured", and the result, if the suit were defended by the insurance company representatives, might well be a much smaller judgment than would otherwise be the case. These facts are commonly known among lawyers and courts in damage suit litigation and to this extent, at least, it seems that the interest of the insurance company in the defense of the damage suit would not be "remote and contingent", but would be very direct and immediate.

The opinion also makes the point that the named insured in the policy, the garageman, was not a party to the damage suit. It is difficult to see where this is material, because the person who was claiming to be an "additional insured", the truck driver, was a party to the damage suit, being the defendant therein, and under the terms of the policy, as an "additional insured", if he was such, he would be just as much of an insured as the named insured himself.

The opinion makes the point that the plaintiff in the damage suit action should be entitled to choose his opponent and have his claim for damages against the defendant determined without being interfered with by the insurance company. However, it would appear that the trial court could have determined the coverage aspects of the situation, with relatively little delay, and then after that, could have proceeded with the trial of the damage suit. Furthermore, if the case is a proper one for interevention, then our statutes have, to that extent, at least, deprived a plaintiff of what would otherwise be his unincumbered right to select whatever defendant he sees fit and proceed against that

defendant without interruption from outside sources. In other words, the plaintiff has that right only if it is the sort of a case where someone else does not have the right to intervene.

As a practical matter, the result of the case is about the same as if the insurance company had tried to file a declaratory judgment suit *after* the damage suit had been filed first, and then sought to get injunctive relief to stay the prosecution of the damage suit until the subsequently filed declaratory judgment suit was disposed of. As a general rule, in such instances courts will not stay a prior damage suit. On the other hand, where the insurance company files its declaratory judgment suit *first*, and gets all the proper parties into court, then it usually is able to stay the proceedings of a subsequent independent damage suit until the coverage question is settled.

In *Kreuger v. Schmiechen*[3], the court adherred to its previous holdings that the fact a defendant carries liability insurance does not enlarge his liability in tort action. The defendants were members of the Consistory, or board of directors of the charitable institution, a church, and hence not liable in tort actons, despite the fact that there was liability insurance.

LABOR LAW

AUSTIN F. SHUTE*

During the past year, the Missouri appellate courts have had to deal with cases involving labor-management relations in ever increasing numbers. As has been indicated in earlier writings,[1] the *Garner* case[2] is contnuing to have great influence over the role which the state court may play in labor relations involving interstate commerce. The main holding of that case was that the federal government has pre-empted the field of labor relations involving unfair labor practices from interference by the state courts.

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3. 264 S.W.2d 311 (Mo. 1954).

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1. Shute, *State versus Federal Jurisdiction in Labor Disputes*, 19 Mo. L. REV. 119 (1954).

2. 346 U.S. 485, 74 Sup. Ct. 161, 98 L.Ed. 161 (1953).

The recent case of *Weber v. Anheuser-Busch*[3] added somewhat to the Supreme Court holding in the *Garner* case, and may be almost as important in its ramifications as the *Garner* case itself. For the *Anheuser-Busch* case not only echoed the holding of the *Garner* case, it went further. It held that even though the particular action complained of may not be an unfair labor practice, yet the state court might still be precluded from jurisdiction. This, on the theory that the action might be such action as was meant to be protected by the federal act. Assume, for example, certain action might violate state law—for instance, the Missouri conspiracy in restraint of trade laws.[4] Even though the action might not be an unfair labor practice, the state court might still not have jurisdiction if the action was such as was intended to be protected by Section 7 of the Taft-Hartley Act.[5]

The *Anheuser-Busch* case involved a jurisdictional dispute between a machinists union, the certified bargaining representative of the Anheuser-Busch employees, and the millwrights. When Anheuser-Busch let work to outside contractors, as it frequently did, the machinists wanted a clause in their collective bargaining agreement providing that such work would only be given to contractors who employed members of the machinists union. The millwrights protested, and the company refused to include the clause, although such a clause had been in previous contracts. The machinists struck, and picketed the plant.

The company promptly did two things: it filed an unfair labor practice charge against the union based on an alleged violation of Section 8 (b) (4) (D)[6] of the Labor Management Relations Act; and obtained a restraining order against the picketing in the state court. The petition for the restraining order alleged not only violations of Section 8(b) (4) (D), but also violations of Sections 8(b) (4) (A)[7] and (B)[8] of the

3. 348 U.S. 468 (1955).

4. Mo. Rev. Stat. § 416.010 (1949); and see Shute, *A Survey of Missouri Labor Law*, 18 Mo. L. Rev. 95 at 110-133 (1953).

5. 49 Stat. 449 (1935), 29 U.S.C. § 151 *et. seq.* (1947).

6. "... forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . ."

7. "... forcing or requiring any employer . . . to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person. . ."

8. "... forcing or requiring any employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9. . . ."

federal Act. In addition, an amended petition alleged an illegal conspiracy in restraint of trade under the Missouri law.

The labor Board found no violation of Section 8(b) (4) (D) of the Act, but not before the union had appealed the lower court decision to the Missouri supreme court. The state supreme court upheld the finding of the lower court on the grounds of an illegal conspiracy in restraint of trade in violation of Missouri law.[9] The United State Supreme Court granted certiorari.[10]

Justice Frankfurter, who wrote the majority opinion, pointed out that the federal Act had not intended to prohibit all picketing, but merely that picketing which the Act designated as unlawful. Other picketing was intended to be free and lawful. He quoted from the *Garner* case:[11] "For the state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."[12]

And further: ". . . even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the State was free to issue its injunction. If this conduct does not fall within the prohibitions of Section 8 of the Taft-Hartley Act, it may fall within the protection of Section 7, as concerted activity for the purpose of mutual aid or protection."[13]

The Court pointed out that here was a case where the plaintiff had alleged in their state court petition violations of the federal legislation other than the one charge which they had filed with the Board. The Board was empowered to deal merely with the one charge filed with it. The fact that no violation was found by the Board as to that particular charge did not mean that the other charges were not valid.

The portion of the decision dealing with the pre-emption of the field from state interference as to unfair labor practices has been established law since the *Garner* case. But, it will be interesting to observe the way in which this new area of protected activity from

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9. 264 Mo. 573, 265 S.W.2d 325 (1954).
10. Weber v. Anheuser-Busch, 348 U.S. 808 (1955).
11. Garner v. Teamsters Local No. 776, 346 U.S. 485, 499 (1953).
12. Weber v. Anheuser-Busch, 348 U.S. 468, 475 (1955).
13. *Id.*, at 478.

state interference will develop. The Supreme Court has made it clear that the mere fact the activity is not an unfair labor practice does not mean that the state court may assert jurisdiction and issue its injunction on the grounds of a violation of state law.

The case of *Jack Cooper Transportation Company v. Stufflebeam,*[14] was decided on the basis of the *Garner* and *Anheuser-Busch* decisions. The picketing was allegedly directed to coerce the company to recognize the union as the bargaining agent for the employees without proper certification from the Board.[15] The lower state court had issued the restraining order, but the Missouri Supreme Court held that the lower court had no jurisdiction. Again, then, we have a definite holding by the supreme court that where the petition alleges unfair labor practices, the state court has no jurisdiction to issue its restraining order.

In *McAmis v. Panhandle Eastern Pipeline Company,*[16] the problem of state and federal jurisdiction was again raised, although the case is more important for its holding that there may be specific performance of an arbitrator's award.

In that case, the company and union had submitted a discharge case to arbitration. The union alleged in its grievance that the discharge was unjust in that the employee was not guilty of the acts charged, that discharge was too severe a punishment for the infraction alleged, and that the employee was discharged because of union activities. In addition to filing the grievance, the union filed an unfair labor practice charge with the Board on the grounds that the employee, McAmis, was discharged solely because of certain union activities.[17] The arbitration ended in a unanimous award in favor of McAmis, and directed the company to rehire him without back pay. The company refused.

The union then brought a suit in the state court for specific performance of the arbitrator's award. Prior to a decision by the lower court, the unfair labor practice charge was dismissed. The lower court issued its order to the company, ordering it to cease and desist from refusing further to obey the order of the arbitration panel.

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14. 280 S.W.2d 832 (Mo. Sup. 1955).
15. *Supra,* note 8.
16. 273 S.W.2d 789 (Mo. App. 1954).
17. 49 STAT. 452 (1935), 29 U.S.C. § 158(a)(3) ". . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

The company contended that since McAmis had alleged unfair labor practice charges before the Board, the arbitration panel had no jurisdiction over the grievance. It was argued that the sole jurisdiction was with the Board. The union argued that the question was not whether there was an unfair labor practice, but whether or not McAmis was guilty of the misconduct charged and whether or not discharge was too severe a punishment for any alleged misconduct. The arbitration panel had obviated any unfair labor practice question by its finding that McAmis may have been guilty of some of the misconduct alleged, but that discharge was too severe under the circumstances.

The Kansas City Court of Appeals pointed out that at the arbitration hearing, neither side introduced any evidence other than that having to do with whether or not McAmis was guilty of the misconduct alleged. The court pointed out that the situation involved one where in their collective bargaining agreement, the company and union had agreed to submit to arbitration all grievances, including grievances involving unfair labor practices as well as grievances not involving such charges, and to be bound by the decision of the arbitrators.

The court pointed out that Congress had not intended to make all disputes between labor and management subject to the exclusive jurisdiction of the Board, but merely those involving unfair practices. The court held that as to that part of the grievance alleging an unfair labor practice, the arbitration panel had no jurisdiction. But as to the rest of the grievance, there was no question of the right of the panel to arbitrate the issue.

The court stated:[18] "There are no decisions, Federal or State, that have come to our attention, which clearly mark the way for us to follow in disposing of this question. However, as a general rule, public policy favors the negotiation of collective bargaining agreements, or contracts, fixing conditions of employment between labor and management. And the enlightened view is that the best interests of labor, management, and the public will best be served by arbitration of such disputes as may arise under bargaining agreements except in such cases as may be excepted by legislative enactment. That is the policy which is emerging in this extremely important, comparatively new, and developing field of the law."

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18. 273 S.W.2d 789, 793 (Mo. App. 1954).

In sustaining the lower court's decree of specific performance, the court held that:[19] "An employee should be entitled to assert both defenses to his claim unlawful discharge, the one in the forum agreed upon between himself and his employer—the other in the forum designated by Congress. There is nothing inconsistent in such a course, nor can there be any conflict of jurisdiction or authority, the reason given in the Garner case for the rule of exclusive jurisdiction."

It is difficult to see how the court could have come to any other decision without completely disrupting the theories of arbitration of grievances between labor and management as they have existed in the past.

An interesting case involving the right of a barbershop owner to display a "union shop" card was considered in *Kerkemeyer v. Midkiff*.[20] This was a declaratory judgment action brought by certain barbershop owners who also worked as barbers in their own shops. The union had made a demand on these owner-workers that they would either have to join the union or return their "union shop" card. The laws of the union required that no member of the union could work in a shop which did not display the union card. The effect, then, of such a demand, would be a compulsory walk out on the part of the union barbers in their employ.

For many years, the owners of these shops had had collective bargaining agreements with the barbers union, and agreed therein to abide by the laws, present or future, governing the display of the "union shop" card. The union had never demanded that the shop owners belong to the union. The constitution of the union was then amended to require that all persons working in a shop must belong to the union. The demand on the shop owners followed.

The majority of the court held that the "union shop" card was a property right belonging to the union, and that the provision in the collective bargaining agreements, whereby the shop owners agreed to abide by the rules regarding display of the "union shop" card, was enforceable. It was held that requiring the shop owners to belong to the union if they worked in the shop was not an unlawful union activity.

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19. *Id.* at 794.
20. 281 S.W.2d 516 (Mo. App. 1955).

It was held not against the public policy of the State of Missouri for the union to demand that the shop owners, if they worked in the shop, belong to the union.

The dissent argued that such a requirement was not a lawful union activity and was against the public policy of the State of Missouri. The obvious difficulties inherent in the situation of an employer belonging to and being bound by the rules of a union were pointed out. Further, it was argued that neither party could reasonably be found to have intended, at the time of the signing of the collective bargaining agreement, that the shop owners would be required to join the union.

This is a very difficult case to understand. From the standpoint of the union, they expect, and perhaps rightly so, that if a man does union work, he should belong to the union. From the standpoint of the shop owner, he has traditionally worked as a barber without being a member of the union, and expects to be treated as an employer, rather than a union member. From the standpoint of the public, such a situation completely disrupts collective bargaining and peaceful labor-management relations. If one is economically realistic, it will be recognized that a barber shop is not such a lucrative craft that the owner can afford to sit back and merely manage. As to the "union shop" card, the fact of criminal liability on the part of one falsely displaying a "union shop" card cannot be ignored.[21]

Certainly, the court in such a situation as this should be more concerned with making good labor-management law than with traditional concepts of contract law. The problem is to determine what is good and what is bad in this field, and whether what is good for one craft or industrial group might not be bad for another.

A recent case deciding the liabilities involved during the period of state seizure of the Kansas City Public Service Company in 1950 was handed down by the Missouri Supreme Court in *Rider v. Vance Julian and Kansas City Public Service Company.*[22]

This case arose when operators of the Kansas City Public Service Company's streetcars and busses struck. Under the authority vested in the Governor of the State of Missouri by the King-Thompson Act,[23]

21. Mo. REV. STAT. § 417.060 (1949).
22. Supreme Court of Missouri, *en banc*, April Session, 1955.
23. Mo. REV. STAT. § 295.010 *et. seq.*

the utility was seized by the State. During the period of state seizure, plaintiff Rider suffered a personal injury alleged to have been due to the negligence of one of the streetcar company's operators. The company alleged that they were not liable, since the state was operating the utility at the time of the alleged negligence. The lower court backed up this contention, on the theory that the seizure was an actual seizure and not merely a token one.[24]

The main issue in the case was whether or not the relationship of employer and employee arose as between the state and the employees of the streetcar company during the period of seizure. The court held that it did not on two theories: (1) there was no contract of employment, either express or implied, between the state and the operating personnel of the railway; (2) the state did not exercise such control over the physical operation of the utility as to impose liability for the tortious acts of the personnel under common law.

The state seizure was held to have been nominal or technical possession and not an actual one. The court pointed out that the management of the company remained the same, and the revenues derived from the operation of the company were channeled in the usual manner. The acceptance by the company of the revenues was held to have been a ratification of any of the tortious acts of their operators.

The question of the constitutionality of the King-Thompson Act was not dealt with, since the court felt that any such determination was not necessary or essential to a proper disposition of the case.

This appears to be the only practical way to dispose of the problem presented by the torts committed by streetcar employees during the period of state seizure. The Act has in it no provision for suit against the state in such event. The company, for all practical purposes, continued to operate the streetcars and motorbusses in exactly the same way it had prior to seizure. The seizure was made in the public interest, and so declared. Certainly, it would not be in the public interest for the state to be committing torts against its citizens without provision for liability therefor.

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24. *A Survey of Missouri Labor Law*, 18 Mo. L. REV. 154-172 (1953).

The final case to be discussed is *Turner v. Emerson Electric Manufacturing Company*,[25] a service letter case.[26] Here, a discharged employee requested a service letter from his former superior executive at the defendant plant. This individual, who had had dealings with plaintiff in a number of instances, including his being laid off, his rehiring, and various personnel problems, wrote to plaintiff that it was not the policy of the company to issue service letters. On the jury finding for the plaintiff, defendant appealed.

The principle problem here is whether or not a corporation can be held liable for failure to issue a service letter when the request is made to one who is neither superintendent or manager. The court held that it could where, as here, the executive employee addressed could be considered to be a superintendent or manager within the meaning of the phrase, that is, one to whom the company has intrusted duties of a supervisory or managerial nature.

The other issue, and on which the case was reversed and remanded, involved the submission of actual malice to the jury when the evidence did not so justify. The court defined actual malice as existing ". . . when one with a sedate, deliberate mind and formed design injures another, as where the person is actuated by spite and ill will in what he does and says, with a design willfully or wantonly to injure another. . . ."[27] Legal malice and actual malice were held not to be synonomous.

Thus, we find the Missouri appellate courts dealing more and more with the rather complicated and dynamic field of labor law. Many times, decisions have to be made with the benefit of very little, if any, precedent. Pressures of all sorts are present, economic and political, as well as social. The doctrine of stare decisis is of very little help, since the concept of labor rights and management rights is as changeable as the particular union or management craft or group dealt with. As lawyers, we should be thankful we merely have to advocate one side or the other of the various problems presented in this field. But, in our advocacy, whether we represent labor or management, we should do all possible to aid the courts in charting their way through the rough and murky waters of labor law.

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25. 280 S.W.2d 474 (Mo. App. 1955).
26. Mo. Rev. Stat. § 290.140 (1949).
27. 280 S.W.2d 474, 479.

PROPERTY

WILLARD L. ECKHARDT*

VENDOR'S REMEDIES FOR BREACH OF CONTRACT FOR SALE OF REAL ESTATE

Specific Performance in Lieu of Liquidated Damages

Robert Blond Meat Company v. Eisenberg[1] was a suit by a vendor against a purchaser for specific performance of a contract for the sale and purchase of real estate. The contract price was $51,000, with a down payment in escrow of $1000 [the exact amount of the broker's commission], and with the balance at closing by $19,000 cash and a $31,000 4½% note secured by a purchase money deed of trust. The contract contained the usual Kansas City clause[2] with reference to remedies for breach, the clause being printed except as to the words "as liquidated damages" which were interlined by typewriter:

> "If the seller has kept his part of this contract, and the buyer fails to comply with the contract on his part as herein provided, within five (5) days thereafter, then the money deposited as aforesaid is forfeited by the buyer as *liquidated damages,* and this contract may or may not be operative thereafter, at the option of the seller."

Upon purchaser's refusal to close, the vendor brought suit for specific performance. The trial court entered a decree ordering the purchaser to pay $19,000 in cash and to execute a $31,000 4½% note for the balance secured by a purchase money deed of trust, with adjustments for taxes, insurance, rentals, and accrued interest on the note; the court expressly

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1. 273 S.W.2d 297 (Mo. 1954).

2. This form of clause (disregarding the typed interlineation) seems to be the most popular form in current use in Kansas City. The "Official Form Approved by Legal Counsel for the Real Estate Board of Kansas City, Mo.," copyright, 1953, uses exactly the same clause. I have not inquired as to whether there has been any change in Kansas City practice since the principal case was reported.

The clause in the principal case is substantially the same as the form in VOLZ *et al.*, Vol. 1 MISSOURI PRACTICE § 73, p. 35 (1953).

A somewhat similar clause has been, and perhaps still is, very popular in St. Louis. See GILL, MISSOURI REAL ESTATE FORMS, Nos. 96A, 97, 99, 100, 101, 103, and 104 (2d ed. 1931).

retained jurisdiction to enter such orders as might be necessary to enforce full compliance with the decree. On appeal this decree was affirmed in an opinion by Hyde, J.

This would seem to be the first case in Missouri to hold that a vendor may have specific performance, although there has been dicta to that effect in earlier cases.[3] The court does not indicate what sanctions may be used to enforce the decree, but the court does answer several questions with reference to the general problem of specific performance in favor of a vendor.

Is the vendor's legal remedy of damages inadequate. The court took the view that the vendor's legal remedy was inadequate, for the general reasons mentioned in the *Restatement of Contracts* § 360, Comment c. (1932).[4] In this case there was an added and special reason, the vendor's right to a 4½% first mortgage note. Although specific performance is discretionary, the trial court properly exercised its discretion in this case.

Does the liquidated damages clause preclude specific performance? As drafted, the clause does not preclude specific performance, because after providing for forfeiture of the down payment as liquidated damages, it expressly goes on to provide: "and this contract may or may not be operative thereafter, at the option of the seller." An additional reason is that this particular clause provided no liquidated damages, because the amount stipulated, $1000, was the same as the broker's commission; $1000, leaving no surplus for the vendor; in effect, the liquidated damages clause simply indemnified the vendor for the broker's commission. Under the theory of the court, if the down payment had been large enough to provide some liquidated damages for the vendor, that would not preclude specific performance in the vendor's favor (in view of the express provision that the contract might be operative thereafter), but the case does not suggest that the vendor may have both liquidated damages and specific performance. If the provision for liquidated damages is really a penalty, the vendor could not retain the down payment. If the provision is a valid one for liquidated damages, presumably the vendor in seeking specific performance. If the provision for liquidated damages is really a payment or by offering to reduce the cash balance owing by the amount of the down payment.

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3. See Mo. DIG., *Specific Performance*, § 66.

4. Compare the attitude of the court in Rice v. Griffith, 349 Mo. 373, 383, 161 S.W.2d 220, 225 (1942), *reversing s. c.*, 144 S.W.2d 837 (Mo. App. 1940).

Practical conclusions: How large should a down payment be to provide sufficient liquidated damages? In the principal case the down payment covered the broker's commission only and provided nothing in addition for the vendor. In the ordinary transaction the typical down payment has been 10%. Perhaps this is enough to provide reasonable liquidated damages for the vendor when a broker's commission is 2½%, but with a broker's commission at 5% or more, the vendor is left with 5% or less, part of which must be used to cover costs of abstracting and legal services. Lawyers should give serious consideration as to whether the down payment (liquidated damages) should not be 12½% or 15% in the ordinary case.

Should the vendor's right to specific performance be expressly excluded. In most cases the intention of the parties and their legitimate interests would best be served by limiting the vendor to money damages, liquidated or actual. In the case of a rare purchaser, a decree that the purchaser specificially perform might be of value to the vendor, but in most cases such a decree would not be a practical remedy. Damages, actual or liquidated, would seem to be the more practical remedy, and of course an adequate down payment in escrow to serve as liquidated damages is largely self-executing. One Missouri text, after noting that a forfeiture provision does not necessarily bar a suit by vendor for specific performance, has this to say: "In representing a purchaser in a doubtful purchase, it may be advisable to provide that the forfeiture of the down payment, particularly when small, shall be the sole remedy of the vendor."[5] A possible reason for not including such an express provision is that a court may take the position (misapplying the concept of mutuality of remedies) that the purchaser likewise is barred from specific performance because of a lack of mutuality of remedies. In any event if the vendor is not to have specific performance, the clause on vendor's remedies should omit the words "and this contract may or may not be operative thereafter, at the option of the seller."[6]

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5. Volz *et al.*, 1 MISSOURI PRACTICE § 59 (1953).

6. A form set out in GILL, MISSOURI REAL ESTATE FORMS, No. 101 (2d ed. 1931), apparently in common use in St. Louis, provides: " . . . if purchaser wrongfully refuses to close, earnest money is to be forfeited and half paid to agent in full of commissions, and half to seller, and purchaser shall remain liable for balance of purchase price, but shall not be entitled to enforce sale." I do not fully understand just what end result this clause is designed to achieve, but if it is the intention to limit the vendor to liquidated damages, the part beginning with the words "and purchaser" should be omitted.

In my opinion a better clause for liquidated damages for the vendor is as follows: "If this contract shall not be closed for the fault of the Purchaser, the money in escrow shall be paid to the Vendor as liquidated damages, it being agreed that actual damages are difficult if not impossible to ascertain."[7] I doubt whether the vendor can sue for specific performance in such a case and I am inclined to think that he is limited to liquidated damages. It should be noted that the principal case does not determine the effect of such a clause because the clause in the principal case expressly provided that at the vendor's option the contract should continue to be operative after "forfeiture" of the down payment and there was no surplus in excess of the broker's commission to compensate the vendor by way of liquidated damages.

Liquidated Damages as Penalty—Actual Damages

Wilt v. Waterfield[8] was an action by a purchaser against a vendor to recover actual damages in lieu of the liquidated damages provided in the contract for sale of real estate. The contract included the following clause with reference to remedies for breach:

> If either party hereto fails or neglects to perform his part of this agreement, he shall forthwith pay and forfeit as liquidated damages to the other party a sum equal to ten percent of the agreed price of sale, except that if said agreed price is less than $2,000, said sum shall be $200.

Although liquidated damages would have been $1900, the trial court awarded actual damages of $7000 and $700 accured interest. In an opinion by Dew, Special Judge, the judgment was affirmed on the theory that the clause in question provided for a penalty, not for liquidated damages, and consequently actual damages could be recovered.

In the typical case the one defaulting contends that the liquidated amount is a penalty, is excessive, and only a smaller amount of actual damages should be recovered. The principal case is exceptional in that the penalty construction results in the recovery of actual damages in a much larger amount.

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7. For a similar clause, see GILL, MISSOURI REAL ESTATE FORMS No. 102 (2d ed. 1931), ["Seller . . . retaining all sums paid hereunder as and for liquidated damages, damages for breach thereof being incipable of accurate ascertainment"].

8. 273 S.W.2d 290 (Mo. 1954).

The theory applied in the principal case is that if a contract requires a party to do a number of things, some of minor importance, some of major importance, and provides for a single substantial amount of "liquidated damages" for *any* breach, the amount being grossly disproportionate for certain minor breaches, the provision is one for a penalty even though the breach complained of is the ultimate breach as to which the amount is reasonable.

The court interpreted the liquidated damages clause in the principal case to mean that the breach could be any breach, including such things as failure to deliver possession on a day certain, failure to convey the full acreage, etc. The court relies principally on two Missouri cases, The first is a 1923 Appeals case, *Adams v. Luckman,*[9] which supports the principal case. The other is the leading Missouri case, *Morse v. Rathburn,* which in my opinion is contrary to the principal case and in effect is overruled by the principal case.[10]

Whether or not *Adams v. Luckaman* and *Wilt v. Waterfield,* the principal case, properly interpret the liquidated damages clauses in question, it is clear that clauses of that type are now worthless in providing liquidated damages and should be avoided. The draftsman must make it clear that the only breach calling for payment of the liquidated damages is the ultimate breach, repudiation or failure to close. This may be expressed (I trust) as follows: "If this contract shall not be closed for the fault of the Purchaser," etc.

A clause providing for liquidated damages in the event of breach by the vendor, as in the principal case, has another possible defect. Has the purchaser thereby precluded himself from obtaining a decree of specific

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9. 256 S.W. 103 (Mo. App. 1923). The clause provided: "if either party thereto fails or refuses to perform his part of this contract, they shall pay to the other the sum of $300 as liquidated damages for such failure." On vendor's failure to close it was held the purchaser could not recover the $300 liquidated damages but could recover only actual damages, if any. The court interpreted the clause as applying to any one of six breaches, some insignificant, and therefore a penalty clause.

10. 42 Mo. 594, 601, 97 Am. Dec. 359 (1868). The clause provided: "And the said parties to this agreement bind themselves that either party failing to comply with its provisions shall forfeit and pay to the other the sum of two thousand dollars." The purchaser refused to close, and the court held that the vendor could recover the $2000 liquidated damages, the amount being reasonable with reference to actual and presumed damages for repudiations by the purchaser.

I am unable to distinguish the clauses in Adams v. Luckaman and Wilt v. Waterfield from the clause in Morse v. Rathburn.

performance? The current case of *Robert Blond Meat Company v. Eisenberg*[11] noted above, suggests some answers to this problem.

"Forfeiture" of Stated Amount

The two cases noted above, *Robert Blond Meat Company v. Eisenberg*[12] and *Wilt v. Waterfield*,[13] make it necessary for the lawyer who drafts contracts for the sale of real estate to reconsider his clause on remedies for breach. In both cases the word "forfeit" is used, although in each case the forfeiture is "as liquidated damages." It is true that in most cases a provision that the deposit is "forfeited" or "forfeited as liquidated damages" does not prevent the clause from being interpreted as a "liquidated damages" clause, but in a close case the use of the word "forfeit" might resolve doubt in favor of a penalty construction. It is submitted that in redrafting these clauses the word "forfeit" should be completely omitted, and the clause should provide simply for liquidated damages as such, to be paid to vendor, retained by vendor, etc.

Possibility of Reverter—Alienability—Limitation Over—Rule Against Perpetuities

In *Donehue v. Nilges*[14] there was a 1908 grant of two acres out of a larger tract to a school so long as used for a school site and no longer, "and if the aforesaid premises be no longer used for a school house site, then the aforesaid premises shall revert to and become the property of the grantors herein of those claiming title to the aforesaid [larger tract] by, through or under said grantors." The property was abandoned for school purposes in 1951.

The court, in a most excellent opinion by Lozier, C., held that the limitation over [executory interest] in favor of the then owners of the larger tract was void under the rule against perpetuities, and that a possibility of reverter remained in the heirs of the grantor. The court expressly reserved the question of the alienability of possibilities of reverter.

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11. *Supra* note 1.
12. *Supra*, note 1.
13. *Supra*, note 8.
14. 266 S.W.2d 553 (Mo. 1954).

On the perpetuities problem, see generally 2 Gill, Real Property Law in Missouri 803-822 (1949). Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 V.A.M.S., § 72, p. 63.

The case involves one problem not mentioned by the court and apparently not raised by counsel, and that is the effect of the partial invalidity on the balance of the deed. If the doctrine of *Lockridge v. Mace*[15] were applied, the whole deed would be void, and there would be the very difficult question whether the school acquired the fee simple absolute by adverse possession.

WATERS AND WATERCOURSES—NAVIGABILITY OF STEAMS IN MISSOURI

The well-known case of *Elder v. Delcour*[16] was considered by Robert S. Gardner, in a comment in a recent issue of the *Missouri Law Review*.[17] In addition to his discussion of *Elder v. Delcour,* Mr. Gardner treats exhaustively the several aspects of the problem of navigable waters in Missouri, with special reference to smaller streams.

TAXATION

ROBERT S. EASTIN*

The cases decided in the field of taxation during 1954 by the Missouri Supreme Court were somewhat less numerous than usual. Classified by categories, they may be stated as follows:

I. SUBJECTS AND INCIDENCE OF TAXATION

A. *Federal Estate Taxes*

In *Carpenter v. Carpenter*,[1] the court was concerned with the "thrust" of the Federal Estate Tax in a situation where, at the time of his death, decedent owned a joint and survivors annuity (a part of his "gross estate" for Federal Estate Tax purposes) which passed directly to his widow, the value of which was substantially in excess of the value of his probate estate. The will of decedent directed the payment of all estate and inheritance taxes "assessed or levied upon any bequests or devise herein made", out of the residue of the estate. While it was conceded that a direction to pay estate taxes on a non-probate

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15. 109 Mo. 162, 18 S.W. 1145 (1891).
16. 269 S.W.2d 17 (Mo. 1954), *reversing s. c.*, 263 S.W.2d 221 (Mo. App. 1953).
17. Gardner, Comment, *Water and Watercourses—Navigability of Streams in Missouri*, 19 Mo. LAW REV. 401 (1954).

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1. 267 S.W.2d 632 (Mo. 1954).

item out of the decedent's estate would be valid, it was held that this language was not sufficiently broad for the purpose. In such a situation the court determined that a pro rata part of the tax should be paid by the widow. In so doing, however, the court refused to lay down any hard and fast rules as to the "thrust" of the Federal Estate Tax but held that the matter should be decided on general equitable principles. Consequently, what the result would be in another fact situation is left in some doubt.

B. General Real Estate Taxes

Section 353.110, *Missouri Revised Statutes* (1949), which gives a qualified exemption to the property of Urban Redevelopment Corporations is constitutional.[2]

C. *Special Taxes*

Tax bills issued by a city of the fourth class for street work are valid, though the work is done by or under contract with the city, which pays the initial cost out of its general fund and seeks reimbursement through tax bills.[3] The tax bills in question were void upon the initial record, however, since the journal of the Board of Aldermen did not show the yeas and nays. However, the court could, and properly did here, permit the amendment of the journal *nunc pro tunc* to show the yeas and nays when there was adequate testimony as to the actual vote.[4]

The *necessity* of a public improvement, to be financed by tax bills on property in a special benefit district, is solely for the city council or other legislative body and cannot be attacked in the courts by arguing that since the formation of the special benefit district was unnecessary, it was unreasonable, and thus a justifiable question under the Kansas City Charter. "Unreasonableness" in such a case means that the boundaries were improper or something of the sort.[5]

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2. Land Clearance for Redevelopment Authority v. City of St. Louis, 270 S.W.2d 58 (Mo. 1954) (*en banc*). For a fuller discussion of the constitutionality of the legislation under which Land Clearance for Redevelopment Authorities operates see State *ex inf.* Dalton v. Land Clearance for Redevelopment Authority, 270 S.W.2d 44 (Mo. 1954) (*en banc*).

3. Frago v. City of Irondale, 263 S.W. 356 (Mo. 1954) relying primarily on the construction of Mo. Rev. Stat. § 88.687 (1949) (Mo. Rev. Stat. § 7200 (1939), prior to the 1953 substantial re-enactment.

4. Cf. Fulton v. Lockwood, *infra*, note 13.

5. In the Matter of Proceedings to Grade North Elmwood Avenue in Kansas City, 270 S.W.2d 863 (Mo. 1954).

II. Collection of Taxes and Tax Sales and Titles

A. *County Collectors*

The failure of a county collector to return a delinquent tax list with his annual settlements with the county court, as required by Section 139.160 *Mo. Rev. Stat.* (1949) may amount to a concealment and so toll the Statute of Limitations in a suit on his bond, at least for a time, but, since there is no "confidential relationship" between the county court and the collector, it is necessary for a relator suing on the bond, to plead and prove the exercise of due diligence by it and the date it discovered the default or should have discovered it in the exercise of due diligence.[6]

B. *Tax Sales and Titles*

In the absence of affirmative proof of mistake or fraud in inducing confirmation of a sale, the former owner of real estate sold for taxes under the Land Tax Collection Act applicable to Jackson County (Sec. 141.210—141.810 Missouri Revised Statutes 1949), may not have the sale set aside after confirmation and after the time for appeal has elapsed upon the sole ground of inadequacy of consideration.[7] The finding on confirmation amounts to a judgment that the bid price represents the reasonable value of the property and some affirmative equitable basis for setting the judgment aside must be shown, other than the court erred in its conclusion. The supreme court does suggest, by implication, that perhaps a petition for review will lie, (pursuant to Sections 511.170—511.240[8]) to set aside a judgment of tax foreclosure as one rendered by default on constructive service. There may be some question as to whether this statute is applicable to the Land Tax Collection Act.

III. Taxing Districts

A. *Bonds*

Even if the Charter of the City of St. Louis does not permit the issuance of Revenue Bonds for off-street parking, since such authority is given by general law (Secs. 82.470 and 82.480, *Missouri Revised Statutes,* 1949) and since the charter recognizes that such authority may be given by law (Sec. 1, Article XVII, St. Louis City Charter) such bonds are

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6. State *ex rel.* School District of St. Joseph v. Wells, 270 S.W.2d 857 (Mo. 1954).
7. Brasker v. Cirese, 269 S.W.2d 62 (Mo. 1954) (en banc).
8. Mo. Rev. Stat. 1949.

valid and, since they are revenue bonds, and not general obligations, a vote of the people is not required by either Constitution, Statute or Charter.[9]

B. *Use of Funds and Financing*

An initiative proceeding to enact an ordinance creating a firemen's pension fund does not have to be submitted to a vote of the people where the proposed ordinance makes certain contributions to the pension fund mandatory, since this amounts to a proposal for an appropriation ordinance without providing new and additional revenue to meet the appropriation as required by Sec. 51, Article III of the 1945 Constitution.[10]

Bride v. City of Slater,[11] which held that a city might not recover sums paid for oil delivered under an invalid contract, was sharply limited in two later cases, *Grand River Township, DeKalb County v. Cooke Sales & Service, Inc.*[12] and *Fulton v. City of Lockwood.*[13] In the former case an order for a road grader, which called for payments designated as "rentals" but actually a portion of the purchase price, payable over two calendar years in the future, violated Sec. 26, Article VI of the Constitution prohibiting a political subdivision from becoming indebted in excess of the revenues from current years without a vote of the people; while in the latter case the infirmity was that the records of the Board of Aldermen of defendant fourth class city did not show the passage of an ordinance approving the contract in question and setting forth the yeas and nays, and no effort was made, as in *Frago v. City of Irondale, supra,* to correct the records *nunc pro tunc.* In both cases recovery of sums paid on the invalid contracts was permitted and the rule of the *Bride* case limited to its particular factual situation.

TORTS

GLENN A. MCCLEARY*

The work of the court in this area of the law continued to be quite heavy. The writer found seventy decisions, excluding the humanitarian

9. Petition of City of St. Louis, 266 S.W.2d 753 (Mo. 1954).
10. Kansas City v. McGee, 269 S.W.2d 662 (Mo. 1954).
11. 263 S.W.2d 22 (Mo. 1953).
12. 267 S.W.2d 322 (Mo. 1954).
13. 269 S.W.2d 1 (Mo. 1954).

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cases which are treated elsewhere in the *Review*, appealed on some point of tort law. However, no new principles of tort law were to be found in the decisions. Outside of one case of battery and one of libel, all the torts cases fell in the area of negligence, and most of the negligence cases involved personal injuries alleged to have been caused by carriers or by automobile accidents. If it were not for carriers and automobiles, there would be relatively little litigation for personal injuries.

It seemed to the writer that the court gave closer scrutiny to the conduct of the plaintiff, or contributory negligence as a matter of law, and to the matter of excessive damages, in many cases ordering a remittitur if the plaintiff was to be permitted to hold the verdict and judgment received in the trial court.

I. NEGLIGENCE

A. Duties to Persons in Certain Relations

1. Possessors of land

An interesting application of the principle that a possessor of land, abutting upon a public highway, may be subject to liability for bodily harm caused to trespassing children by an excavation or other artificial condition maintained by him thereon so close to the highway that it involves an unreasonable risk to such children, because of their tendency to deviate from the highway, was made in *Wells v. Henry W. Kuhs Realty Co.*[1] There the defendant was maintaining a dump on which it permitted the placing of glass bottles, jars and jugs, broken and otherwise. The dump was in close proximity to a public alley passing through the defendant's tract in a thickly populated urban area. Children in the neighborhood habitually resorted to the public alley and to other lanes on the defendant's tract of land, and to an unimproved portion of the defendant's land, for play. Of this the defendant had knowledge. The margin of demarcation between the alley and the defendant's property was obscured by dirt and debris, washed down and pulled down by the defendant from time to time in previous removals of trash and debris from its dump. The margin was further obscured by weeds. Here plaintiff's 11 year old son, while engaged with other children in a game of catching flying June bugs, inadvertently strayed a few steps, approximately three feet as alleged

1. 269 S.W.2d 761 (Mo. 1951).

in plaintiff's petition, onto the dump, and was caused to slip and fall on broken glass, his body coming into direct contact with other broken glass bottles and jars and resulting in severe cuts of the lower abdomen from which he died. A judgment of dismissal by the trial court for failure to state a claim upon which relief could be granted was reversed by the supreme court.[2]

The liability of a proprietor of a place of public amusement to a patron, who was participating in a sport sponsored at such place, was applied to a rural resort on Big River. The action, in *Perkins v. Byrnes*,[3] was by the parents for the death of their 19 year old son who drowned while swimming in the swollen stream which was not marked with warning notices of high water or swift undercurrent, and there were no life boats, life belts, or any other form of safety or warning devices. In reversing the judgment of the lower court, which had directed a verdict for the defendant at the close of all the evidence, and after considering other decisions where liability has been imposed upon the proprietor of a place of public amusement for hazardous conditions in natural lakes and rivers, the opinion reasoned: "If shallow water, hidden logs, or a concealed hole, present a jury question of negligence and consequent liability on the part of the proprietor of a public bathing resort, a fortiori, a swollen river with a hidden or deceptive undercurrent is a circumstance upon which reasonable minds could differ." There was evidence from which a jury could have found that the dangerous condition was so open and obvious that only the foolhardy would have attempted to go swimming on this occasion, but those were not the only inferences to be drawn from the facts and circumstances. It could not be said as a matter of law that the deceased was contributorily negligent. Both questions were for the jury.[4]

Submissible cases were made in *Burke v. Stix, Baer & Fuller*,[5] where an invitee was stepped on in a cafeteria by a waitress who had stepped backward, without looking, into the aisle where patrons customarily walked while carrying food, and in *Dill v. Dallas County Farmers' Exchange*,[6] where the invitee slipped on loose grain on the floor of the feed store. In both cases an instruction was given that if

2. The case is more fully discussed in 20 Mo. L. REV. 101 (1955).
3. 269 S.W.2d 52 (Mo. 1954).
4. The case is more fully considered in 20 Mo. L. REV. 320 (1955).
5. 264 S.W.2d 337 (Mo. 1954).
6. 267 S.W.2d 677 (Mo. 1954).

the jury found the injuries were caused by accident and were not due to any negligence, the invitee was not entitled to recover. The court held where the issue is whether defendant is or is not negligent, the case does not justify a so-called "accident" instruction merely because a jury might find a defendant was innocent of negligence.[7]

2. Railroads and Other Carriers

While there was an unusually large number of cases involving the liability of carriers, which were appealed to the Missouri Supreme Court in the year under review, there was but one case which presented an interesting problem of liability to merit consideration here. In *Drescher v. Wabash R.R.*,[8] the action was by the administratrix against the railroad under the Federal Employees' Liability Act for the death of a car repairman. The evidence showed that the deceased's automobile had collided with the railroad's engine and tender on the railroad's premises, though the deceased-repairman was in the act of leaving the premises fifty minutes before quitting time without the permission of the employer. The principal issue was whether the deceased was acting in the scope of his employment at the time of the accident under the Federal Employers' Liability Act. The plaintiff took the position that the "scope of employment" under the Act does not require the employee at the time of his injury to be engaged in performing the actual services for which he was employed, but only such activity as would be a necessary incident to his employment; that a trip through the employer's premises to the place of employment and his return trip through such premises to get home are necessary incidents to a servant's employment, and within the reasonable contemplation of the parties. The court held that it was within the reasonable contemplation of the employment that the deceased, after quitting his work for the night, would necessarily traverse the defendant's premises when leaving for home and would use the road in question, which was provided and maintained by the defendant in its yards and was the most feasible course of exit; that the

7. Krueger v. Schmiechen, 264 S.W.2d 311 (Mo. 1954), a tort action against the members of the governing body of a church for injuries alleged to have been sustained when the plaintiff fell while on the church premises, followed the non-liability rule of charities in tort actions and this immunity was held to extend to its members, though the church had obtained a liability insurance policy which covered members of the governing body. The plaintiff charged negligence in the following manner: ". . . that his said fall was caused by negligence of the defendants, through their agents and servants, in operating, managing and controlling the said Church."

8. 270 S.W.2d 843 (Mo. 1954).

relationship of employer and employee obtained throughout the period of the deceased's presence on the premises that day; that the deceased's protection under the Federal Employers' Liability Act did not cease while he was still in the defendant's yards, although he was leaving fifty minutes before his scheduled quitting time and without permission; and that the deceased's intended departure, even though fifty minutes prior to the end of his shift period, was still reasonably incidential to his employment and reasonably within the contemplation of the parties.[9]

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9. Other cases may be noted involving carries but which do not present new problems. The action in Hughes v. Terminal R.R. Ass'n of St. Louis, 265 S.W.2d 273 (Mo. 1954) *(en banc)*, was under the Federal Employers' Liability Act for death of a switchman, who, after alighting from a train moving in a switching operation, was struck by defendant's locomotive moving in the opposite direction. Judgment for the plaintiff was reversed on the ground that instructions which authorized a finding that defendant's employees, in the exercise of due care, had a duty to look out and be in a position to see and to communicate and receive signals that the deceased was in danger, and the failure to do so could be found to be negligence, were prejudically erroneous without requiring a finding that, under the circumstances, a reasonable and prudent man would have anticipated danger to employees so engaged, so as to impose a duty of look out for their safety. There was no rule introduced, or custom shown, requiring defendant's employees to look out for the safety of switchmen working in defendant's yards in any and all circumstances, and the court could not say as a matter of law that the defendant had such a duty in the circumstances of the instant case.

In Envinger v. Thompson, 265 S.W.2d 726 (Mo. 1954) *(en banc)*, the action was brought by a mechanic to recover damages for dermatitis allegedly caused by contact with a compound used by the defendant in the cooling systems of its diesel engines. Since the harmful characteristics of the chromium compound which was involved was not a matter of common knowledge, plaintiff's evidence that defendant should have known it made a jury question.

In an action under the Federal Employers' Liability Act for injuries to the plaintiff from a fall down an elevator shaft, wherein it appeared that an operator was deemed off duty when he had delivered to the incoming operator the key for opening the doors from the exterior of the shaft, that plaintiff had received the key, but that the elevator had been moved in plaintiff's absence, it was held in Votrain v. Illinois R. Co., 268 S.W.2d 838 (Mo. 1954), that the evidence warranted submission to the jury of the question whether the negligent act of the departing operator in moving the elevator in whole or in part was the cause of plaintiff's injuries, or whether plaintiff was guilty of negligence which was the sole cause of his fall and injuries.

McDill v. Terminal R.R. Ass'n of St. Louis, 268 S.W.2d 823 (Mo. 1954), was an action by a railroad employee for injuries sustained when a sheet iron side riser of a diesel step assembly, which he was flattening, skidded off the rounded top of an anvil, when the employee tripped while changing his handholds on the sheet metal, and fell upon employee's right great toe. Whether the employer was negligent in failing to furnish an anvil with a square top and in not properly maintaining the floor before the employee's work bench were properly left to the jury.

An instruction, in an interurban car-automobile crossing collision case, "that the defendant railroad company did not have an absolute and unqualified right of way at the crossing . . . but owed the duty to exercise ordinary care to avoid a probable accident thereat, which duty commenced as soon as defendant's motorman knew, or had reason to apprehend that a vehicle approaching the crossing apparently would not stay out of danger and the court further instructs you that the defendant railroad company was not relieved from such duty to exercise ordinary care to avoid a

3. Automobiles

In volume, the appeals arising from injuries received in automobile accidents were approximately equal in number to the cases involving carriers. As in the carrier case, no new questions of liability were presented, the grounds of the appeals presenting only the usual problems whether a submissible case had been made, the adequacy of instructions, and other general grounds. The more important questions in the automobile cases involved the doctrine of *res ipsa loquitur* and contributory negligence and are considered under those headings.[10]

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probable accident by having erected a properly functioning automatic warning signal at said crossing," was held, in Jones v. Illinois Terminal R.R., 272 S.W.2d 272 (Mo. 1954) *(en banc)*, misleading and calculated to minimize the effect of defendant's evidence, causing the jury to believe it should not consider, in determining whether plaintiff was contributorily negligent, that the railroad automatic warning signal was properly functioning.

Reese v. Illinois Terminal R.R., 273 S.W.2d 217 (Mo. 1954), was an action under the Federal Employers' Liability Act by a switchman against the railroad company for injuries sustained by him while operating a switch in the railroad yard. The giving of instructions which directed a verdict for the switchman was held to constitute error, in view of the fact that the instruction did not submit that the ice condition involved was dangerous or not reasonably safe as charged in the petition.

In the exercise of the highest degree of care by a bus carrier of passengers, sufficient time must be allowed before starting up so that the alighting passenger shall have a reasonable opportunity to reach a place of safety and will not be imperiled by the carrier's movement of the bus. Before starting the bus the operator should see and know that the alighting passenger has not only alighted safely, but that he is not in such position or situation as to be imperiled by the starting up of the bus; and that if the position of the alighting passenger upon the street be such that the movement of the bus might imperil or endanger him, the carrier is charged by law with knowledge of such fact. This rule was applied in Mayor v. St. Louis Pub. Serv. Co., 269 S.W.2d 101 (Mo. 1954), in an action by a bus passenger, who walked with the aid of crutches, for injuries sustained when the bus, from which the passenger had alighted on a rainy night from the front end of the bus within plain view of the operator, struck the passenger's crutch as the bus was making a right turn, and caused the passenger to fall beneath the bus.

In Brock v. Gulf, Mobile & Ohio R.R., 270 S.W.2d 827 (Mo. 1954), the defendant's duty to exercise ordinary care to provide a brakeman with a reasonably safe place in which to work was applied to work being performed on a spur track into the premises of a third person. Here the injuries were sustained when the plaintiff-brakeman stepped into a hole containing boiling water as he left the engine to uncouple cars. The defendant was held under a duty to inspect the spur track at reasonable intervals and to use ordinary care in such inspections to keep the premises in a reasonable safe condition for plaintiff's use.

10. Other cases may be noted involving automobiles but which do not present new questions. Stroh v. Johns, 264 S.W.2d 304 (Mo. 1954), an action for wrongful death, the granting of a new trial by the trial court was upheld, after a verdict for the plaintiff, on the ground that plaintiff's counsel argued to the jury that the immediate and direct cause of the collision was the great speed of defendant's automobile, when failure to slacken speed and not excessive speed was submitted by the instructions, notwithstanding plaintiff's contention that such argument was merely another way of saying that failure to slacken speed was the direct cause of the collision. The plaintiff had the right to argue speed as a circumstance shown on the issues of defendant to slacken the speed, but not to argue speed as an independent ground of negligence when excessive or great speed was not submitted as a ground of negligence.

4. Imputed Negligence

Whether a tree trimmer employed by a telephone company to clear the company's right of way of trees and brush, so that the company could install new telephone lines, the three trimmer furnishing all labor, tools, equipment, vehicles and supervision required, was an agent or an independent contractor was presented in *Williamson v. Southwestern Bell Telephone Co.*[11] The plaintiff was injured while riding as a passenger in an automobile which was struck by a truck of the tree trimmer which was traveling in the opposite direction, causing a pruning hook on a rack on the left side of the truck to crash through the windshield and strike her head. The court held as a matter of law that the tree trimmer had the status of an independent contractor so that the telephone company was not liable on an employer-employee theory. It was further held that the company was not liable on the ground that the tree trimmer was carrying out the company's franchise function or duty of operating a telephone company or furnishing telephone service, within the meaning of the rule that one carrying on an activity which can be lawfully carried only under franchise granted by public authority cannot delegate the work to be done. The court said that "In a sense, every act of a corporation is done under its charter . . . but it does not follow merely because the corporation is a public utility that its acts or contracts fall within the category of the nondelegable duties granted by the franchise." The court pointed out that the danger from the operation of the truck arose from the manner in which the work was performed, and was not a danger inherent in the work of clearing the right of way or the transportation of tools and employees so as to be nondelegable to an independent contractor.[12]

Where plaintiff's automobile, which had been traveling down the highway, struck the defendant's automobile which had entered the intersection first from a side road which bore a stop sign, it was held in Ferguson v. Betterton, 270 S.W. 2d 756 (1954), that the defendant's instruction that if she entered the intersection from the plaintiff's right before or approximately at the same time that the plaintiff entered the intersection then the defendant had the right of way, and that even though this did not relieve the defendant of her duty to exercise the highest degree of care, it did entitle her to assume that the plaintiff motorist would respect her right until such time as she observed to the contrary, was not prejudicially erroneous.

11. 265 S.W.2d 354 (Mo. 1954).

12. A novel theory of liability was presented in Slicer v. W. J. Menefee Const. Co., 270 S.W.2d 778 (Mo. 1954), in an action by the husband for wrongful death of his wife who was killed while crossing a new highway which was being constructed by the defendant contractor. On appeal from the dismissal of the action on the ground that the petition did not state a cause of action, it was held that no duty was owed by the contractor to the plaintiff's wife. The fact that the contractors permitted public

5. Humanitarian Negligence

The cases based on the humanitarian doctrine are treated separately in each volume of the *Review* by Mr. Becker.[13] Due to the significance of the doctrine to Missouri lawyers, it has been thought that these decisions should receive special emphasis.

B. Res ipsa loquitur

The automobile accident cases do not afford a fertile field for the application of the doctrine *res ipsa loquitur*. Where two automobiles are operated by different possessors, it cannot be said that the defendant was in sole control and management of the agencies involved, a basic requirement before negligence may be inferred on the part of one of the operators without proving the sepcific fact of negligence. Where only one automobile is involved in the accident, the doctrine is not applied in many situations, principally because so many accidents can happen while operating an automobile without any negligence on the part of the operator, that it cannot be said that accidents of this nature do not usually happen unless there has been negligence, which is another and equally basic element for the application of the doctrine. While the doctrine is not usually applicable to injuries received when an automobile in which the plaintiff is riding runs off of the highway, if the plaintiff can show some additional fact which helps to show negligence in operating the automobile prior to running off of the highway the doctrine will be applicable. In *Browne v. Heeter*,[14] in an action for injuries to the plaintiff when the automobile in which he was riding, and which was driven by the defendant, left the roadway and struck a tree, it appeared that the defendant swerved to the right in attempting to avoid a collision with another car which he suddenly observed approaching him partially (3 to 4 feet) in the defendant's lane. The defendant did have control of the car and did cause it to swerve off of the highway into a tree. The court held that the accident did point to some negligence in the defendant in the manner in which he swerved under the circumstances (there were 6 to 7 feet of pavement and 5 to 6 feet of shoulder within which to swerve to avoid the collision). Nor was specific

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travel upon the unfinished and unfit-for-public-travel highway would not create a duty owed by the defendant-contractor to deceased, assuring the deceased safe ingress and egress between her residence and the old highway.

13. Becker, *The Missouri Supreme Court and the Humanitarian Doctrine in the Year 1954*, 20 Mo. L. Rev. 38 (1955).

14. 267 S.W.2d 666 (Mo. 1954).

negligence shown by the plaintiff, as the cause of the swerving was given by the defendant in his deposition. Plaintiff was not bound by the defendant's deposition version of what caused the collision, in the sense of what caused the defendant to run into the tree, and did not show or prove defendant's precise negligence.

Much the same type of problem is involved where the injuries result to the plaintiff while riding in an automobile which skids off of the highway. It is a long settled rule in Missouri that the mere skidding of an automobile is, in and of itself, not such an occurrence that will permit an inference of negligence, because skidding as a matter of experience may occur without fault. Therefore, the doctrine of *res ipsa loquitur* has been held inapplicable unless there is evidence of some fact or circumstance connected with the skidding from which negligence may be inferred. In *Triplett v. Beeler*,[15] an action for injuries sustained by the plaintiff, a passenger, when the automobile in which he was riding skidded off of the pavement during a rainstorm at night, evidence as to the speed of the automobile and the inattention of the driver at the time or just prior to the skidding was held sufficient to submit the case to the jury under the *res ipsa loquitur* doctrine.[16]

C. *Defenses in Negligence Cases*

A case of particular interest to plaintiffs, whose cause of action arises in a jurisdiction where as a part of his case he must plead and prove that he was in the exercise of due care, is *Redick v. Thomas Auto Sales, Inc.*[17] There it was held that, under Illinois law, the plaintiff was obliged to plead and prove his own due care, or lack of contributory negligence nothwithstanding the Missouri rule making contributory negligence an affirmative defense. It was held that the Illinois requirement that plaintiff plead and prove that he was in the exercise of due care was substantive and not merely procedural, as both are essential elements of the plaintiff's right to recover under the law of Illinois. Missouri cases following the previous rule were expressly disapproved. The trial court was held not to have erred in refusing to instruct the jury that the burden of proving defendant's contributory negligence rested upon the defendant.

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15. 268 S.W.2d 814 (Mo. 1954).
16. See a more complete discussion of the problem in 20 Mo. L. REV. 216 (1955).
17. 273 S.W.2d 228 (Mo. 1954).

The problem of what a driver of an automobile may be expected to do, to avoid being held contributorily negligent as a matter of law, when he is faced with the situation of an approaching automobile encroaching upon his side of the highway, was quite fully considered in *Moore v. Middlewest Freightways, Inc.*[18] There it was held that the plaintiff truck driver, who saw defendant's approaching truck encroaching upon his side of the highway 900 to 1000 feet from him, had the right to assume that it would turn back in time to avoid a collision and to continue to assume, until he knew, or by the exercise of the highest degree of care should have known, that it would not do so; and even after he became chargeable with knowledge that the defendant's approaching truck would not turn back to its own side of the road in time to avoid the collision, he was obliged to turn onto the shoulder only if it appeared, in the existing darkness, reasonably practicable and not dangerous, even though daylight inspection might disclose that the maneuver could have been made in safety.

The rule in Missouri that one is not necessarily contributorily negligent as a matter of law solely because he drives at a speed which prevents his stopping within the distance his headlights reveal objects ahead of him, and that whether he is contributorily negligent as a matter of law depends upon all the circumstances in a particular case, was again applied in *Parsons v. Noel.*[19] This was an action for the wrongful death of the plaintiff's husband resulting from a collision between an automobile driven by the decedent and a truck which had stopped by the defendant's employee with its rear dual wheels on the highway.

An interesting situation involving contributory negligence is found in *Stoessel v. St. Louis Public Service Co.*[20] The action was for injuries allegedly sustained when the defendant's streetcar, which the plaintiff was about to board, moved forward and around a curve in such a manner that the plaintiff, who was standing where she was invited to stand to board the streetcar, was struck by the rear overhand of the car. From a judgment for the defendant, the trial court granted a new trial, which order was affirmed by the supreme court, on the ground that an instruction was patently erroneous, in directing a verdict for the defendant, upon finding the plaintiff negligent if the jury found that

18. 266 S.W.2d 578 (Mo. 1954).
19. 271 S.W.2d 543 (Mo. 1954).
20. 269 S.W.2d 41 (Mo. 1954).

the plaintiff saw or could have seen the yellow warning line and stood between such yellow line and the side of the car which she had to do to board the car, when she knew or could have known that the rear end of the streetcar would swing out and strike her. The court held that the issue on contributory negligence was not whether the plaintiff stood between the yellow line and the streetcar with knowledge that the car would strike her if it started forward, since she stood where she was invited to stand and where she had to stand in order to board the streetcar. That place was necessarily between the yellow warning line and the side of the streetcar. Thus the plaintiff's knowledge when standing in this designated place that the rear end of the streetcar would strike her, if the car started before she boarded it, would not prove negligence on her part. The issue was whether the plaintiff continued to stand in that place after the car started forward with knowledge that it would strike her if she did not step back behind the yellow line, and with time to have so acted before the rear end of the car struck her. The instruction did not hypothesize these facts which would point to any duty on the plaintiff to act until after the car started forward. The court said that "the instruction obviously fails to hypothesize that plaintiff continued to stand between the yellow line and the streetcar after the car started forward with knowledge that she was then in the path of the overhand and with knowledge that the car was proceeding immediately onto a left curve and that she had time to remove herself from such position before being struck."

The care which a guest in an automobile must use, to avoid being contributorily negligent, was raised in the instructions in *Toburen v. Carter*,[21] where the guest was injured when the automobile in which she was riding collided at night with the rear of the defendant's automobile. In the absence of visible lack of caution of the driver or known imminence of danger, a guest may ordinarily rely upon the driver who has the exclusive control of the automobile. Only when dangers, which are either reasonably manifest or known to the guest, confront the driver, and the guest has an adequate and proper opportunity to conduct or influence the situation for safety is he negligent if he sits by without warning or protest and permits himself to be driven carelessly to his injury. Thus an instruction, given for the defendant, which permitted the jury to find that the plaintiff was contributorily negligent if the

21. 273 S.W.2d 161 (Mo. 1954).

plaintiff could have seen the defendant's automobile and could have warned the driver of the automobile in which the plaintiff was riding of the danger so as to avoid the collision, was prejudicially erroneous in that it placed upon the plaintiff the absolute duty to warn the driver if she could have seen the defendant's automobile in time to enable the driver to avoid the collision. The court pointed out that this portion of the instruction would impose a higher duty on the guest than that of the operator, which is to exercise the highest degree of care.[22]

D. *Burden of Proof*

An instruction which requires the plaintiff or the defendant to prove an issue "to the satisfaction of the jury" has been held to be erroneous. However the court observed, in *Lebow v. Missouri Public Service Co.*,[23] that no case has been reversed and remanded because the instruction contained this phrase. In that case the court instructed the jury that the defendant pleading contributory negligence has the burden of proof, "and it devolves upon the defendant to prove such contributory negligence by a preponderance of the evidence to the satisfaction of the jury, before you are warranted in finding for defendant on that issue, unless the evidence offered by the plaintiff shows he was

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22. A driver of a motor vehicle is contributorily negligent as a matter of law where, having a clear view along the railroad track drives upon the track in the daytime, when by looking he could have seen the approaching train. This has long been the rule in Missouri. Lohmann v. Wabash R.R., 269 S.W.2d 885 (1954). Likewise, where a driver of a motor vehicle drives onto a railroad track despite the warning of a red flashing light, he is contributorily negligent as a matter of law. In Threlkeld v. Wabash R. R. Co., 269 S.W.2d 893 (Mo. 1954), the driver assumed that the flashing lights were only operating because a train was standing at the station, and that any approaching train would not exceed the speed limit and would give the statutory warning which he could hear.

In White v. Rohrer, 267 S.W.2d 31 (Mo. 1954), it was pointed out, in an action for injuries received by the plaintiff when the defendant ran into the rear-end of his car, that the test of the sufficiency of a warning of an automobile to stop is whether it is timely, the form and character of the signal, whether by arm or by lights, depending on the circumstances, and the forward driver does not in all circumstances discharge the full measure of duty to give adequate or timely warning when he employs his brake signals only.

In Crandall v. McGilvray, 270 S.W.2d 793 (Mo. 1954), in an action against the employer for injuries sustained by a farmhand when the fingers of his left hand were caught in the husking rollers of a mechanical corn picker, judgment was entered by the trial court for the defendant notwithstanding the verdict in favor of the plaintiff. This was affirmed as the farm hand was held to have been contributorily negligent as a matter of law where he attempted to remove an obstruction which had stopped the husking rollers of the mechanical corn picker without first disengaging the power take-off, when he knew that the rollers would resume operation at high speed and might draw his hand between the rollers if the power take-off was not disengaged.

23. 270 S.W.2d 713 (Mo. 1954).

guilty of contributory negligence, and in this connection you are further instructed that the law presumes that the said . . . was in the exercise of ordinary care in the absence of evidence to the contrary." The latter part of the instruction on the presumption of ordinary care, where there is evidence of the plaintiff's contributory negligence, was held to be erroneous, and when the effect of these two erroneous directions are combined, the instruction was held to be reversibly erroneous.

In *Young v. Kansas City Public Service Co.*,[24] an instruction upon the burden of proof and in defining terms informed the jury "that by the term 'greater weight or preponderance of the credible evidence' is meant that evidence which is most convincing to the minds of the jury." From a verdict in favor of the defendant, the plaintiff appealed on the ground that the instruction erroneously required the highest degree of proof by the plaintiff. The court held that this did not overemphasize the burden of proof to mislead the jury.[25]

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

CARL C. WHEATON*

PARTIES

a. *In General*

Persons who would be parties to a suit must have some actual and justiciable interest susceptible of protection by that suit.[1]

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24. 270 S.W.2d 788 (Mo. 1954).

25. An instruction given in Hall v. Brookshire, 267 S.W.2d 627 (Mo. 1954) *(en banc)*, in an action for libel, that plaintiff was required to prove his case by the preponderance of the evidence, but that the burden of proof rested upon the defendant to prove beyond a reasonable doubt that plaintiff had committed perjury in order to sustain his defense of truth, was erroneous. A plea of justification in libel and slander actions involving the imputation of crime may be sustained by a preponderance of the evidence, the same as the rights of the parties in other civil actions, and the defense does not have to be established beyond a reasonable doubt.

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1. Hribernik v. Reorganized School District R-3, 276 S.W.2d 596 (Mo. App. 1955).

It is usually said that one must be a real party in interest. Dillard v. Dillard, 266 S.W.2d 570 (Mo. 1954). In this case it was held that, in view of the fact that upon

In a taxpayers' action to enjoin collection of school tax allegedly approved at a void election where one plaintiff had never owed or paid a school tax, and the other two plaintiffs paid their school tax during the pendency of the action, they had no justiciable interest in the action and could not be parties.[2]

b. *Necessary*

In an action on a contract by one of the parties thereto, the only parties defendant who may be necessary are the other parties to the contract sued on, and those who have an interest in the dispute which will be affected by the action.

In an action by the purchaser against the vendors for specific performance of a contract for the sale of a farm, cattle, and implements, the vendors' farm manager, who was not a party to the contract, was not a necessary party because he was to receive, as part of his compensation, $10 for each calf sold, and the purchaser in the contract had agreed to sue for payment of such amount.[3]

Judgment for contestants in will contest proceedings was not void because the testator's widow, a beneficiary in the will, was not a party to the action where the widow appeared as a witness and testified that she had renounced the will and had exercised her statutory right of election and was asserting no claim or interest under the will.[4]

c. *Interpleader*

The mere fact that about 88 per cent of the outstanding preferred and common stock of a railroad corporation was owned by a second railroad corporation did not show that the first railroad corporation was not a fair and impartial stakeholder entitled to maintain an interpleader suit to determine the right of the preferred stockholders to an additional dividend.[5]

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the death of a testator the real estate passes directly to the devisees named in his will, the executrix of a decedent was not, in the absence of a showing of interest of the executrix as such in the realty possessed by the defendent, the real party in interest with respect to a suit for a declaratory judgment as to the ownership of the real estate, and a declaratory judgment suit for such a purpose could not be instituted and maintained by the executrix.

Also, see Fort Osage Drainage District v. Jackson County, 275 S.W.2d 326 (Mo. 1955), as to the real party interest in an action by a drainage district against a county to collect a maintenance tax levied against the benefits to public roads and highways in the district.

2. Hribernik v. Reorganized School District R-3, *supra* note 1.
3. Ray v. Wooster, 270 S.W.2d 743 (Mo. 1954).
4. Donnan v. Donnan, 264 S.W.2d 318 (Mo. 1954).
5. St. Louis Southwestern Railway Co. v. Meyer, 272 S.W.2d 249 (Mo. 1954).

Further, the fact that a railroad corporation induced the court to quash certain subpoenas duces tecum or refused to produce documents, particularly correspondence and opinions of lawyers as to the right of the preferred stock to participate in additional dividends, did not show a lack of impartiality on the part of the railroad corporation so as to deprive it of the status of stakeholder to maintain an interpleader suit to determine the right of the preferred stockholders to participate in additional dividends.[6]

Again, the fact that, 11 days prior to the institution of an interpleader suit by the first railroad corporation to determine the right of the preferred stockholders to participate in additional dividends deposited in a special dividend fund with a trust company, the counsel of the second railroad corporation, which owned about 88 per cent of the total stock of the first railroad corporation, wrote a letter to the first corporation's counsel and took the position that the preferred stock was entitled to participating rights, did not compel the inference that there was collusion on the part of the first railroad corporation in instituting the suit and did not defeat, as a matter of law, the first railroad corporation's right to maintain the suit.[7]

Interpleader may not be defeated initially by the mere assertion that a fund is larger in amount than the amount tendered.[8]

Hence, an alleged fact that a railroad corporation failed to pay into court the entire amount due stockholders as additional dividends did not defeat an interpleader suit by the railroad corporation to determine the right of the preferred stockholders to participate in additional dividends, in the absence of any showing of an abuse of discretion on the part of the board of directors.[9]

d. *Class Actions*

Class suits can be maintained only by those whose interests are real and susceptible of some relief.[10]

Therefore, in a taxpayer's action to enjoin the collections of a school tax allegedly approved at a void election, where the plaintiffs had no

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6. *Ibid.*
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
10. *Supra* note 1.

justiciable interest in the controversy, they could not represent other taxpayers who had not paid the school tax.[11]

The requirements of Missouri Supreme Court Rule 3.07 relating to class actions cannot be regarded as merely technical or directory. It is mandatory, and it reveals the court's solicitude for the constitutionality of Section 507.070 of the present *Missouri Revised Statutes* by requiring that the elements of due process be accorded to all absent persons whom others who sue would bind as a class. That section forbids suitors to bind members of a class unless it is made apparent by the procedure followed that they fairly and adequately represent that class.[12]

e. *Intervention*

Interventions in pending causes are of two classes, first, those in which the intervention is not indispensible to the asserted right or interest of the petitioner for intervention, and second, those in which the absolute right is given by statute, or where the intervener's asserted interest can be preserved or enforced only by permitting intervention in a pending cause.

It must therefore appear that the petitioning intervener must have (1) an "interest" in the pending action, and (2) that the representation of such interest "by existing parties is or may be inadequate," and (3) that the intervener "is or may be bound by a judgment in the action".

The word "interest," as used in the intervention statute has a definite legal meaning. It generally means a concern which is more than mere curiosity, or academic or sentimental desire. One interested in an action is one who is interested in the outcome or result thereof because he has a legal right which will be directly enlarged or diminished by the judgment or decree in such action. It means a direct and immediate claim to, and having its origin in, the demand made or proceeds sought or prayed by one of the parties to the original action, but such "interest" does not include a mere consequential, remote, or conjectural possibility of being in some manner affected by the result of the original action; to come within the above statute, the "interest" must be such an immediate and direct claim upon the very subject matter of the action that the intervener

11. *Ibid.*
12. *Ibid.* For an example of a proper class action, see St. Louis Southwestern Railway Co. v. Meyer, *supra* note 5.

will either gain or lose by the direct operation of the judgment that may be rendered therein.[13]

SERVICE

a. *By Publication*

Where a railroad corporation, in addition to declaring a dividend of $5 a share on both preferred and common stock, declared a further dividend of $1 a share on outstanding shares of capital stock, but payment of the further dividend was withheld because of the reasonable doubt as to the right of the preferred stockholders to participate, and the corporation deposited an additional dividend in the special dividend fund in a trust company for the benefit of the shareholders, before the institution of an interpleader suit, service by publication on non-resident defendants was authorized under the statute providing that service by publication shall be allowed in all cases affecting a "fund", "specific property", or any "res" or status within the jurisdiction of the court.[14]

PLEADING

a. *Office of*

The office of pleadings is to define and to isolate the issues to those controverted so as to advise the trial court and the parties of the issues to be tried and to expediate the trial of the cause on its merits.[15]

b. *Construction of*

All pleadings shall be so constructed as to do substantial justice, and, even as formerly, the parties are to be protected by the court when it construes pleadings in order to secure them against being misled. Under the present civil code pleadings are not to be used to conceal issues and to ambush the adverse party.[16]

Where there is no attack upon a petition prior to judgment, every reasonable intendment will be indulged in favor of the pleading, and the petition will be construed most favorably to the plaintiff.[17]

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13. State of Missouri *ex rel.* Farmers Mutuals Automobile Ins. Co. v. Weber, 273 S.W.2d 318 (Mo. 1954).
14. St. Louis Southewestern Railway Co. v. Meyer, *supra* note 5.
15. Dillard v. Thomas, 270 S.W.2d 548 (Mo. App. 1954).
16. Hildebrand v. Anderson, 270 S.W.2d 406 (Mo. App. 1954).
17. Emerson v. Treadway, 270 S.W.2d 614 (Mo. App. 1954).

c. *Necessity of Reply*

In an action against a power company for the damages caused by the erection of a transmission line across the plaintiff's land, the statement in the power company's general denial that a construction company erected the power line and committed the acts complained of was not an averment that the construction company was an independent contractor and the plaintiffs were not required to file a reply to that averment.[18]

d. *Petition*

1. Form of Action

The form of an action is determined by the substance of the petition.[19]

2. And/or

In an action against a landlord and a tenant in control of premises for injuries sustained when the railing on which an invitee was leaning collapsed, a petition which stated that the defendants, as owners, and/or agents, had control, management, supervision, and possession of the premises was not defective for use of phrase "and/or" as failing to state a theory of liability.[20]

3. Different Theories

If a petition contains averments which, if proved, would entitle the plaintiff to recover on either of several theories, and it is impossible to say definitely whether the plaintiff is counting on one or the other, he may be permitted to recover upon whichever of the two theories his evidence may warrant, and the allegations not necessary to the statement of the cause of action on which recovery properly may be had may be treated as surplusage and disregarded.[21]

4. The Prayer

Although our courts have on several occasions loosely stated that the prayer is no part of the petition—a thought more accurately expressed by saying that the relief prayed for is not part of the plaintiff's cause of action in determining the cause of action intended to be pleaded under the new code—if the allegations of fact are ambiguous or suscepti-

18. Linder *et ux.* v. White River Valley Electric Co-op, 270 S.W.2d 414 (Mo. App. 1954).
19. Hildebrand v. Anderson, *supra* note 16; Duvall v. Stokes, 270 S.W.2d 419 (Mo. App. 1954).
20. Coplen v. Zimmerman, 271 S.W.2d 513 (Mo. 1954).
21. Emerson v. Treadway, *supra* note 17.

ble of two constructions, the prayer may be looked to for the purpose of ascertaining the intention of the pleader.[22]

e. *The Answer*

1. General denial

A property owners' allegation that an alleged employee was an independent contractor, who had agreed to furnish all materials and to construct a house for an agreed sum, constituted a general denial to the lumber company's petition, which alleged that the property owners had purchased lumber and materials furnished to their alleged employee, and raised the sole question as to whether the property owners or their authorized agent purchased the lumber and materials.[23]

2. Affirmative Defenses

Failure of consideration[24] and laches[25] are affirmative defenses.

It has been held recently, in an action in Missouri relating to an automobile collision in Illinois, that the law of that state to the affect that the rule that the plaintiff must plead and prove his due care is substantive law shall prevail in the action here, and that a petition which fails to allege the plaintiff's care is insufficient.[25a] This appears to reverse earlier decisions.

3. Alternative and Hypothetical Defenses

One may plead in the alternative[26] and hypothetically.[27]

4. Joinder of Defenses

A denial in a slander action that the words charged were spoken and a defense that the words spoken are true may be joined in the same answer, as they are not inconsistent. It does not necessarily follow that the defendants spoke the alleged slanderous words because of the claim that they are true.[28]

One may assert any number of defenses alternately or hypothetically, though they are inconsistent.[29]

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22. Hildebrand v. Anderson, *supra* note 16; Duvall v. Stokes, *supra* note 19.
23. R. J. Hurley Lumber Co. v. Cummings, 264 S.W.2d 379 (Mo. App. 1954).
24. Dugan v. Trout, 271 S.W.2d 593 (Mo. App. 1954).
25. State of Missouri, *inf.* Dalton v. Mattingly, 275 S.W.2d 34 (Mo. App. 1955).
25a. Redick v. M. B. Thomas Auto Sales, 273 S.W.2d 228 (Mo. 1954).
26. Five Twelve Locust v. Mednikow, 270 S.W.2d 770 (Mo. 1954).
27. Trice v. Lancaster, 270 S.W.2d 519 (Mo. App. 1954); Five Twelve Locust v. Mednikow, *supra* note 26.
28. Trice v. Lancaster, *supra* note 27.
29. Five Twelve Locust v. Mednikow, *supra* note 26.

f. *Counterclaims*

1. Affirmative judgments

Affirmative judgments may be granted in connection with counterclaims.[30]

2. Refiling of reply

Where a defendant's refiled counterclaim did not differ in legal effect from the defendant's initial counterclaim, the plaintiff was not required to refile his reply to the defendant's counterclaim or his own counterclaim which was filed at the same time as the reply.[31]

g. *Amendments to Pleadings*

1. Scope of

It is unnecessary to consider whether interlined amendments constitute entirely new matter and a departure from the previous pleading, for the old rule against departure in pleadings has been abrogated by our new civil code and is no longer recognized or enforced. Amendments are now unlimited in scope and, in the absence of prejudice to other parties or harmful consequences of delay, courts should be extremely liberal in permitting them. Whether an amendment of a pleading should be permitted is primarily within the sound judicial discretion of the trial judge, whose action will not be disturbed where there is no showing that such discretion has been palpably and obviously abused.[32]

2. Relation Back

Although it is true that a prior pleading is abandoned by the filing of an amended one, the amended pleading relates back to the time of the filing of the original pleading, if the claim or defense stated in the amended pleading is the same as that stated in the original one. Where a refiled counterclaim differed from the counterclaim, as initially stated and filed, only superficially in form and language and not at all in substance and legal effect. the refiled counterclaim related back to the date on which the counterclaim was filed originally.[33]

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30. Hildebrand v. Anderson, *supra* note 16.
31. *Ibid.*
32. Stewart v. Stewart, 277 S.W.2d 322 (Mo. App. 1955). Also, see Slater v. Kansas City Terminal Railway Company, 271 S.W.2d 581 (Mo. 1954), in which the amendment merely provided that the plaintiff was suing as a widow rather than as an administratrix.
33. Hildebrand v. Anderson, *supra* note 16.

3. Partition Actions

Since all pleadings and proceedings in a partition suit are governed by the rules applicable in ordinary civil actions, the pleadings in a partition suit may be amended as provided by Section 509.490 of our *Revised Statutes*.[34]

4. Trial of Issues Not Raised by Pleadings

In a servant's action for injuries, where the evidence as to the loss of future earnings came in without objection, the petition would be considered as amended in accordance therewith.[35]

Also, where prospective purchasers testified, in an action to recover an earnest money deposit, that the broker had agreed to arrange certain financing as a condition to purchase, and the broker did not object to such testimony but joined issue thereon and testified that he had not promised to do so, the issue of whether the broker had promised to arrange the financing would be treated as if it had been raised in the pleadings.[36]

MOTION TO DISMISS

a. *Admissions and Inferences*

In ruling on a motion to dismiss a petition, all properly pleaded facts in and all inferences of fact that may fairly and reasonably be drawn from the petition must be taken as true.[37]

However, neither conclusions of law nor conclusions of the pleader on the facts are admitted by a motion to dismiss and, where such conclusions appear in a petition, they must be disregarded.[38]

b. *Matters Considered*

On a motion to dismiss a petition for failure to state any cause of action against the defendants, the court may only consider what appears on the face of the petition.[39] Hence, evidence tending to show laches could not be considered.[40]

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34. Stewart v. Stewart, *supra* note 32.
35. Evinger v. Thompson, 265 S.W.2d 726 (Mo. 1954).
36. Kimbrough v. Gross, 268 S.W.2d 56 (Mo. App. 1954).
37. Jacobs v. Jacobs, 272 S.W.2d 185 (Mo. 1954); Gilbert v. Edwards, 276 S.W.2d 611 (Mo. App. 1955).
38. Gilbert v. Edwards, *supra* note 37.
39. State of Missouri, *inf.* Dalton v. Mattingly, *supra* note 25; Hudson v. Jones, 278 S.W.2d 799 (Mo. App. 1955).
40. State of Missouri, *inf.* Dalton v. Mattingly, *supra* note 25.

c. *Construction of*

In determining whether or not a petition states a claim or cause of action, the averments of the petition are to be given a liberal construction, according the averments their reasonable and fair intendment. So considered, a petition should be held sufficient if its averments invoke substantive principles of law which entitle the plaintiff to relief.[41]

JOINDER OF GROUNDS FOR MOTION

All of the presently existent motion grounds intended to be relied on must be included in one motion, the movant cannot separate them, and file a separate motion for each cause assigned.[42]

MOTION FOR JUDGMENT ON THE PLEADINGS

a. *Admissions*

A motion for a judgment on the pleadings admits well-pleaded facts but not mere conclusions.[43]

b. *When Sustained*

A motion for a judgment on the pleadings will be sustained only if the moving party is entitled to the judgment as a matter of law.[44]

MOTION FOR DISMISSAL

a. *Weighing Evidence*

On a motion to dismiss in an equity case, the trial court may weigh the evidence.[45]

b. *Waiver of*

A motion to dismiss was waived by the defendant by having introduced testimony on the merits of the case after the refusing of the motion.[46]

c. *Lack of Prosecution*

A judgment dismissing an action for want of prosecution, on the trial

41. Wells v. Henry W. Kuhs Realty Co., 269 S.W.2d 761 (Mo. 1954).
42. State of Missouri *ex rel.* and to the Use of Hicklin v. Fidelity and Casualty Company of New York, 274 S.W.2d 596 (Mo. App. 1955).
43. Brickell v. Kansas City, Mo., 265 S.W.2d 342 (Mo. 1954); State *ex rel.* Day v. Meriwether, Judge, 269 S.W.2d 161 (Mo. App. 1954).
44. Bricknell v. Kansas City, Mo., *supra* note 43.
45. Creek v. Union Nat. Bank in Kansas City, 266 S.W. 737 (Mo. 1954).
46. *Ex parte* Ferone, 267 S.W.2d 695 (Mo. App. 1954).

court's own motion, and by virtue of the trial court's inherent power, was not void because the dismissal was without notice to the plaintiff.[47]

The action of a trial court in dismissing the plaintiff's cause of action for want of prosecution is not a judgment on the merits, and does not constitute a dismissal with prejudice which prevents the plaintiff from refiling his cause of action.[48]

Motion for Directed Verdict and After-Trial Motion for Judgment

a. *When granted*

A motion for a directed verdict or for an after-trial motion for judgment should be sustained only where the evidence and inferences reasonably drawn therefrom are so strongly against a party that there is not room for reasonable minds to differ.[49]

It is usually held that a party asserting the affirmative of a determinative issue, proof of which is necessary to establish the fact, is not entitled to a directed verdict where his proof rests on oral testimony, although the opposing party offers no evidence on the issue, as the truth and weight of his evidence, the credibility of his witnesses, remains an issue for the jury.

This general rule is not applicable in unusual situations where the defendant in his pleadings or by his counsel in open court admits the plaintiff's claim, or by his evidence also establishes the plaintiff's claim, or where there is no real dispute of the basic facts supported by uncontradicted testimony essential to a claim or to an affirmative defense.[50]

b. *Waiver of*

An alleged error in overruling a defendant's motion for a directed verdict at the close of a plaintiff's case is waived when the defendant subsequently introduces evidence on the merits.[51]

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47. Snyder v. Christie, 272 S.W.2d 27 (Mo. App. 1954).
48. *Ibid.*
49. Hammontree v. Edison Bros. Stores, 270 S.W.2d 117 (Mo. App. 1954); Morris v. Alexander, 275 S.W.2d 373 (Mo. App. 1955); Bartling v. Firestone Tire and Rubber Company, 275 S.W.2d 618 (Mo. App. 1955); Also, see Helton v. Huckeba, 270 S.W.2d 486 (Mo. App. 1954).
50. Rogers v. Thompson, 265 S.W.2d 282 (Mo. 1954).
51. Wilt v. Waterfield, 273 S.W.2d 290 (Mo. 1954); Baird v. Ellsworth Realty Co., 265 S.W.2d 770 (Mo. App. 1954); Lerner v. Yeghishian, 271 S.W.2d 588 (Mo. App. 1954); Wilson v. White, 272 S.W.2d 1 (Mo. App. 1954); Farmer v. London & Lancashire Insurance Company, 274 S.W.2d 517 (Mo. App. 1955).

CASES TRIED WITHOUT A JURY

a. *Excluded Evidence*

Where the appellants claimed that the trial court erroneously excluded certain evidence in an interpleader suit, but such evidence was preserved, the evidence, so far as it was admissible, and met the requirements of relevancy, materiality, and probative force, would be considered by the supreme court on appeal.[52]

b. *Findings of Facts*

In cases tried without a jury, all issues of fact upon which no specific findings are made are deemed on appeal to have been found in accordance with the result reached.[53]

c. *Request for Findings and Conclusions*

Where the plaintiff filed a written request for findings of fact and conclusions of law but did not do so until nine days after the court had rendered a final judgment, the court was not required to grant his request.[54]

d. *Duties of Appellate Courts*

In cases tried without a jury, an appellate court reviews it both on the law and on the evidence.[55]

Further, although due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses, the appellate court cannot avoid the responsibility of such independent review and consideration. Similarly, although the judgment shall not be set aside unless clearly erroneous, the upper court is enjoined by statute to give such judgment as the trial court ought to have given, as to the appellate court shall seem agreeable to law. Unless justice requires otherwise, the court shall dispose finally of the case on appeal and no new trial shall be ordered as to issues in which no error appears.[56]

During the past year, these doctrines have been applied to equity

52. St. Louis Southwestern Railway Co. v. Meyer, *supra* note 5.
53. Beckemeier v. Baessler, 270 S.W.2d 782 (Mo. 1954); Townsend v. Lawrence, 267 S.W.2d 489 (Mo. App. 1954); Wilson v. White, *supra* note 51.
54. Bonnot v. Tackitt, 265 S.W.2d 748 (Mo. App. 1954).
55. Alexander v. Glasgow, 275 S.W.2d 339 (Mo. 1955).
56. Emerson v. Treadway, *supra* note 17.

cases in general[57] and, in particular, to proceedings to obtain injunctions,[58] and to actions for specific performance,[59] to cancel deeds,[60] to rescind a real estate transaction,[61] to obtain a ruling that a deed was given only as security,[62] to establish a trust,[63] and to obtain an easement.[64]

They have likewise been applied in general to actions at law tried without a jury[65] and, in particular, to actions for breaches of contract,[66] to enforce a lein,[67] to recover a sum due from an estate,[68] and to obtain possession of realty.[69]

This is also true as to various phases of divorce proceedings,[70] and to a case involving child custody.[71]

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57. Meyer v. Schaub, 266 S.W.2d 620 (Mo. 1954); Miller v. Minstermann, 266 S.W.2d 672 (Mo. 1954); Larner-Diener Realty Co. v. Fredman, 266 S.W.2d 689 (Mo. 1954); Allen v. Kelso, 266 S.W.2d 696 (Mo. 1954); Creek v. Union Nat. Bank in Kansas City, 266 S.W.2d 737 (Mo. 1954); Feste v. Bartlett, 269 S.W.2d 609 (Mo. 1954); Allen v. Allen, 270 S.W.2d 33 (Mo. 1954); Nichols v. Wirts, 270 S.W.2d 801 (Mo. 1954); Taylor v. Taylor, 270 S.W.2d 806 (Mo. 1954); George F. Robertson Plastering Company v. Magidson, 271 S.W.2d 538 (Mo. 1954); Early v. Koelbel, 273 S.W.2d 312 (Mo. 1954); Ensign v. Home for the Jewish Aged, 274 S.W.2d 502 (Mo. App. 1955); Reece v. Van Gilder, 264 S.W.2d 893 (Mo. App. 1954); Dredge v. Busby, 269 S.W.2d 122 (Mo. App. 1954); Junkins v. Local Union No. 6313, 271 S.W.2d 71 (Mo. App. 1954); Housden v. Berns, 273 S.W.2d 794 (Mo. App. 1954); Robbins v. Anderson, 274 S.W.2d 809 (Mo. App. 1955); E. C. Robinson Lumber Company v. Lowrey, 276 S.W.2d 636 (Mo. App. 1955); Coleman v. Coleman, 277 S.W.2d 866 (Mo. App. 1955).

58. Jaeger v. Reynolds, 276 S.W.2d 182 (Mo. 1955); Miller v. Berry, 270 S.W.2d 666 (Mo. App. 1954); City of Spickardsville v. Terry, 274 S.W.2d 21 (Mo. App. 1954).

59. Glauert v. Huning, 266 S.W.2d 653 (Mo. 1954); Kershner v. Hurlburt, 277 S.W.2d 619 (Mo. 1955).

60. Dillard v. Dillard, *supra* note 1; Meyer v. Schaub, *supra* note 57; Cleary v. Cleary, 273 S.W.2d 340 (Mo. 1954); Balch v. Whitney, 273 S.W.2d 497 (Mo. 1954).

61. Blanke v. Miller, 268 S.W.2d 809 (Mo. 1954).

62. Ratermann v. Striegel, 273 S.W.2d 304 (Mo. 1954).

63. Ferguson v. Stokes, 269 S.W.2d 655 (Mo. 1954); Dallmeyer v. Dallmeyer, 274 S.W.2d 250 (Mo. 1955).

64. Jaeger v. Reynolds, *supra* note 58.

65. Scott v. Kempland, 264 S.W.2d 349 (Mo. 1954); Fort Osage Drainage District v. Jackson County, 275 S.W.2d 326 (Mo. 1955); Emerson v. Treadway, *supra* note 56; Wilson v. White, *supra* note 51; Brooks v. Dunson, 272 S.W.2d 305 (Mo. App. 1954); Kraft v. Armentrout, 275 S.W.2d 402 (Mo. App. 1955).

66. Willibald Schaefer Co. v. Blanton Co., 264 S.W.2d 920 (Mo. App. 1954) and Smith v. Githens, 271 S.W.2d 374 (Mo. App. 1954) in general; Joseph v. Mutual Garage Co., 270 S.W.2d 137 (Mo. App. 1954), Bailment contract; Henley v. Fox, 272 S.W.2d 864 (Mo. App. 1954), sale of realty; Leader v. Pennell, 271 S.W.2d 57 (Mo. App. 1954); note; State *ex rel.* Lyons v. Maryland Casualty Company, 278 S.W.2d 754 (Mo. 1955), official bond; Fulton v. City of Lockwood, 269 S.W.2d 1 (Mo. 1954); Beckemeier v. Baessler, *supra* note 53, and Bonnot v. Tackitt, *supra* note 54, for the value of services and materials.

67. E. C. Robinson Lumber Company v. Lowrey, *supra* note 57.

68. Peterson v. Peterson, 273 S.W.2d 239 (Mo. 1954).

69. Barker v. Allen, 273 S.W.2d 191 (Mo. 1954).

70. Cadenhead v. Cadenhead, 265 S.W.2d 426 (Mo. App. 1954); Easley v. Easley, 266 S.W.2d 28 (Mo. App. 1954); Wattson v. James B. Welsh Realty & Loan Co., 266 S.W.2d 35 (Mo. App. 1954); Prudot v. Stevens, 266 S.W.2d 756 (Mo. App. 1954); Kinder

In an equity case, tried de novo, an appellate court is not required to reverse a judgment because of the chancellor's incorrect rulings on evidence, but it usually considers such evidence in the record as it deems admissible, excludes from consideration evidence improperly admitted, and reaches its judgment on the competent evidence offered without regard to the trial court's rulings.[72]

A motion for a new trial on the grounds that the findings were against the evidence and that the findings and judgment were for the wrong party was too general to call the trial court's attention to the question of the specific amount due under the note involved, but, in view of the statutory provision that the sufficiency of the evidence to support the judgment may be raised whether or not it was raised in the trial court, such question could be reviewed on appeal.[73]

Cases Submitted Without Trial

Where the submission of a case was in effect a submission on an agreed statement of facts to be determined from the pleadings, interrogatories, and a copy of the pre-trial hearing, the court could properly consider as true all of the new facts pleaded in the defendant's last filed answer.[74]

In deciding a case upon an agreed statement of facts to be determined from the pleadings, legal conclusions stated in such pleadings are not to be considered, but ultimate facts are.[75]

Control of Court Over Judgment

A trial court has no power or authority to change or modify a judgment after thirty days has elapsed since the entry of the judgment.[76]

Therefore, such a court has no power to enter a judgment reinstating an action more than thirty days after the entry of a judgment dismissing the action for want of prosecution.[77]

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v. Kinder, 267 S.W.2d 356 (Mo. App. 1954); Dagley v. Dagley, 270 S.W.2d 553 (Mo. App. 1954); Hicks v. Hicks, 270 S.W.2d 625 (Mo. App. 1954); Lockhart v. Lockhart, 271 S.W.2d 208 (Mo. App. 1954); Cherry v. Cherry, 272 S.W.2d 700 (Mo. App. 1954); Forbis v. Forbis, 274 S.W.2d 800 (Mo. App. 1955).

71. Hensley v. Lake, 274 S.W.2d 493 (Mo. App. 1955).
72. Ensign v. Home for the Jewish Aged, *supra* note 57.
73. Dillard v. Thomas, *supra* note 15.
74. Alexander v. Glasgow, *supra* note 55.
75. *Ibid.*
76. Snyder v. Christie, *supra* note 47.
77. *Ibid.*

NEW TRIALS

a. *Grounds for*

During the past year, it has been decided that false answers[78] and concealments on the voir dire,[79] admission of improper evidence,[80] incorrect instructions,[81] argument outside of the evidence,[82] and an excessive verdict[83] were valid grounds for new trials.

A trial court is not justified in setting aside a verdict and in granting a new trial on a ground of error committed during a trial, unless the error was prejudicial to the losing party.[84]

Further, one waives a ground for a new trial, if he does not at the trial present the issue involved in such a ground.[85]

b. *Amendment of Motion*

Neither leave of court, nor notice of the movant's intention to amend, is required for the amendment of a motion for a new trial within the time limited for the filing of such a motion.[86]

c. *Service of Motion*

A copy of a motion for a new trial, together with all amendments thereto, should be served upon the opposing parties before the presentation thereof to the court for disposition, since such a motion is not one that may be disposed of ex parte.[87]

d. *Proof of Allegations of Motion*

Allegations of a motion for a new trial do not prove themselves notwithstanding the motion is sworn to by the plaintiff.[88]

e. *Time to Rule on Motion*

It seems clear that it was the purpose of the legislature to provide

78. Girratono v. Kansas City Public Service Company, 272 S.W.2d 278 (Mo. 1954).
79. Johnson v. Kansas City Public Service Co., 265 S.W.2d 417 (Mo. 1954); Girratono v. Kansas City Public Service Company, *supra* note 78.
80. Levin v. Hilliard, 266 S.W.2d 573 (Mo. 1954).
81. Burke v. Stix, Baer & Fuller Co., 264 S.W.2d 337 (Mo. 1954).
82. Stroh v. Johns, 264 S.W.2d. 304 (Mo. 1954).
83. Bartch v. Terminal R.R. Ass'n. of St. Louis, 264 S.W.2d 937 (Mo. App. 1954).
84. Levin v. Hilliard, 266 S.W.2d 573 (Mo. 1954); Smith v. St. Louis Public Service Company, 277 S.W.2d 498 (Mo. 1955).
85. Helton v. Huckeba, *supra* note 49.
86. State of Missouri *ex rel.* and to the Use of Hicklin v. Fidelity and Casualty Company of New York, *supra* note 42.
87. *Ibid.*
88. McCormack v. McNamee, 274 S.W.2d 272 (Mo. 1955).

and to allow the full period of 90 days after the filing of a motion for a new trial, if required by the court, for its consideration of such a timely motion taken under advisement, and that it was not intended to shorten that period for the consideration by the court of matters timely submitted by amendment and which expressly form a part of such a motion.[89]

Under the statute providing that a motion for a new trial is deemed denied if not passed on within 90 days after the filing of such a motion, where a motion was timely filed October 20 and was timely amended by interlineation on an ex parte application October 22, the court had jurisdiction on January 19 following, 91 days after October 20, to grant the motion.[90]

f. *Construction of*

Assignments of error in a motion for a new trial should be given liberal construction.[91]

g. *Discretion of Court*

Although, in determining whether a motion for a new trial should be granted, a trial court is vested with a wide discretion to be exercised in furtherance of substantial justice, the idea that a judgment should not be set aside arbitrarily, capriciously, or without good cause is inherent in our practice. This thought finds expression in Supreme Court Rule 3.22 providing that the court may award a new trial of any issue *upon good cause shown* and in Supreme Court Rule 3.25 permitting a trial court to reopen, correct, amend or modify its judgment *for good cause.*[92]

h. *What Court Must Consider*

In a hearing on a motion for a new trial based on alleged false statements of one juror in his voir dire examination before trial, which allegedly resulted in prejudice to the defendant, a statement of the juror that he had forgotten matters pertaining to which he had answered falsely did not require the trial court to believe such statement, and, in determing

89. State of Missouri *ex rel.* and to the Use of Hicklin v. Fidelity and Casualty Company of New York, *supra* note 42.
90. *Ibid.*
91. Stroh v. Johns, *supra* note 82.
92. Willis v. Willis, 274 S.W.2d 621 (Mo. App. 1955). In Triplett v. Beeler, 268 S.W.2d 814 (Mo. 1954), even a trial judge, who has the right to consider all of the evidence and who has the opportunity to observe the situation, must have some sound basis for disturbing a jury's finding.

such issue, the court had to consider all of the facts and surrounding circumstances.[93]

i. *Specifying Reasons for Decision on*

Whether entered on the motion of a party or on the court's initiative, an order granting a new trial should specify the grounds therefor.[94]

The action of a trial court in adopting and specifying, as grounds for a new trial, on assignments of error made by the movant, which particularly specified alleged errors, sufficiently complied with the rule requiring a statement of the reasons for granting such a motion; but an appellate court could not approve a practice of adopting "shotgun" assignments for such a purpose.[95]

A trial court, by specifying only one of several asserted grounds for a new trial, in granting a motion for a new trial, in effect, overruled the other grounds assigned.[96]

According to Supreme Court Rule 1.10, when a court grants a new trial without specifying of record the ground or grounds therefor, the presumption is that the court erroneously granted the motion for a new trial, the burden of supporting such action is placed on the respondent, and it shall never be presumed that the new trial was granted on any discretionary grounds.[97]

j. *Granting of on Court's Motion*

Even though a trial court has inherent jurisdiction, during the period for which it retains control over a judgment, to set aside the judgment on its own motion, if, on a reconsideration and further reflection, it is satisfied that its first conclusions were wrong, and even though an outside suggestion may be the motivating cause of the investigation resulting in the setting aside of the judgment, it has long been recognized that a judgment validly rendered following a trial upon the issues cannot be vacated except upon "some legal ground."[98]

This right of a court to set aside a judgment on its own motion exists

93. Girratono v. Kansas City Public Service Company, *supra* note 78.
94. Willis v. Willis, *supra* note 92.
95. Caldwell v. St. Louis Public Service Company, 275 S.W.2d 288 (Mo. 1955).
96. Smith v. St. Louis Public Service Company, *supra* note 84.
97. Hall v. Brookshire, 267 S.W.2d 627 (Mo. 1954); Willis v. Willis, *supra* note 92.
98. Willis v. Willis, *supra* note 92.

whether or not any erroneous ruling at the trial was excepted to by the losing party.[99]

k. *Retrial Necessary after Granting of*

The statute relating to the granting of a new trial empowers only the granting of a new trial, which leaves the case open for a trial de novo. It does not permit the rendition of a new judgment without a retrial.[100]

OBJECTIONS TO TRIAL ERRORS

The usual law is that no allegations of error will be considered by an appellate court except such as have been presented to or decided by the trial court.[101] For exceptions to this rule, see Supreme Court Rule 3.23.

Also, according to that rule, with the exceptions mentioned therein, errors relied upon on appeal must be preserved by being assigned as errors in a motion for a new trial.[102]

Further, it has been decided that it is necessary, in jury-tried cases, in order to preserve the question of submissibility for appellate review, to file a motion for a directed verdict at the close of all of the evidence and to assign error of the trial court in failing to direct such a verdict in an after-trial motion, either one for a new trial or one to set aside the verdict and judgment and to enter judgment for the opposite party.[103]

During the year our appellate courts have applied the general rule to a defect of parties,[104] to an amendment of a pleading,[105] to alleged

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99. Stroh v. Johns, *supra* note 82.

100. Willis v. Willis, *supra* note 92.

101. Scott v. Kempland, 264 S.W.2d 349 (Mo. 1954); Braudis v. Helfrich, 265 S.W.2d 371 (Mo. 1954); Nickels v. Witschner, 270 S.W.2d 848 (Mo. 1954); State of Missouri *ex rel.* Cole v. Matthews, 274 S.W.2d 286 (Mo. 1955); Kauflin v. Turek, 277 S.W.2d 540 (Mo. 1955); Dillard v. Thomas, *supra* note 73; Stewart v. Stewart, *supra* note 32.

102. Polster v. O'Hanlon, 267 S.W.2d 381 (Mo. App. 1954), *in Re* Village of Pleasant Valley, 272 S.W.2d 8 (Mo. App. 1954);

The fact that the trial court failed to make findings of fact and to give a statement of the grounds for its decisions, to which a party is entitled on request, which procedural matter was not preserved for the reviewing court by stating it as an allegation of error in a motion for a new trial, was waived. Alexander v. Glasgow, *supra* note 55.

103. Ukman v. Hoover Motor Express Co., 269 S.W.2d 35 (Mo. 1954); Jameson v. Fox, 269 S.W.2d 140 (Mo. App. 1954).

104. Ray v. Wooster, *supra* note 3; Sigman v. Rubeling, 271 S.W.2d 252 (Mo. App. 1954).

But notice that there is no waiver, where a defect of parties precludes the stating of an action. Sigman v. Rubeling, *supra* this note.

105. Stewart v. Stewart, *supra* note 32.

errors relating to the introduction of evidence,[106] to instructions,[107] to arguments,[108] to the inconsistency of a verdict,[109] to a nunc pro tunc order which ordered that a motion for a new trial should indicate that it was timely filed,[110] to the refusal to grant a new trial,[111] to interrogatories to a garnishee,[112] and to the awarding of and to the sufficiency of alimony pendente lite.[113]

Generally, however, a party does not, by failure to object until after verdict, waive prejudicial errors in the selection of jurors where the circumstances do not become known to him until after the verdict and where there is no fault on his part with respect to his not obtaining such knowledge previously.[114]

Moreover, the supreme court has held that it might decide constitutional questions even ex mero motu where matters of public concern are involved, and that it could do this even though the constitutional questions have not been raised as orderly procedure required.[115]

Also, a reviewing court passed upon an assignment of error to an instruction relating to damages, though the appellant had not attacked the verdict for excessiveness, as it thought that this matter involved a plain error affecting substantial rights.[116]

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106. Scneder v. Wabash R.R., 272 S.W.2d 198 (Mo. 1954); McCormack v. McNamee, *supra* note 88; Ensign v. Home for the Jewish Aged, *supra* note 57; Horrell v. St. Louis Public Service Co., 277 S.W.2d 612 (Mo. 1955); James v. Ray, 264 S.W.2d 26 (Mo. App. 1954); Bonnot v. Tackitt, *supra* note 54; Kimbrough v. Gross, *supra* note 36; State of Missouri *ex rel.* State Highway Commission of Missouri v. Schade, 271 S.W.2d 196 (Mo. App. 1954); Fitzgibbon Discount Corporation v. Windisch, 271 S.W.2d 226 (Mo. App. 1954); Songer v. Brittain, 272 S.W.2d 16 (Mo. App. 1954); Housden v. Berns, 273 S.W.2d 794 (Mo. App. 1954); O'Connor v. Egan, 274 S.W.2d 334 (Mo. App. 1955).

107. Stroh v. Johns, *supra* note 82; Brock v. Gulf, Mobile and Ohio R.R., 270 S.W.2d 827 (Mo. 1954); Haley v. Edwards, 276 S.W.2d 153 (Mo. 1955); Baird v. Ellsworth Realty Co., *supra* note 51; James v. Fox, 269 S.W.2d 140 (Mo. App. 1954); De Winter v. Lashley, 274 S.W.2d 40 (Mo. App. 1954).

108. Blanford v. St. Louis Public Service Co., 266 S.W.2d 718 (Mo. 1954); Harris v. St. Louis Public Service Co., 270 S.W.2d 850 (Mo. 1954); Helton v. Huckeba, *supra* note 49; Hancock v. Crouch, 267 S.W.2d 36 (Mo. App. 1954).

109. Connor v. Temm, 270 S.W.2d 541 (Mo. App. 1954).

110. Mirax Chemical Products Corp. v. Tarantola, 268 S.W.2d 71 (Mo. App. 1954).

111. Stroh v. Johns, *supra* note 82.

112. Brant v. Brant, 273 S.W.2d 734 (Mo. App. 1955).

113. Richardson v. Richardson, 270 S.W.2d 68 (Mo. App. 1954).

114. McCormack v. McNamee, *supra* note 88.

115. Harris v. Bates, 270 S.W.2d 763 (Mo. 1954).

116. Anderson v. Glascock, *supra* note 55.

APPEALS

a. *Right Statutory*

Appeals may only be taken when the right to do so is authorized by statute.[117]

b. *Purpose of*

Judgments of lower courts are reviewed by appellate courts to correct reversible errors committed by the trial court.[118]

c. *Controversy Necessary*

The existence of an actual and vital controversy susceptible of some relief is essential to appellate jurisdiction.[119]

d. *Appellant Must be Aggrieved*

Where a trial of a breach of contract action for $20,000 resulted in a verdict and judgment for the plaintiff for $4,000, and the defendants filed no after-trial motion, thus showing a desire to abide by the conclusion, to pay its judgment, costs, and litigation expenses and to extinguish the liability which the supreme court had found existed in an amount determinable by the jury, an erroneous order setting aside the judgment, and granting a new trial, entitled the defendants to an appeal as aggrieved parties, though the judgment set aside was against the defendants.[120]

Where a defendant's motion for a new trial was sustained on the issue of the amount of the plaintiff's damages, the defendant could complain on appeal only of errors affecting the issue of his liability to the plaintiff. He was aggrieved solely as to those errors.[121]

Where the plaintiff had a verdict and judgment, in the absence of an apparent or demonstrated connection between the small size of the verdict and the alleged irregularities in the selection of the jury, and in the absence of the contention that the alleged irregularities rendered the verdict and judgment void ab initio, the plaintiff is in no position to urge such irregularities in an appellate court.[122]

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117. Lawrence County on Behalf of Tunnell v. Johnson, 269 S.W.2d 110 (Mo. 1954); Dugan v. Trout, 271 S.W.2d 593 (Mo. App. 1954).
118. Blanford v. St. Louis Public Service Co., *supra* note 108.
119. Hribernik v. Reorganized School District R-3, *supra* note 1.
120. Adair County v. Urban, 268 S.W.2d 801 (Mo. 1954). For another case of an aggrieved party, see Cunningham v. Leimkuehler, 276 S.W.2d 633 (Mo. App. 1955).
121. Nibler v. Coltrane, 275 S.W.2d 270 (Mo. 1955).
122. McCormack v. McNamee, *supra* note 88.

One who has been validly granted a new trial is not an aggrieved party.[123]

e. *From What Appeal May be Taken*

1. Final Judgments

There can be but one final judgment and it must dispose of all of the issues and parties and the appeal must be taken from that judgment.[124]

A judgment sustaining a motion to quash an execution on the ground that it was not supported by any final judgment was itself a final judgment for the purpose of appeal.[125]

2. Granting of a New Trial

Appeal may be taken from an order the effect of which is to grant a new trial.[126]

f. *Substitution for an Appeal*

A motion to quash an execution cannot be substituted for an appeal.[127]

g. *How Taken*

1. The Transcript

(a) Contents

Abandoned pleadings should be omitted from transcripts.[128]

(b) Filing

The trial court retains jurisdiction of a case until the transcript on appeal is filed in the appellate court.[129]

(c) Attitude of Appellate Court Toward

The appellate court must take the record as it finds it.[130]

Such a court accepts as true the recitation in a transcript as to what happened during a trial.[131]

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123. State of Missouri *ex rel.* and to the Use of Hicklin v. Fidelity & Casualty Company of New York, *supra* note 42.
124. Sutton v. City of St. Joseph, 265 S.W.2d 760 (Mo. App. 1954).
125. Flynn v. Janseen, 266 S.W.2d 666 (Mo. 1954).
126. Adair County v. Urban, *supra* note 120.
127. Flynn v. Janseen, *supra* note 125.
128. Dugan v. Trout, *supra* note 24.
129. Nibler v. Coltrane, *supra* note 121.
130. E. C. Robinson Lumber Company v. Lowrey, *supra* note 57; Ellis v. State Department of Public Health and Welfare, 277 S.W.2d 331 (Mo. App. 1955).
131. Flynn v. Janssen, *supra* note 125. To the effect that this rule applies to selection of the panel, see McCormack v. McNamee, *supra* note 88; See Songer v. Brittain, *supra* note 106, to the effect that it is neither the function nor the duty of an appellate court to search the transcript for verification of factual statements.

2. Briefs

(a) Abandonment of Grounds for Appeal

Allegations of error not developed in an appellant's brief by the citation of authorities and an argument are treated as abandoned.[132]

(b) Jurisdictional Statement

A statement in an appellant's brief that an action involved title to realty and therefore the appeal was taken to the supreme court was a conclusion and insufficient to show wherein the supreme court acquired jurisdiction of appeal. It should have indicated how title to realty was involved.[133]

(c) Statement of Facts

A statement of facts is not fair, if it omits essential facts on which the respondent relies.[134]

(d) Points and Authorities

To comply properly with Supreme Court Rule 1.08(a) (3), the allegations of error and the points relied on should constitute a short concise outline of the part of the brief called "an argument" in Supreme Court Rule 1.08(a) (4). The purpose of this is to give the appellate court a short concise summary of what the appellant claims the trial court did wrong and why he claims it was wrong.[135]

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132. Lansford v. Southwest Lime Co., 266 S.W.2d 564 (Mo. 1954); Conser v. Atchison, T. & S. F. Ry., 266 S.W.2d 587 (Mo. 1954); Grand River Tp., De Kalb County v. Cooke Sales & Service, Inc., 267 S.W.2d 322 (Mo. 1954); State of Missouri v. Harold, 271 S.W.2d 527 (Mo. 1954); Heuer v. Ulmer, 273 S.W.2d 169 (Mo. 1954); Palmer v. Lasswell, 267 S.W.2d 492 (Mo. App. 1954); Songer v. Brittain, *supra* note 106; Vosburg v. Smith, 272 S.W.2d 297 (Mo. App. 1954); Atkinson v. Coca-Cola Bottling Company, 275 S.W.2d 41 (Mo. App. 1955).

133. Schoenhals v. Pahler, 272 S.W.2d 228 (Mo. 1954).

134. *Ibid.*

135. Conser v. Atchison, T. & S. F. Ry., *supra* note 132; Lewis v. Willingham, 274 S.W.2d 814 (Mo. App. 1955). In this case the plaintiff's brief fails to comply with Supreme Court Rule 1.08 in that the attempted allegations of error wholly fail to show what action or rulings of the trial court are sought to be reviewed and why they are claimed to be erroneous.

Under points and authorities, the brief first states "Estoppel", and cites authorities thereunder. 2. "Laches" and cites authorities thereunder. 3. "The priority of the Production Credit Association's claim over the claim of Mrs. Lewis' attachment:" It then asked the following questions:

A. Did the mentioning of the combines in the note, which was given to secure the $10,000.00 indebtedness and which note was secured by a chattel mortgage on numerous other property amount to anything more than a mortgage?

"B. Was it a pure conditional sales contract, or can it be construed for any purpose other than a mortgage to secure the indebtedness?"

These allegations preserve nothing for review.

Points on appeal consisting of abstract statements of law and quotations from decisions present nothing for review.[136]

Assignments of error in a brief with reference to the admission and exclusion of evidence present nothing for review when no specific evidence or ruling is pointed out and the assignments contain no reference to any specific portions of the record where the evidence or erroneous rulings may be found.[137]

Further, assignments of error should state why a ruling of a court is wrong.[138]

An assignment of error that "the evidence was insufficient under the law to support the verdict" is a complaint that the verdict was against the weight of the evidence. To say that there is an insufficient amount of evidence implies that there is some evidence, and, therefore, to say that the evidence is insufficient to support the verdict can be construed as meaning that there is some evidence, but not enough, in the light of the evidence to the contrary, to support the verdict.[139]

A separate state of "Assignments of Error" is no longer required and only adds to the time, labor, expense, and space expended in appellant's brief. The present rule requires only the "point relied on, which shall specify the allegations of error, with citation of authorities."[140]

Authorities sustaining points must, when available, be cited.[141]

It is not sufficient to cite a key number in the Missouri Digest.[142]

(e) Argument

Where there are no references in the printed argument, or in the points relied on, to the page or pages in the transcript where an action

136. Bonnot v. Tackitt, *supra* note 54; State of Missouri *ex rel.* State Highway Commission of Missouri v. Schade, *supra* note 106; Lockhart v. Lockhart, 271 S.W.2d 208 (Mo. App. 1954); State *ex rel.* P. W. Finger Roofing Co. v. Koch, 272 S.W.2d 22 (Mo. App. 1954); Farmer v. The London & Lancashire Ins. Co., *supra* note 51.

137. Evinger v. Thompson, *supra* note 35; Ensign v. Home for the Jewish Aged, *supra* note 57; Nibler v. Coltrane, *supra* note 121.

138. Evinger v. Thompson, *supra* note 35; Haley v. Edwards, 276 S.W.2d 153 (Mo. 1955); Townsend v. Lawrence, 267 S.W.2d 489 (Mo. App. 1954); State of Missouri *ex rel.* State Highway Commission of Missouri v. Schade, *supra* note 106; De Voto v. Fez Construction Company, 271 S.W.2d 199 (Mo. App. 1954); State *ex rel.* P. W. Finger Roofing Co. v. Koch, *supra* note 136; Vosburg v. Smith, *supra* note 132.

139. Palmer v. Lasswell, *supra* note 132.

140. Scneder v. Wabash R.R., *supra* note 106.

141. Cherry v. Cherry, 272 S.W.2d 700 (Mo. App. 1954).

142. Atkinson v. Coca-Cola Bottling Co., *supra* note 132.

of a court which is complained of may be found, there is a violation of Supreme Court Rule 1.08. An appellate court is under no duty to search a record in order to discover, if possible, errors committed by the trial court.[143]

h. *Burden of Proof*

On appeal the presumption is that the trial court decision was correct and the burden is on the appellant affirmatively to show error as a condition precedent to reversal.[144]

i. *Changing Theories on Appeal*

It is usually held that litigants on appeal must adhere to the theory adopted in the trial court.[145]

The right to revoke this rule, however, is not without limitation. While it may be invoked by a respondent, it is not always available to an appellant. The reversal of a judgment must be based on the theory upon which the cause was submitted and decided under the pleadings and evidence of the losing party. On the other hand, an appellant should not be permitted to object to the affirmance of a judgment on any theory if as a matter of law the new theory sustains the judgment appealed from.[146]

j. *Matters Considered on Appeal*

A supplemental transcript on appeal, which failed to show compliance with the statutory provisions for the preparation and filing of such a transcript could not be considered by the supreme court on appeal.[147]

Complaints of error found only in the plaintiff's printed argument and not made in his points and authorities are abandoned and will not be considered.[148]

Specific charges of negligence in a petition not submitted on appeal are abandoned and will not be considered on appeal.[149]

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143. Ambrose v. M.F.A. Co-operative Ass'n., 266 S.W.2d 647 (Mo. 1954); Schoenhals v. Pahler, *supra* note 133; Bonnot v. Tackitt, *supra* note 54; State of Missouri *ex rel.* State Highway Commission of Missouri v. Schade, *supra* note 106.

144. E. C. Robinson Lumber Company v. Lowrey, *supra* note 57. This rule was applied to the giving of an instruction in Nibler v. Coltrane, *supra* note 121.

145. Small v. Wegner, 267 S.W.2d 26 (Mo. 1954); Welch v. McNeely, 269 S.W.2d 871 (Mo. 1954); Cleary v. Cleary, *supra* note 60; Dredge v. Busby, *supra* note 57; Dillard v. Thomas, *supra* note 15; Dugan v. Trout, *supra* note 24.

146. Kirchner v. Farmers' Mut. Fire Ins. Co., 267 S.W.2d 390 (Mo. App. 1954).

147. Fulton v. City of Lockwood, *supra* note 66.

148. Knight v. Calvert Fire Ins. Co., 268 S.W.2d 53 (Mo. App. 1954).

149. Cade v. Atchison, T. & S. F. Ry., 265 S.W.2d 366 (Mo. 1954).

Likewise, where the plaintiffs did not appeal from the judgment giving them a life estate in the land on which the house they built was situated, they could not raise any questions about their interest in the title to this land on appeal.[150]

The defendant's original counterclaim which was not offered in evidence upon the trial was not before the court on appeal.[151]

A moot question need not be considered on appeal.[152]

The general rule is that an appellate court will not consider matter de hors the record. However, one exception to that rule is that such a court will consider evidence outside of the record to determine whether the question in controversy has become moot.[153]

Where it appeared on the face of the record that the trial court found that the instrument sued on was a valid and binding promissory note and that the trial court rendered a judgment in conflict with the express terms of the note, there was a plain error of record which caused manifest injustice and the appellate court could consider such error regardless of whether or not it was raised in the motion for new trial.[154]

k. *Duty of Appellate Court*

1. In General

Upon appeal the reviewing court has the duty to enter the judgment which the trial court should have entered.[155]

Further, it is the duty of an appellate court to protect absent parties in injunction proceedings.[156]

2. In Connection with Pleadings

On appeal from a judgment dismissing a petition for failure to state

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150. Reece v. Van Gilder, *supra* note 57.
151. Fulton v. City of Lockwood, *supra* note 66.
152. Daniels v. Brown, 266 S.W.2d 680 (Mo. 1954).
153. Koch v. Board of Regents of Northwest Missouri State College, 265 S.W.2d 421 (Mo. App. 1954).
154. Dillard v. Thomas, *supra* note 15. For a case in which there was no plain error, see Bonnot v. Tackitt, *supra* note 54.
155. White v. Barton, 269 S.W.2d 673 (Mo. App. 1954); Richardson v. Richardson, 271 S.W.2d 338 (Mo. App. 1954); State of Missouri *ex rel.* Ratliff v. Morant, 271 S.W.2d 230 (Mo. App. 1954).
156. Hribernik v. Reorganized School District R-3, *supra* note 1.

a cause of action, all well-pleaded facts and issues are to be taken as true.[157]

Also, in determining whether or not a petition states a claim or cause of action, the averments of the petition are to be given a liberal construction, according the averments their reasonable and fair intendment. So considered, a petition should be held sufficient if its averments invoke substantive principles of law which entitle plaintiff to relief. A petition is not to be held insufficient merely because of a lack of definiteness or certainty in allegation or because of informality in the statement of an essential fact.[158]

In determining the cause of action intended to be pleaded under the new code, an appellate court may consider the facts pleaded and the relief sought.[159]

3. In Connection with Trial Arguments

Appellate courts will not determine whether a trial court has erred in failing to sustain objections to an argument where the entire argument is not available on appeal.[160]

4. As to Admissions

On appeal, facts admitted by the briefs and oral arguments of the appellant's counsel are accepted as true.[161]

5. As to Matters Involving Discretion

A reviewing court is likely to affirm an action by the trial court taken in the exercise of discretion.[162]

There follow statements of decisions in various situations in which this general doctrine has been applied to rulings made at different stages of a proceeding. They are listed in the order in which they would occur during a legal proceeding.

In a hearing on a motion for alimony pendente lite and suit money in a wife's divorce action, where the wife refused to answer interroga-

157. Lines v. Teachenor, 273 S.W.2d 300 (Mo. 1954).
158. Slicer v. W. J. Menefee Const. Co., 270 S.W.2d 788 (Mo. 1954).
159. Housden v. Berns, 273 S.W.2d 794 (Mo. App. 1954).
160. De Winter v. Lashley, 274 S.W.2d 40 (Mo. App. 1954).
161. Baker v. Baker, 274 S.W.2d 322 (Mo. App. 1955).
162. Trice v. Lancaster, *supra* note 27.

tories submitted by her husband regarding her first marriage on the ground that answers might incriminate her, the trial court did not abuse its discretion in refusing to strike the wife's pleading for her refusal to answer interrogatories.[163]

A trial court refused to grant a request for a continuance in order to have time to obtain a copy of the evidence of a witness at a former trial. Where the record showed that counsel requesting the continuance had agreed upon a setting of the case for trial on the date on which it was tried, and without a copy of the witness' prior testimony, the matters stated in the motion and shown by the exhibits were directed to the trial court's discretion. No abuse of discretion was shown.[164]

Whether a statement is admissible under the res gestae rule depends upon the particular circumstances; whether the statement is admissible under those circumstances is within the trial court's discretion; and the appellate court will not reverse the trial court's ruling unless it appears that that discretion was abused.[165]

The sufficiency of evidence to lay a foundation for the introduction of secondary evidence lies in the discretion of the trial court, and his determination, although it is reviewable, will not be disturbed by a reviewing court unless there has been an abuse of discretion.[166]

A reviewing court should not ordinarily interfere with the trial court's discretion in determining whether proper facts have been established to justify the admission of a record under the Uniform Business Records as Evidence Law.[167]

A ruling of a trial court with respect to the scope and extent of cross-examination in an ordinary civil suit will not be disturbed on appeal, unless an abuse of discretion is shown.[168]

In an action by a passenger against a bus company for injuries allegedly sustained when the bus stopped suddenly, the bus company had a right to cross-examine the passenger with respect to discrepancies be-

163. Franklin v. Franklin, 273 S.W.2d 737 (Mo. App. 1955).
164. Helton v. Huckeba, *supra* note 49.
165. Cummings v. Illinois Cent. R.R., 269 S.W.2d 111 (Mo. 1954).
166. Nibler v. Coltrane, *supra* note 121.
167. Fisher v. Gunn, 270 S.W.2d 869 (Mo. 1954).
168. Fisher v. Gunn, *supra* note 167; Hoffman v. Illinois Terminal Railroad, 274 S.W.2d 591 (Mo. App. 1955).

tween the complaint, which charged that the passenger fell on the pavement, and the passenger's testimony, which did not disclose that he fell to the pavement, and denying an inquiry on this subject was an abuse of discretion and prejudicial error.[169]

A trial court's ruling on a motion to set aside a default judgment will not be disturbed in the absence of an abuse of discretion.[170]

The giving or the refusal of withdrawal instructions is within the sound discretion of the trial judge and, unless that discretion is abused, his action will not be disturbed.[171]

The trial judge has a wide discretion in ruling as to the impropriety and prejudicial effect of arguments of counsel, and his rulings will generally be deferred to by the appellate court.[172]

Hence, a reviewing court should defer to the judgment of a trial court that improper argument to a jury was not so prejudicial as to justify declaring a mistrial or granting a new trial.[173]

A trial court's decision as to the granting, or refusal to grant, a new trial on the ground that false answers were made, or that facts were not properly disclosed on the *voir dire,* was not disturbed on appeal.[174]

The rule is that, where the trial court has denied a new trial on such a discretionary ground as the weight of the evidence, an appellate court will not interfere with the court's ruling, unless it clearly appears that the trial court has abused or arbitrarily exercised its discretion.[175]

It is the rule in this state that the granting of a new trial on the basis of newly discovered evidence rests very largely in the discretion of the trial court, and, in the absence of a clear abuse of such discretion, the appellate court will not interfere. Where the affidavits filed in support of the motion disclose that the new evidence was merely cumulative and probably would not have produced a different result if a new trial had

169. Hoffman v. Illinois Terminal Railroad Company, *supra* note 168.
170. Butcher v. White, 267 S.W.2d 701 (Mo. App. 1954).
171. Songer v. Brittain, *supra* note 106.
172. Votrain v. Illinois Terminal R.R., 268 S.W.2d 838 (Mo. 1954).
173. Daniels v. Brown, 266 S.W.2d 680 (Mo. 1954); Hancock v. Crouch, 267 S.W.2d 36 (Mo. App. 1954).
174. Woodworth v. Kansas City Public Service Company, 274 S.W.2d 264 (Mo. 1955).
175. Conser. v. Atchison, T. & S. F. Ry., *supra* note 132; McCormack v. McNamee, *supra* note 88; Palmer v. Lasswell, *supra* note 132.

been granted, the trial court did not abuse its discretion in denying the plaintiff's request.[176]

6. Weighing Evidence

The weight of the evidence in a jury case is for consideration only by the trial court, and the assignments of error alleging that the verdict is against the weight of the evidence and the law under the evidence present nothing for appellate review.[177]

7. Agreed Statement

Where a case is submitted to a reviewing court on an agreed statement of facts, the question involved is one of law to be decided by that court.[178]

l. *Test Applied on Appeal from Dismissal of Petition for Failure to State*

a Claim

On appeal from a judgment dismissing a petition for failure to state a claim upon which relief can be granted, a reviewing court will construe the petition favorably to the plaintiff, giving him the benefit of every reasonable and fair intendment in view of the facts.[179]

m. *Consideration of Evidence, in General*

An appellate court is unable to consider assignments of error presented by a party requiring a consideration of the evidence where only a part of the evidence is presented in the transcript.[180]

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176. Smith v. Smith, 267 S.W.2d 704 (Mo. App. 1954).

177. Nelson v. Tayon, 265 S.W.2d 409 (Mo. 1954); Lansford v. Southwest Lime Co., 266 S.W.2d 564 (Mo. 1954); White v. Rohrer, 267 S.W.2d 31 (Mo. 1954); Amos v. Southern Railway Company, 273 S.W.2d 155 (Mo. 1954); Sutton v. City of St. Joseph, 265 S.W.2d 760 (Mo. App. 1954); Colley v. Cox, 266 S.W.2d 778 (Mo. App. 1954); Leader v. Pennell, *supra* note 66; De Voto v. Fez Construction Company, *supra* note 138; Connor v. Temm, 270 S.W.2d 541 (Mo. App. 1954); Vosburg v. Smith, *supra* note 132; Clark v. Howard, 273 S.W.2d 771 (Mo. App. 1954). Also see Brooks v. St. Louis Public Service Company, 275 S.W.2d 252 (Mo. 1955), in which it was held that upon appeal from an order granting a new trial in an automobile collision case, the record would be viewed favorably to the verdict.

178. A.P. Green Fire Brick Company v. Missouri State Tax Commision, 277 S.W.2d 544 (Mo. 1955).

179. Jacobs v. Jacobs, 272 S.W.2d 185 (Mo. 1954).

180. Brooks v. Dunson, 272 S.W.2d 305 (Mo. App. 1954).

n. *Tests Applied in Reaching Judgment as to Whether Submissible Case Has Been Made*

1. Substantial Evidence

Where there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. The appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.[181]

Further, a reviewing court, in reviewing a contention of error in overruling a defendant's motion for a directed verdict involving the question whether the plaintiff made out a case for consideration by a jury, must have a regard for the rule that substantial evidence must have been introduced tending to prove facts essential to a plaintiff's recovery.[182]

Also, a reviewing court will not disturb a judgment for damages amply supported by substantial, competent evidence.[183]

This general doctrine has been applied to reviews of administrative decisions.[184] However, it has been held that such decisions may be set aside, if they are clearly contrary to the overwhelming weight of the evidence.[185]

Where there is a complete absence of probative facts to support a verdict or a refusal to direct a verdict, an appellate court is justified in reversing a judgment based upon such verdict or refusal to direct a verdict.[186]

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181. Sederquist v. Chicago, R.I. & P. R.R., 268 S.W.2d 861 (Mo. 1954); State of Missouri *ex rel.* Chariton River Drainage District v. Montgomery, 275 S.W.2d 283 (Mo. 1955); R. J. Hurley Lumber Co. v. Cummings, 264 S.W.2d 379 (Mo. App. 1954); Vosburg v. Smith, *supra* note 132; O'Connor v. Egan, 274 S.W.2d 334 (Mo. App. 1955); Atkinson v. Coca-Cola Bottling Co., *supra* note 132.

182. Brawley v. Esterly, 267 S.W.2d 655 (Mo. App. 1954).

183. Kamo Electric Co-operative v. Baker, 274 S.W.2d 497 (Mo. App. 1954); State *ex rel.* Burcham v. Drainage District No. 25, 272 S.W.2d 712 (Mo. App. 1954).

184. Union-May-Stern Company v. Industrial Commission of Missouri, 273 S.W.2d 766 (Mo. App. 1954); Willens v. Personnel Board of Kansas City, 277 S.W.2d 665 (Mo. App. 1955).

185. Lunn v. Columbian Steel Tank Co., 275 S.W.2d 298 (Mo. 1955); Foster v. Carter Carburetor Corp., 264 S.W.2d 904 (Mo. App. 1954); Hammett v. Nooter Corp., 264 S.W.2d 915 (Mo. App. 1954).

186. Cummings v. Illinois Cent. R.R., 269 S.W.2d 111 (Mo. 1954); Helton v. Huckeba, *supra* note 49; Walton v. Van Camp, 271 S.W.2d 53 (Mo. App. 1954); O'Connor v. Egan, 274 S.W.2d 334 (Mo. App. 1955); Atkinson v. Coca-Cola Bottling Company, *supra* note 132.

2. Evidence Considered

The supreme court, in passing on an assignment of error of the defendant that there was no evidence to support a directed verdict for the defendant, was required to give the plaintiff the benefit of any part of the defendant's evidence which was favorable to the plaintiff and not contradicted by the plaintiff's own testimony and not contrary to the plaintiff's fundamental theory, and to give the plaintiff the benefit of all reasonable inferences from all of the evidence, and to disregard all of the defendants' evidence which was unfavorable to the plaintiff.[187]

Also, in determining the sufficiency of the evidence to support the verdict, an appellate court takes as true the evidence offered by plaintiff.[188]

Further, in reviewing an order overruling the defendant's motion for a directed verdict, the supreme court considers the admitted facts.[189]

3. View Taken of Evidence

The supreme court, in determining on an appeal by a defendant whether the plaintiff made a jury case, considers the evidence, from the view most favorable to the plaintiff's contentions.[190]

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187. Ukman v. Hoover Motor Express Co., 269 S.W.2d 35 (Mo. 1954). Cases decided during the past year which have supported this decision in whole or in part are Wapelhorst v. Linder, 269 S.W.2d 865 (Mo. 1954); Moore v. Middlewest Freightways, 266 S.W.2d 578 (Mo. 1954); Lebow v. Missouri Public Service Company, 270 S.W.2d 713 (Mo. 1954); Crandall v. McGilvray, 270 S.W.2d 793 (Mo. 1954); Reimers v. Frank B. Connet Lumber Co., 271 S.W.2d 46 (Mo. 1954); East v. McMenamy, 266 S.W.2d 728 (Mo. 1954); Colley v. Cox, 266 S.W.2d 778 (Mo. App. 1954); Berry v. McDaniel, 269 S.W.2d 666 (Mo. App. 1954); Walters v. Larson, 270 S.W.2d 112 (Mo. App. 1954); Smith v. Motors Ins. Corp., 270 S.W.2d 128 (Mo. App. 1954); Songer v. Brittain, *supra* note 106; Vosburg v. Smith, *supra* note 132; De Long v. Broadston, 272 S.W.2d 493 (Mo. App. 1954); O'Connor v. Egan, *supra* note 181; Atkinson v. Coca-Cola Bottling Company, *supra* note 132; Morris v. Alexander, 275 S.W.2d 373 (Mo. App. 1955); Executive Board of Mo. Baptist Gen. Ass'n v. Campbell, 275 S.W.2d 388 (Mo. App. 1955); Helton v. Huckeba, *supra* note 49). See Catanzaro v. McKay, 277 S.W.2d 566 (Mo. 1955), which applies the same rules to a defendant's appeal from an order setting aside a verdict in his favor and granting a new trial.

188. O'Connor v. Egan, *supra* note 187; Atkinson v. Coca-Cola Bottling Company, *supra* note 132.

189. Moore v. Middlewest Freightways, 266 S.W.2d 578 (Mo. 1954).

190. Hayes v. Coca-Cola Bottling Co. of St. Louis, 269 S.W.2d 639 (Mo. 1954); Wapelhorst v. Linder, 269 S.W.2d 865 (Mo. 1954); Lebow v. Missouri Public Service Company, 270 S.W.2d 713 (Mo. 1954); Crandall v. McGilvray, 270 S.W.2d 793 (Mo. 1954); Catanzaro v. McKay, 277 S.W.2d 566 (Mo. 1955); Cunningham v. Thompson, 277 S.W.2d 602 (Mo. 1955); Bartch v. Terminal R.R. Ass'n of St. Louis, 264 S.W.2d 937 (Mo. App. 1954); Sutton v. City of St. Joseph, 265 S.W.2d 760 (Mo. App. 1954); Colley v. Cox, 266 S.W.2d 778 (Mo. App. 1954); Palmer v. Lasswell, *supra* note 132; Brawley v. Esterly, 267 S.W.2d 655 (Mo. App. 1954); Hammontree v. Edison Bros. Stores, 270 S.W.2d 117 (Mo. App. 1954); Duvall v. Stokes, 270 S.W.2d 419 (Mo. App.

This law has been applied where defendants have been successful in the trial court and the plaintiff has appealed.[191]

o. *Tests Applied in Determining the Correctness of Instructions*

In determining the correctness of instructions, the supreme court has said that it should not be hypertechnical in requiring the use of particular words or phrases, or in requiring any particular arrangement or form of language, but that it should determine whether the average laymen had been sufficiently apprised of the necessary facts to be found by them, and of the correct legal conclusions which follow.[192]

p. *Appeals on Ground of Excessive or Inadequate Verdicts or Judgments*

1. Right to Require Remittitur as Condition to Affirmance

It has long been the settled law in this state that courts have the power to keep verdicts within the limit of fair and reasonable compensation and mere excessiveness of the verdict may be cured in the appellate court by remittitur.[193] The purpose of the practice is to avoid the expense and delay of a new trial; and the court grants the plaintiff an election to remit without regard to the consent of the defendant, who can not be harmed by whichever choice the plaintiff makes. The practice is only pursued when there is nothing in the record to indicate that the excessive verdict was due to anything other than mere mistake or misunderstanding on the part of the jury, and not when it was attributable to passion and prejudice of the jury, which necessarily

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1954); Helton v. Huckeba, *supra* note 49; Songer v. Brittain, *supra* note 106; Vosburg v. Smith, *supra* note 132; Morris v. Alexander, 275 S.W.2d 373 (Mo. App. 1955); Bartling v. Firestone Tire and Rubber Company, 275 S.W.2d 618 (Mo. App. 1955); Pettit v. United Benefit Life Insurance Company, 277 S.W.2d 857 (Mo. App. 1955).

It was held in Burns v. Lewis-Howe Co., 266 S.W.2d 14 (Mo. App. 1954) that it is an appellate court's duty in reviewing the evidence upon a motion for a directed verdict to view the evidence in the light most favorable to plaintiff's case. This does not mean, however, that it should give the evidence a strained construction or draw unreasonable inferences in favor of a plaintiff. Nor should it consider isolated portions of a witnesses' testimony with reference to a particular fact, but should consider all the testimony of said witness with reference to the subject matter, in order to determine the effect of same.

191. White v. Rohrer, 267 S.W.2d 31 (Mo. 1954); Welch v. McNeely, 269 S.W.2d 871 (Mo. 1954).

192. Stoessel v. St. Louis Public Service Co., 269 S.W.2d 41 (Mo. 1954).

193. Scneder v. Wabash R.R., *supra* note 106.

vitiates the verdict in its entirety. However, in affirming a judgment upon the condition of remittitur, it is to be remembered that the appellate court is not substituting its own judgment for that of the jury in fixing the amount of the damages, but is only determining the maximum amount which the evidence would support, and at the same time saying that, if the jury had stopped at such amount, the verdict in that event would have been allowed to stand.[194]

The verdict of a jury which the trial court permits to stand, as corrected by remittitur, presupposes a verdict resultant of the jury's unbiased, dispassionate, and impartial consideration of the evidence, and the mere size of a verdict for damages, although it is necessary to reduce it one-half or more by remittitur, does not of itself indicate passion or prejudice on the part of the jury which vitiates the verdict.[195]

It has been held recently that a jury's action should not be interfered with by a reviewing court unless the injustice of the size of the verdict is manifest, and is so grossly excessive as to indicate an arbitrary exercise and abuse of discretion.[196]

It is now settled that a verdict will be set aside as inadequate for the same reasons that justify setting it aside as excessive. If it is so grossly inadequate as to indicate prejudice of the jury, it is the duty of the trial court to set it aside.[197]

2. Matters Considered in Determining Whether Verdict is Excessive or Inadequate

There is no exact formula for gauging whether a verdict is excessive. Each case must be considered upon its particular facts. Consideration is given to the nature and extent of the injuries and disabilities, diminished earning capacity, changing economic factors, and the compensation awarded and approved in cases of similar or fairly comparable injuries. The nature, extent, and permanency of the injuries are the paramount factors and the ultimate test of the excessiveness or of the inadequacy of an

194. Sanders v. Illinois Central R.R., 270 S.W.2d 731 (Mo. 1954). For other cases holding that a verdict which is the result passion and prejudice cannot be cured by remittitur, see Tate *ex rel.* Burcham v. Drainage District No. 25, 272 S.W.2d 712 (Mo. App. 1954) and Day v. Union Pacific Railroad Co., 276 S.W.2d 212 (Mo. 1955).

195. Rucker v. Illinois Terminal R.R., 268 S.W.2d 849 (Mo. 1954).

196. Sutton v. City of St. Joseph, 265 S.W.2d 760 (Mo. App. 1954). See also Triplett v. Beeler, 268 S.W.2d 814 (Mo. 1954).

197. Hufft v. Kuhn, 277 S.W.2d 552 (Mo. 1955).

award is what will fairly and reasonably compensate the plaintiff for his injuries.[198]

3. Weighing Evidence—Substantial Evidence

In reviewing an assignment of error that damages awarded, as reduced by remittitur required by the trial court as a condition to overruling a motion for a new trial, were grossly excessive, the reviewing court does not weigh the evidence but examines the record to determine whether there is substantial evidence to support the trial court's ruling, and, if the evidence, viewed in the light most favorable to the ruling, affords reasonable and substantial support thereof, the ruling must be sustained.[199]

It has also been held recently that, in determining whether a verdict is excessive, the reviewing court should consider the failure of the trial court to set aside the verdict as excessive or to order a remittitur,[200] and that an appellate court should not interfere with the amount of a judgment for damages for personal injuries which has been allowed to stand by the trial court unless the amount is so grossly excessive or unmistakably beyond the bounds of reason as to be shocking to the judicial conscience.[201]

q. *Trial Court's Decision Presumed Correct*

On appeal, the presumption always is that the decision of the lower court was correct.[202]

Thus, when it does not appear upon the record that any of the jurisdictional prerequisites are absent, it is presumed that the court found all of the facts necessary to its jurisdiction.[203]

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198. Rodefeld v. St. Louis Public Service Co., 275 S.W.2d 256 (Mo. 1955). See also Triplett v. Beeler, 268 S.W.2d 814 (Mo. 1954).

199. Daniels v. Brown, 266 S.W.2d 680 (Mo. 1954). Also, see Kraus v. Kansas City Public Service Co., 269 S.W.2d 743 (Mo. 1954); Day v. Union Pacific R.R., 276 S.W.2d 212 (Mo. 1955); Missouri Public Service Co. v. Hunt, 274 S.W.2d 27 (Mo. App. 1954).

For other cases holding that appellate courts, in deciding whether verdicts are excessive, should consider the evidence from the view most favorable to the plaintiff, see Arditi v. Brooks Erection Co., 266 S.W.2d 556 (Mo. 1954); Scneder v. Wabash R.R., *supra* note 106; McCormack v. McNamee, *supra* note 88; Rodefeld v. St. Louis Public Service Company, *supra* note 198; Day v. Union Pacific R.R., 276 S.W.2d 212 (Mo. 1955); Hufft v. Kuhn, 277 S.W.2d 552 (Mo. 1955).

200. Sutton v. City of St. Joseph, 265 S.W.2d 760 (Mo. App. 1954).

201. State *ex rel.* Burcham v. Drainage District No. 25, 272 S.W.2d 712 (Mo. App. 1954).

202. Emerson v. Treadway, *supra* note 17.

203. State *ex rel.* and to the Use of Hicklin v. Fidelity & Casualty Co. of New York, *supra* note 42. Also, see Prudot v. Stevens, *supra* note 70.

Where no declarations of law were asked or given in the trial court, the reviewing court would assume that the trial court tried the case upon a correct theory of law.[204]

On appeal, the presumption is that the trial court, in weighing the evidence, was governed by correct rules of law.[205]

Where it could not be ascertained by the appellate court from its record whether a copy of the amended motion for a new trial had been served upon the opposing party, but the court had taken up the amended motion without objection, it would be presumed that the court acted according to law in so considering the motion.[206]

r. *Judgment of Appellate Court*

1. Dismissal Because Cause Is Moot

A cause which has become moot may be dismissed by an appellate court. The motion to obtain a dismissal on this ground may be supported and controverted by affidavits which may be considered by the appellate court when it is determining the truth of the grounds pleaded in the motion.[207]

2. Dismissal for Noncompliance with Rules of Court

An appellate court may dismiss an appeal for failure of an appellant to comply with the supreme court's rules concerning the method of appeal. Recently there have been dismissals for failure to follow Supreme Court Rule 1.08 relating to the contents of briefs.[208]

However, where a respondent has substantially corrected the omissions in the appellant's statement of facts in his brief, a motion to dismiss for failure to make a proper statement of the facts will be dismissed.[209]

A motion to dismiss on appeal because of the late delivery to the respondent of copies of the appellant's brief was overruled where no complaint of the tardy delivery of the brief was made until the filing of

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204. Emerson v. Treadway, *supra* note 17.
205. Emerson v. Treadway, *supra* note 17.
206. State *ex rel.* and to the Use of Hicklin v. Fidelity and Casualty Company of New York, *supra* note 42. Also, see Caldwell v. St. Louis Public Service Co., 275 S.W.2d 288 (Mo. 1955).
207. Koch v. Board of Regents of Northwest Missouri State College, 265 S.W.2d 421 (Mo. App. 1954).
208. Ambrose v. M.F.A. Co-operative Ass'n., 266 S.W.2d 647 (Mo. 1954); Songer v. Brittain, 272 S.W.2d 16 (Mo. App. 1954); Geary v. Geary, 277 S.W.2d 327 (Mo. 1955).
209. Wilt v. Waterfield, 273 S.W.2d 290 (Mo. 1954).

the motion to dismiss more than two weeks after the case had been submitted to the appellate court for decision and where no brief was presented on behalf of the respondent.[210]

3. Dismissal Because the Appellant Filed Abbreviated Transcript without Respondent's Consent

An appeal may be dismissed if an appellant files an abbreviated transcript without the respondent's consent. In a recently decided case, an appellant's counsel more than thirty days prior to the time for filing the transcript in the circuit court, served on the defendant's counsel a statement of the points to be relied on in the appellate court, together with a statement of the facts which the evidence tended to prove, and the defendants failed, within ten days thereafter, to indicate whether they desired the evidence to be included in the transcript. The appellant considered that, by such failure, the defendants agreed that said statement was correct and that the evidence need not be included in the transcript. He relied on Supreme Court Rule 1.06 to support this contention. The court held that that rule, which permits an omission of the evidence from the transcript, was not applicable for several reasons. First, the rule applies solely "when an appellant desires only to have reviewed legal questions with respect to *instructions given or refused . . .*". There were *no instructions given or refused* in this case. The rule also provides that the appellant, after serving such statement, *shall file the same in the trial court.* (The italics are those of the appellate court.)

The court said that there was nothing in this record to indicate that the statement was filed and the appellant did not claim that it was done. The rule also requires that "the statement shall . . . contain a request to the respondent to indicate . . . whether or not the respondent desires the evidence to be included in the transcript". There was attached to the appellant's suggestions in opposition to the motion to dismiss, a copy of the statement of points to be relied on, and a copy of the "stipulation of facts". Neither requested the defendants to state whether they desired "the evidence to be included in the transcript" and the appellant made no contention that a separate written request was made. For these reasons, Supreme Court Rule 1.06 was held to be of no aid to the appellant.[211]

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210. Willis v. Willis, 274 S.W.2d 621 (Mo. App. 1955).
211. Brooks v. Dunson, 272 S.W.2d 305 (Mo. App. 1954).

4. Judgment Affirmed or Reversed

Decrees are to be affirmed on appeal if the right result is reached in the trial court, though the reason advanced for the affirmance is not the correct ground for sustaining the decree.[212]

In order that a judgment may be reversed because of an error of a trial court, the error must materially affect the merits of the action.[213]

Applying this doctrine, the Missouri appellate courts, during the last twelve months, have affirmed judgments which have been appealed from on the grounds that courts have erred in sustaining a petition where it was claimed that there was inconsistency in a single count,[214] in admitting evidence,[215] in excluding evidence,[216] in giving instructions,[217] in refusing instructions,[218] in connection with arguments,[219] in denying a request to set aside a judgment,[220] in the form of an order directing a remittitur,[221] and in the granting of a new trial.[222]

It has also been decided that alleged trial errors are deemed immaterial where the reviewing court has determined that there is no case for the jury.[223]

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212. Decker v. Fitge, 276 S.W.2d 144 (Mo. 1955).

213. Clayton v. St. Louis Public Service Company, 276 S.W.2d 621 (Mo. App. 1955).

214. Grand River TP., De Kalb County v. Cooke Sales & Service, Inc., 267 S.W.2d 322 (Mo. 1954).

215. Evinger v. Thompson, 265 S.W.2d 726 (Mo. 1954); Conser v. Atchison, T. & S.F. Ry., 266 S.W.2d 587 (Mo. 1954); Daniels v. Brown, 266 S.W.2d 680 (Mo. 1954); Cox v. Wrinkle, 267 S.W.2d 648 (Mo. 1954); Boring v. Kansas City Life Insurance Co., 274 S.W.2d 233 (Mo. 1955); Horrell v. St. Louis Public Service Co., 277 S.W.2d 612 (Mo. 1955); Lockhart v. Lockhart, 271 S.W.2d 208 (Mo. App. 1954); Housden v. Berns, 273 S.W.2d 794 (Mo. App. 1954); Heiter v. Terminal R.R. Ass'n. of St. Louis, 275 S.W.2d 612 (Mo. App. 1955); Thomas v. Boone Electric Cooperative, 277 S.W.2d 640 (Mo. App. 1955).

216. Ferguson v. Stokes, 269 S.W.2d 655 (Mo. 1954); Wapelhorst *et ux.* v. Lindner, 269 S.W.2d 865 (Mo. 1954); Housden v. Berns, 273 S.W.2d 794 (Mo. App. 1954); Clayton v. St. Louis Public Service Co., 276 S.W.2d 621 (Mo. App. 1955).

217. Arditi v. Brooks Erection Co., 266 S.W.2d 556 (Mo. 1954); Largo v. Bonadonna, 269 S.W.2d 879 (Mo. 1954); Trice v. Lancaster, 270 S.W.2d 519 (Mo. App. 1954); Morris v. Alexander, 275 S.W.2d 373 (Mo. App. 1955).

218. Rexite Casting Co. v. Midwest Mower Corp., 267 S.W.2d 327 (Mo. App. 1954); Proceedings for Condemnation of Private Property for Sixth Street Expressway, Kansas City v. National Engineering & Manufacturering Company, Inc., Lessee of Tract 63, 274 S.W.2d 490 (Mo. App. 1955).

219. Wapelhorst v. Lindner, 269 S.W.2d 865 (Mo. 1954); State of Missouri *ex rel.* Ratliff v. Morant, 271 S.W.2d 230 (Mo. App. 1954); Hoffman v. Illinois Terminal R.R. Co., 274 S.W.2d 591 (Mo. App. 1955); Clayton v. St. Louis Public Service Co., 276 S.W.2d 621 (Mo. App. 1955).

220. Ebenreck v. Union Service Co., 276 S.W.2d 607 (Mo. App. 1955).

221. Hunter v. Roberts, 267 S.W.2d 368 (Mo. App. 1954).

222. Stroh v. Johns, 264 S.W.2d 304 (Mo. 1954); Girratono v. Kansas City Public Service Co., 272 S.W.2d 278 (Mo. 1954); Woodworth v. Kansas City Public Service Co., 274 S.W.2d 264 (Mo. 1955).

223. Branstetter v. Kunzler, 274 S.W.2d 240 (Mo. 1955).

On the other hand, appellate courts have decided that errors of trial courts in connection with the voir dire examination,[224] instructions,[225] the argument,[226] the submission of a case to the jury without evidence to substantiate a finding for the plaintiff,[227] and the granting of a judgment for the defendant when the plaintiff had a right to nominal damages,[228] were prejudicial and have, for that reason, reversed judgments.

The burden rests on the appellate to establish reversible error.[229]

The death of a defendant having been suggested and shown to have occurred after the final submission of a case in an appellate court, it was ordered that the judgment of the appellate court affirming the judgment of the circuit court should be entered as of the date of such submission.[230]

5. Cause Remanded

The furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had; and, even though the plaintiff fails to substantiate the theory upon which his case was tried, if he nevertheless shows a state of facts which might entitle him to recover if his case were brought upon a proper theory, the judgment will not be reversed outright, but instead, in the exercise of a sound judicial discretion, the case will be remanded to give him the opportunity to amend his petition so as to state a case upon the theory which his evidence discloses.[231]

It is also well established that a judgment will not be reversed without a remand unless the record clearly shows that the available

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224. Moore v. Middlewest Freightways, 266 S.W.2d 578 (Mo. 1954); Woodworth v. Kansas City Public Service Co., 274 S.W.2d 264 (Mo. 1955).
225. Lerner v. Yeghishian, 271 S.W.2d 588 (Mo. App. 1954).
226. Bartch v. Terminal R.R. Ass'n. of St. Louis, 264 S.W.2d 937 (Mo. App. 1954); Clayton v. St. Louis Public Service Company, 276 S.W.2d 621 (Mo. App. 1955).
227. Hoffman v. Illinois Terminal Railroad Co., 274 S.W.2d 591 (Mo. App. 1955).
228. State of Missouri *ex. rel.* Ratliff v. Morant, 271 S.W. 2d 230 (Mo. App. 1954).
229. McDill v. Terminal R.R. Ass'n. of St. Louis, 268 S.W.2d 823 (Mo. 1954).
230. George F. Robertson Plastering Co. v. Magidson & Oakland Realty Co., 271 S.W.2d 538 (Mo. 1954).
231 East v. McMenamy, 266 S.W.2d 728 (Mo. 1954); Stouse v. Stouse, 270 S.W.2d 822 (Mo. 1954); Emerson v. Treadway, 270 S.W.2d 614 (Mo. App. 1954); Wright v. Fick, 275 S.W. 2d 607 (Mo. App. 1955).

essential evidence has been fully presented and that the plaintiff cannot recover in any event.[232]

Further, although a judgment, based on respondeat superior, against a partnership in the firm name was void, where there was no service upon, or entry of appearance by, any individual partner, and neither the answer nor the entry of appearance by the firm purported to be that of any individual partner, or authorized for him, and where the status of an alleged agent, upon whose negligence the suit was founded, had not been fully developed at the trial, the cause was remanded to afford an opportunity to bring in additional parties if the plaintiff desired to retry the case.[233]

When the only claim on appeal is that the decision in the trial court was incorrect as to damages, there may be a remand for a retrial only as to damages.[234]

Further, it has been held that, where a suit for an injunction could not be maintained by the plaintiff, judgment on the merits in favor of the defendants should be reversed and the cause remanded with directions to dismiss the petition. In support of this ruling the court cited Section 512.160 of our Revised Statutes.[235]

s. *Transfer from Court of Appeals to Supreme Court*

When a case is transferred from a court of appeals to the supreme court, the latter court considers the case as if the proceeding had been brought directly to it from the trial court.[236]

t. *Transfer from Division of Supreme Court to Supreme Court Sitting en Banc*

A cause transferred by a division of the supreme court to the court

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232. State of Missouri *ex rel.* Ratliff v. Morant, 271 S.W.2d 230 (Mo. App. 1954); Cummins v. Dixon, 265 S.W.2d 386 (Mo. 1954); Niedergerke v. Niedergerke, 271 S.W.2d 204 (Mo. App. 1954); City of Fredericktown v. Hunter, 273 S.W.2d 732 (Mo. App. 1954).

233. Davison v. Farr, 273 S.W.2d 500 (Mo. 1954).

234. Williams v. Kansas City, 274 S.W.2d 261 (Mo. 1955); Huff v. Kuhn, 277 S.W.2d 552 (Mo. 1955); Cirese v. Spitcaufsky, 265 S.W.2d 753 (Mo. App. 1954); De Long v. Broadston, 272 S.W.2d 493 (Mo. App. 1954); Davison v. Farr, 273 S.W.2d 500 (Mo. App. 1954).

235. Lane v. Finney, Trustee, 274 S.W.2d 521 (Mo. App. 1955).

236. Collins v. Division of Welfare, 270 S.W.2d 817 (Mo. 1954); State ex rel. Schneider's Credit Jewelers, Inc. v. Brackman, 272 S.W.2d 289 (Mo. 1954); Helton v. Huckeba, 276 S.W.2d 78 (Mo. 1955).

en banc where it is then docketed, stands before the court *en banc* anew, for submission and disposition de novo, as though the case had never been before a division of the supreme court at any time.[237]

While the briefs which may have been filed in a case while it is in a division of the supreme court go to the court *en banc* with the case when it is transferred there, the status of the case after transfer to the court *en banc* is as though briefs had never been filed therein. However, when a cause is transferred from a division of the court to the court *en banc* any of the litigents therein is then entitled, as of course and of right, to file an entirely new brief in the cause if he so desires, and in such a brief any and all points may be raised which the record of the case warrants.[238]

237. Hall v. Brookshire, 267 S.W.2d 627 (Mo. 1954).
238. Hall v. Brookshire, 267 S.W.2d 627 (Mo. 1954).