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## Masthead and Recent Cases

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

## Recent Cases

### PROCEDURE—ABANDONMENT OF ASSIGNMENT

*Smith v. St. Louis Public Service Co.*<sup>1</sup>

The plaintiff was injured as a result of a collision between a car driven by himself and defendant's streetcar. In plaintiff's petition, several assignments of primary negligence were pleaded. Also, a violation of the humanitarian rule was

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1. 259 S.W.2d 692 (Mo. 1953).

pleaded. After all the evidence was in, plaintiff abandoned his assignments of primary negligence. Thus, at the request of plaintiff, the court gave instructions to the jury only under the humanitarian doctrine. This move deprived defendant of the defense of contributory negligence.

The plaintiff recovered a judgment in the trial court for \$1500 against defendant for his personal injuries. The defendant appealed to the St. Louis Court of Appeals. The court ruled that plaintiff was not entitled to recover under the humanitarian theory. Both plaintiff and defendant agreed, later upon argument to the supreme court, that plaintiff failed to make a jury case on the record under this theory. The court then ordered judgment reversed and the cause remanded for new trial. In so remanding the case, the court stated that it is a settled practice of appellate procedure that a judgment should not be reversed for failure of proof without remanding, unless the record indicates that all of the facts were fully developed and that no recovery could be had *in any event*.<sup>2</sup> It further stated: "We are not prepared to say that no recovery could be had in any event."

The cause was transferred to the supreme court, *en banc*, upon application of defendant. This court ruled that the case should not have been remanded, but reversed outright. It stated that no hard and fast rule may be written but that each case will be determined upon its own facts. It went further to say that where counsel has committed his client's cause by refusing to restrict the submittance to one issue because such appears to his *strategic advantage* in the trial of the case, the cause should not be remanded for new trial.

There seem to be two ideas that arise side by side in determining the question whether the cause should be reversed outright or remanded<sup>3</sup> for new trial. One is that an appellate court should not reverse a case without remanding unless it is convinced that the facts are such that a recovery cannot be had.<sup>4</sup> Thus, the court will give the plaintiff a second chance at recovering lawful compensation from defendant in the event of misadventure.<sup>5</sup> But the new trial will not be awarded

2. *Lance v. Van Winkle*, 358 Mo. 143, 213 S.W.2d 401 (1948); *Byrne v. Prudential Ins. Co. of America*, 88 S.W. 2d 344 (Mo. 1935).

3. *Buchanan v. Cabiness*, 240 M. App. 829, 221 S.W.2d 849 (1949). A court of appeals has discretion to remand a case for retrial where it seems that ends of justice would be subserved by so doing.

4. *Smith v. Terminal R.R. Ass'n. of St. Louis*, 160 S.W.2d 476 (Mo. 1942). 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 sound judicial discretion, the case will be remanded to give him the opportunity to amend his petition, if so advised, so as to state a case upon the theory which his evidence discloses.

5. *Hunt v. Chicago M., St. P., P. R.R.*, 225 S. W.2d 738 (Mo. 1949); *Patzman v. Howey*, 340 Mo. 11, 100 S.W.2d 851 (1936); *Anderson v. Wells*, 220 Mo. App. 19, 273 S.W. 233 (1925); *Scott v. Davis*, 216 Mo. App. 530, 270 S.W. 433 (1925); *Neeper v. Heinbach*, 249 S. W. 440 (Mo. App. 1923); *Chandler v. Chicago & A. R.R.*, 251 Mo. 592, 158 S.W. 35 (1913); *Woodson v. Metropolitan R.R.*, 224 Mo. 685, 123 S.W. 820 (1909); *Rutledge v. Missouri Pacific R.R.*, 123 Mo. 121, 24 S.W. 1053, 27 S.W. 327 (1894).

unless it is evident that the party will derive benefit thereby.<sup>6</sup> And no new trial will be granted merely to permit a party to introduce evidence that he might have introduced on the trial.<sup>7</sup> If the evidence would justify a court in submitting that issue had it not been abandoned, it is but just for plaintiff to give him an opportunity to be heard on the real merits of his case.<sup>8</sup>

The other idea is that on appeal a party directs its complaint only to the assignments still in the case. Whether the abandoned assignments were supported by substantial evidence or not becomes a moot question. The party has waived his rights under them.<sup>9</sup> Thus, the appellate court should not be required to search the whole record to find out whether the motion for new trial was properly overruled because there was evidence sustaining some assignments afterwards discarded. There are several divisional opinions that do not follow this idea.<sup>10</sup> However, it is well understood that *en banc*, not divisional, opinions are the controlling authority.<sup>11</sup>

These two ideas are not in conflict. The first is applicable in the case of a legal misadventure. The second is applicable in the case of counsel trying to secure a strategic advantage. It might be argued that differentiating between these two instances is difficult. Could it be said that every case of abandonment of assignments is for the purpose of securing some legal advantage? Why else would an attorney seek to confine the assignments? These questions may be answered only by a case by case approach as the instant *en banc* case suggests. No hard and fast rule may be stated. However, in *Hunt v. Chicago M. St. P. R.R.*<sup>12</sup> a formula which is helpful in determining which of the two situations a case falls into is stated as follows:

“Where a party has the benefit of presenting his evidence on all his pleaded assignments to the jury, and of thereby impressing their minds with the magnitude of his adversary’s dereliction; and then deliberately chooses to restrict the submission to one issue because he believes that is to his advantage—such a course is more a matter of *legal strategy* than of misadventure.”

In nearly every negligence case there are fewer assignments submitted to the jury than there are in the petition. If in every such case plaintiff were entitled to a new trial, there would be no end to litigation.

IKE SKELTON, JR.

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6. *Ferguson v. Turner*, 7 Mo. 497 (1842).

7. *Hospes v. Almstedt*, 83 Mo. 473 (1884).

8. *Gordon v. Metropolitan St. Ry.*, 153 Mo. App. 555, 134 S.W. 26 (1911).

9. *Bean v. St. Louis Public Service Co.*, 233 S.W.2d 782 (Mo. App. 1950); *Bowers v. Columbia Terminal Co.*, 213 S.W.2d 663 (Mo. App. 1948); *Schiermeier v. Kroger Grocery Co.*, 167 S.W.2d 967 (Mo. App. 1943); *Gutherie v. City of St. Charles*, 347 Mo. 1175, 152 S.W.2d 91 (1941).

10. *Yoakum v. Lusk*, 223 S.W. 53 (Mo. 1920); *Ridge v. Jones*, 335 Mo. 219, 71 S.W.2d 713 (1934).

11. Appellate court cases announcing a different opinion than the supreme court, *en banc*, should not be followed. *Hunt v. U.S. Fire Ins. Co.*, 239 Mo. App. 625, 193 S.W.2d 778 (1946).

12. *Supra*.

