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Work of the Supreme Court for the Year 1955 - Statistical Survey, The

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THE WORK OF THE SUPREME COURT FOR THE YEAR 1955

Statistical Survey

CHARLES P. DRIBBEN*

The statistical survey for 1955 shows that during the year 271 majority opinions were written by the judges and commissioners of the Supreme Court of Missouri.¹ This number has been exceeded only twice since 1945, when 291 opinions were filed in 1952 and 274 opinions were filed in 1954. The year's total showed a decrease of three opinions from the preceding year. Opinions on three appeals were rendered in the same opinion with three other appeals.²

In addition to the 271 majority opinions, there were 2 opinions concurring in result, 7 opinions dissenting from the majority and 2 opinions dissenting from the majority in part. There were 4 concurrences in result without opinion, 3 dissents without opinion, 5 dissents in part without opinion and 2 commissioners signified dubitante to decisions without written opinions. There were 18 opinions written on motions and attached to case opinions. The court was able to all concur in 244 decisions.

During the year seven justices wrote 102 majority opinions, 6 dissenting opinions, and 2 opinions dissenting in part, and 2 concurring opin-

*Chairman, Board of Student Editors

1. The Supreme Court list of majority opinions for 1955 showed that 281 opinions were written. Six of those opinions because of rehearing or transfer to the court en banc were not published in 1955. Four divisional opinions that were written were transferred to the court en banc and were either there adopted or were rewritten by another justice.

2. Total majority opinions for the preceding years are 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; 1954, 274.

(327)

ions. The six commissioners wrote 153 majority opinions and 1 dissenting opinion. Seven special justices wrote 16 majority opinions and 1 dissenting opinion. 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. Circuit Judge Lawrence Holman also served as a Special Judge prior to appointment as a commissioner of the Supreme Court. Justice Ernest M. Tipton died in February, 1955. Justice George R. Ellison resigned effective April 1, 1955. Mr. Henry I. Eager and Mr. Clem F. Storekman were appointed Judges on April 21, 1955.

TABLE I

NUMBER OF OPINIONS WRITTEN BY EACH DIVISION

En Banc	48
Division Number One	133
Division Number Two	90
Total	<u>271</u>

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

Administrative Law and Procedure	1
Adoption	1
Appeal and Error	14
Assault and Battery	2
Attorney and Client	1
Auctions and Auctioneers	1
Automobiles	4
Burglary	2
Carriers	1
Charities	1
Constitutional Law	4
Contempt	1
Contracts	2
Corporations	2
Counties	2
Courts	8
Criminal Law	35

Damages	2
Declaratory Judgment	1
Divorce	2
Drains	1
Easements	2
Elections	1
Electricity	1
Eminent Domain	5
Equity	1
Evidence (Rules)	12
Evidence (Sufficiency)	9
Executors and Administrators	4
Forcible Entry and Detainer	1
Garnishment	1
Habeas Corpus	1
Homicide	3
Husband and Wife	2
Infants	1
Injunctions	1
Insurance	2
Interpleader	1
Judges	2
Judgments	6
Jury	1
Labor Relations	4
Landlord and Tenant	2
Libel and Slander	1
Licenses	2
Master and Servant	5
Monopolies	1
Municipal Corporations	4
Negligence	11
Negligence (Automobiles)	13
Newspapers	1
New Trial	4
Officers	2
Parent and Child	1
Pleading	1
Quo Warranto	1
Railroads	3
Rape	1
Real Property	12
Release	1
Res Ipsa Loquitur	1
Robbery	2

Sales	1
Schools and School Districts	3
Sheriffs and Constables	1
Specific Performance	3
States	1
Stipulations	1
Street Railways	1
Subrogation	1
Taxation	5
Trial	10
Trust	4
Vendor and Purchaser	1
Venue	1
Waters and Water Courses	1
Wills	9
Witnesses	3
Work and Labor	1
Workmen's Compensation	6
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Total	271

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 Mandamus Made Peremptory in Part and Quashed in Part	2
Appeal Dismissed	4
Cause Transferred to Court of Appeals	6
Child Remanded to Custody of Father	1
Decree Affirmed	2
Decree Reversed and Cause Remanded with Directions	3
Judgment Affirmed	123
Judgment Affirmed in Part and in Part Modified and Cause Remanded with Directions	1
Judgment Affirmed in Part, Reversed in Part and Remanded	3
Judgment Affirmed in Part, Reversed in Part and Remanded with Directions	1

Judgment Affirmed on Condition of Remittitur	2
Judgment and Decree Affirmed	2
Judgment of Dismissal Affirmed	2
Judgment of Ouster	1
Judgment Reversed	10
Judgment Reversed and Cause Remanded	46
Judgment Reversed and Cause Remanded with Directions	23
Judgment Reversed and Defendant Ordered Discharged	1
Judgment and Decree Reversed and Cause Remanded with Directions	5
Judgment and Decree Reversed and Restraining Order Dis- solved	1
Order Affirmed	2
Order Reversed and Cause Remanded	1
Order and Decree Affirmed	1
Order and Judgment Affirmed	2
Order and Decree Reversed and Cause Remanded with Direc- tions	1
Order Granting New Trial Affirmed and Cause Remanded	9
Order Granting New Trial Set Aside and Cause Remanded with Directions	2
Order Granting New Trial Set Aside and Judgment Rein- stated	1
Order of Prohibition Issued	1
Ouster Denied	3
Peremptory Writ Issued	1
Preliminary Rule in Prohibition Made Absolute	5
Preliminary Rule in Prohibition Discharged	1
Total	271

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 Reconsideration of Motion for Rehearing or to Transfer to Court En Banc Denied	1
Motion for Rehearing or to Modify Opinion Denied	1
Motion for Rehearing or to Modify Opinion or to Transfer to Court En Banc Denied	4

Motion for Rehearing or to Transfer to Court En Banc Denied	69
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 for Rehearing or to Transfer to Court En Banc or for Stay Order Denied	1
Motion for Transfer to Court En Banc Denied	2
Motion to Modify Opinion Denied	2
Opinion Modified on Court's Own Motion	4
Rehearing Denied	27
Rehearing Denied and Opinion Modified	1
Total	118

Appellate Practice

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

The year under review covers almost a minimum of cases transferred to the courts of appeal for want of appellate jurisdiction in the Missouri Supreme Court. Only six were so transferred. However, the troublesome character of the question of proper appellate jurisdiction is again demonstrated by the fact that one of the six had been transferred by the court of appeals to the supreme court¹ only to be retransferred by the supreme court on the ground that the appellate jurisdiction is properly in the court of appeals.²

That case, *Judge v. Durham*, illustrates both the difficulty of the question involved, and the divergence of opinion that has resulted in attempts to resolve it. The case was one where the plaintiff brought an action for injunction and for damages for alleged unlawful interference with her use of a certain driveway easement alleged to have been acquired by prescription. The record shows that the trial court regarded the only issue as being the existence or nonexistence of plaintiff's easement. On appeal, the parties assigned error only to the action of the trial court in finding

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1. *Judge v. Durham*, 265 S.W. 2d 437 (Mo. App. 1954).

2. *Ibid.*, 274 S.W. 2d 247 (Mo. 1955).

the existence of the easement. The court of appeals relied on four prior decisions of the supreme court in holding that the matter of the establishment of the easement was, in fact, presented by appeal and that title to real estate is involved. The supreme court, however, took a different view. It pointed to the fact that two of the previous decisions relied upon by the court of appeals had been expressly overruled by the later case of *Gibson v. Sharp*³ and reached the conclusion that the ultimate issue in the case was one for an injunction and damages and that the determination of the existence or ownership of the easement in order to rule that ultimate issue does not present a controversy "involving" the title to real estate within the meaning of Article V, Section 3, Constitution of Missouri, 1945. Principal reliance is placed upon the prayer contained in the pleadings which merely asks for an injunction and for damages but does not ask for a decree vesting or establishing title to the alleged easement. Thus the final ruling of the supreme court seems to be that, even where it becomes necessary for the trial court to determine the existence or non-existence of an easement before rendering a judgment for injunction or damages, title to real estate is not involved unless the issues go further and acquire adjudication of the existence of the easement and a decree establishing or denying it. In other words, the court is now firmly committed to the proposition that the word "involved" means "directly involved" and that appellate jurisdiction on that ground depends on whether or not the judgment appealed from involves the question of whether title is to be taken from one litigant and awarded to another by the very terms of the decree itself.

The same reasoning is employed by the court in *Mack v. Mack*⁴ a suit for partition between a divorced husband and wife where the trial court denied partition upon the ground that, by a stipulation in the divorce action, the property had been impressed with a possessory trust postponing the right of the husband to partition until the children of the parties had obtained majority. The court points to the fact that the husband was not denied partition in any event but only that his right to partition had been postponed until the expiration of the trust. Consequently, regarding the action as one where title was only incidentally involved, the court transferred the appeal to the appropriate court of appeals.

3. 270 S.W. 2d 721 (Mo. 1954).
 4. 281 S.W. 2d 872 (Mo. 1955).

In *Winslow v. Sauerwein*⁵ the suit was in equity to enjoin defendants from using and trespassing upon a strip of land which involved a controversy as to whether or not the disputed strip was set aside as a private street, the prayer being one for an injunction against defendants from using and trespassing over, along and upon the so-called private street. There was no prayer that title be quieted in either of the parties. Again applying the rule that title must be directly involved the case was transferred to the appropriate court of appeals. So, also, in *Fisher v. Lavelock*,⁶ where the suit was one in equity to cancel an option to repurchase real estate, the court held that the only relief sought was to divest defendant of his interest by reason of the option and that a suit to cancel an option does not involve or adjudicate title to real estate. It was pointed out that title to the premises would remain in plaintiff whether the relief prayed for was granted or denied, at least until the option to purchase had been exercised. That case, also, was transferred to the proper court of appeals.

The distinction between those cases where title is only indirectly or incidentally involved and those cases where title is actually sought to be adjudicated is well illustrated by the decision of the court in *Albi v. Reed*⁷ where the supreme court retained jurisdiction of an action for an injunction and injunctive relief involving a strip of land because title to that strip was in fact directly involved. The court points to the fact that the trial court not only found the fact of title but in its judgment adjudicated and determined the title in no uncertain terms. The fact that the court below reached an erroneous conclusion in adjudicating title does not affect the question of appellate jurisdiction. The final result in that case was to reverse the judgment so far as it adjudicates the title to real estate and to affirm it in all other respects.

The monetary limitation upon the jurisdiction of the supreme court, in the year under review, has presented less difficulty. In *State v. Montgomery*⁸ the court retained jurisdiction of an appeal in a condemnation case where the record affirmatively showed that the award of the jury was more than \$7500.00 in excess of the amount to which the condemner contended that the land owners were entitled, thus presenting the converse of

5. 282 S.W. 2d 14 (Mo. 1955).

6. 282 S.W. 2d 557 (Mo. 1955).

7. 281 S.W. 2d 882 (Mo. 1955).

8. 275 S.W. 2d 283 (Mo. 1955).

the situation which was before the court in *Kansas City v. National Engineering and Manufacturing Company*,⁹ decided in 1954 and considered in the article on the work of the Missouri Supreme Court for the year 1954 published in November, 1955.¹⁰

In *Beasley v. Athens*¹¹ the court again emphasizes the rule that its jurisdiction must not only affirmatively appear upon the record, but also the case must be one where the jurisdictional amount is actually in issue and does not rest in speculation and conjecture. The court states that "we reserve to ourselves the right to pierce the shell of the pleadings, proofs, record and judgment sufficiently far to determine that our proper jurisdiction is not infringed upon or improper jurisdiction is not forced upon us by design, inadvertence, or mere colorable and not real amounts. Parties do not have the unbridled whimsical power to control appellate jurisdiction by a mere stroke of the pen in their pleadings." In that case plaintiff appealed from a verdict and judgment for defendants in a case where he had sought \$5,000 actual and \$5,000 punitive damages; but, in his argument to the jury, he asked for only \$1,000 in actual and \$1,000 punitive damages, stating in effect that if greater sums were awarded a remittitur would probably be required. Accordingly the case was transferred to the court of appeals. Similarly, in *Bauer v. City of Berkeley*¹², a suit against the city and its officials and others for an injunction to enjoin certain street work the total cost of which was far in excess of the jurisdictional amount, but where the balance remaining due was below the jurisdictional amount and only that balance remaining due and unpaid could have been affected by the suit, the court held that the determination of the jurisdictional amount may not be left to chance, speculation or conjecture; and, because it did not affirmatively appear, the case was transferred to the court of appeals.

THE RIGHT OF APPEAL

In *Nibler v. Coltrane*¹³ the suit was on contract counts for damages and for personal services. There was a verdict and judgment for plaintiff.

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9. 265 S.W. 384 (Mo. 1954).
 10. 20 Mo. L. REV. 335 (1955).
 11. 277 S.W. 2d 538 (Mo. 1955).
 12. 278 S.W. 2d 772 (Mo. 1955).
 13. 275 S.W. 2d 270 (Mo. 1955).

Upon the filing of motion for new trial the trial court ordered a remittitur providing that, if not filed within ten days, a new trial would be ordered on the issue of the amount of damages only. Within the ten day period the trial court extended the time within which plaintiff would be permitted to make the remittitur but on the same date defendant filed his notice of appeal. The remittitur was not made. The court overruled a motion to dismiss the appeal on the ground it had been taken prematurely, holding that the defendant had the right to take the appeal before the time for filing remittitur had expired and that the trial court did retain jurisdiction so that plaintiff could have remitted at any time before the transcript was filed in the appellate court.

RECORDS AND BRIEFS

In *St. Louis Housing Authority v. Evans*¹⁴ respondent refused to agree to the transcript of the record as presented by appellant because of respondent's contention that the transcript did not comply with the Statute or the Supreme Court Rules. Appellant then filed the transcript in the supreme court without having it settled or approved by the trial court. The motion of respondent to dismiss the appeal was sustained, the court holding that the parties may agree that the transcript correctly includes all of the record but that if they fail to agree the trial court must approve an abbreviated record before the record itself will be sufficient to comply with the rules.

In *Clemons v. Becker*¹⁵ plaintiff appealed from an adverse verdict for the defendant and, on the appeal, filed a brief with points and authorities, first, that there is insufficient evidence to support the verdict, second that an instruction which is broader than the pleadings or the proof is defective, and third that the omission of an essential element from an instruction is error. The court disposed of the first point by pointing out that a verdict for the defendant on plaintiff's claim needs no supporting evidence; and held that points two and three did not present any question for review in that they wholly failed to show what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous

14. 285 S.W. 2d 550 (Mo. 1955).

15. 283 S.W. 2d 449 (Mo. 1955).

as required by Rule 1.08. However, although holding that the court would be justified in not considering the case further, the opinion does, in the interest of justice, review the instructions and points in the light of the arguments presented in the portion of the brief devoted to argument, but finds no merits in plaintiff's contentions and affirms the judgment.

Criminal Law

WILLIAM J. CASON*

The substantive and procedural questions which are raised in the field of criminal law often are found to have been passed upon not once but several times in the past. However, the ingenuity of the bar of this state has again raised several unique and interesting questions which have been decided by the Missouri Supreme Court in the year 1955.

I. SPECIFIC OFFENSES

A. *Assault with Intent to Kill*

An unusual question of what will constitute double jeopardy was raised in one case¹ wherein defendant was convicted of assault with intent to kill.² Defendant was the driver of a "getaway" car in an attempted bank robbery. It was admitted that defendant never entered the bank at any time or took part in the attempted robbery other than as operator of the vehicle in question. A police officer who entered the bank while the robbery was in progress was shot by some of defendant's companions. Defendant was previously tried and found guilty of the offense of robbery³ on this set of facts.⁴ It was defendant's contention throughout the instant proceedings that since in this prosecution, and in the former one for robbery, the "assault" was a vital and essential element to be established by the state, this second prosecution puts him in double jeopardy in viola-

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1. *State v. Chernick*, 278 S.W. 2d 741 (Mo. 1955).
2. MO. REV. STAT. § 559.180 (1949).
3. MO. REV. STAT. § 560.120 (1949).
4. *State v. Chernick*, 280 S.W.2d 56 (Mo. 1955).

tion of his constitutional rights.⁵ This position of the defendant was not entirely without authority. There have been some courts which have adopted what is referred to as the "same transaction test"⁶ in determining this question. The reasoning of those courts which have adopted such a view seems to be that the "same offense" means not only the offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to a charge and punishment, and when the integral part is not a distinct affair, but grows out of the same transaction, the acquittal or conviction of an offender of an offense for one part of the transaction bars conviction for any other crime the facts of which were a part of such transaction.

The Missouri Court refused the "same transaction" test and adopted what may be referred to as the "several offense" rule. The court reasoned that since the facts necessary to convict the defendant in the instant case would not necessarily convict the defendant of robbery there was no double jeopardy.

The perils of seeking public office were illustrated by the facts in one case wherein it was alleged that a candidate for the office of prosecuting attorney was assaulted by the use of hands, feet and a certain blunt instrument while he was handing out campaign cards.⁷ The evidence adduced at the trial indicated that the complaining witness had in fact been assaulted by use of hands and feet but no blunt instrument was in fact described or produced. The instruction of the state submitted the assault with the blunt instrument and with hands and feet. This was held not to be error since the section under which the prosecution was proceeding did not require that any instrument be used in the assault but merely that it be done with the prescribed intent.⁸

B. Burglary

An interesting analysis of what may constitute "entering" is found in one case⁹ where defendant was convicted of second degree burglary.¹⁰

5. Mo. CONST. art. I, § 19.

6. *State v. Mowser*, 92 N.J.L. 474, 106 Atl. 416, 4 A.L.R. 695 (1919).

7. *State v. Miles*, 282 S.W.2d 542 (Mo. 1955).

8. Mo. REV. STAT. § 559.190 (1949).

9. *State v. Whitaker*, 275 S.W.2d 316 (Mo. 1955).

10. Mo. REV. STAT. § 560.070 (1949).

Defendant was discovered with a portion of his body in and a portion out of a window. This window led into an area between a roof and a false ceiling of a store and there were no "valuable goods and chattels" in this particular area. There was a closed but not locked manhole in the ceiling into a store below wherein there were valuable goods. Defendant contended that there was no entering of any sort because his entire body did not enter and therefore "he," which word as a matter of definition includes all of him, did not enter. The court ruled against defendant on this contention but cited no Missouri case in so doing.¹¹ On the question of whether defendant had entered a place containing valuable goods the court relied on text authority to the effect that one entering an attic of a house had entered the entire house and ruled against defendant on this point also.¹²

C. Rape

In a prosecution for rape the evidence did not show that defendant had intercourse with prosecutrix nor did it show he participated physically in the act though he drove a car in which the act took place while it took place and knew what was happening.¹³ Defendant was convicted of rape and his punishment assessed at twenty-five years in the state penitentiary. The conviction was upheld, the court relying on those cases holding that a party may be charged with doing an act of rape himself and held liable for such charge if he was present, aiding and assisting another to do it.¹⁴ Driving the motor vehicle while the act proceeded was tacitly considered by the court as "aiding and assisting" enough.

D. Molesting a Minor

Evidence was held sufficient to sustain conviction of crime of molesting a minor¹⁵ in one situation where defendant was alleged to have exhibited his privates to a young girl and had put his hands under her skirts and had caressed her though there was no evidence he had in fact touched her private parts.¹⁶

11. 12 C.J.S., *Burglary*, § 10b.

12. 12 C.J.S., *Burglary*, § 10.

13. *State v. Sheard*, 276 S.W.2d 191 (Mo. 1955).

14. *State v. Sykes*, 191 Mo. 62, 89 S. W. 851 (Mo. 1905).

15. Mo. REV. STAT. § 563.160 (1949).

16. *State v. Martin*, 275 S.W.2d 336 (Mo. 1955).

E. Habitual Criminal Act

One defendant was convicted of obtaining a narcotic drug by using a false name and address.¹⁷ He also was convicted under what is generally known as the Habitual Criminal Act.¹⁸ There was no evidence adduced that defendant had ever been convicted of a felony. There was evidence that he had been convicted of an offense in Indiana which was a misdemeanor there. However, such offense would have been a felony at the time of its commission in Missouri. Under the particular wording of the Missouri statute above noted the conviction was upheld.

II. TRIAL

A. Evidence

In a robbery prosecution¹⁹ the Circuit Attorney took the stand himself and testified that he had questioned one of the known participants in the particular occurrence and that immediately thereafter he had issued a pick up order on defendant. He did not say what the known participant had told him but he only testified as to what he had done. This was held to be error as being in violation of the principles of the hearsay rule.

Care must be used by the state in proving prior convictions when such are in issue according to one case wherein the defendant was being tried for grand larceny and was alleged to have been convicted of larceny three times previously.²⁰ The state introduced certain court records which would indicate that defendant had been convicted of larceny previously as charged. However, the actual judgment entry was not produced either in the original or as certified. The clerk of the court testified as to the convictions from memoranda in the docket sheets and on the back of warrants. This was held to be reversible error.

The question of when "other crimes" may be introduced is often presented in the trial of a criminal case. A thorough and interesting analysis of this problem is found in a murder case decided by the court in the past

17. MO. REV. STAT. § 195.170 (1949).

18. MO. REV. STAT. §§ 556.280, 556.290 (1949).

19. *State v. Chernick*, 280 S.W.2d 56 (Mo. 1955).

20. *State v. King*, 275 S.W.2d 310 (Mo. 1955).

year.²¹ The court appears to have adopted the following rule: Evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; (5) the identity of the person charged with the commission of the crime on trial. However, the court indicates that it will scrutinize this type of evidence severely.

In a first degree robbery case²² the counsel for defendant sought to interrogate one of the prosecution's witnesses concerning certain statements made by him at the preliminary hearing in conflict with his testimony at the trial. Counsel for the state objected to anything that might have been said at the preliminary hearing as immaterial and this objection was sustained. The court held this to be prejudicially erroneous as unduly limiting the defendant's right to cross examination.

The court again affirmed the right of the state to show prior consistent statements of a state witness who has been impeached in order that he may be rehabilitated.²³

B. *Argument of Counsel*

As usual, the zeal of counsel for the state in presenting the view the state takes of the evidence in his argument has presented several questions for review. In one case the prosecuting attorney referred to the defendant as a "pimp" in argument. Defendant was being tried for receiving earnings from a prostitute without consideration. The court ruled that the word used was merely a synonym for the word "panderer" or "procurer" and is commonly used to describe a person guilty of the crime of which defendant stood charged and, hence, its use was not error.²⁴ In other cases, referring to the defendant as a "vulture"²⁵ or a "punk"²⁶ was considered not error.

21. *State v. Reese*, 274 S.W.2d 304 (Mo. 1954).

22. *State v. Thompson*, 280 S.W.2d 838 (Mo. 1955).

23. *State v. Crocker*, 275 S.W.2d 293 (Mo. 1955).

24. *State v. Armstead*, 283 S.W.2d 577 (Mo. 1955).

25. *State v. Hardy*, 276 S.W.2d 90 (Mo. 1955).

26. *State v. Schuster*, 282 S.W.2d 553 (Mo. 1955).

A reference to the fact that there was "nothing on the defendant's side of the scale" was held not to be an improper reference to the defendant's failure to testify nor was it error to refer to the evidence of the state as being "uncontradicted."²⁷

It was reversible error for the prosecuting attorney in argument to remark "I don't know what this boy says. There is no evidence of any type by him in this case. . .".²⁸ This argument was held to be in direct violation of the Missouri Supreme Court rule and the Missouri statute prohibiting references to an accused's failure to testify.²⁹

In one case the counsel for the state in argument made mention of the fact that the defendant's wife was not in court.³⁰ Under the evidence adduced she would have been a witness to relevant facts. The argument was denounced as being prejudicial error under the provisions of the Missouri statute providing that if an accused shall not avail himself of the testimony of his wife on a trial it shall not be construed to affect his guilt nor shall it be referred to by any attorney in the case.

C. Instructions

The court has again warned that if the evidence on the part of the State tends to prove that the crime was actually consummated it will be error to submit the issue of an attempt to commit the crime.³¹ However, it is not entirely clear just what the ruling of the court would be if the crime involved is one having different degrees in view of Section 556.220, *Missouri Revised Statutes* (1949). That section provides in part, "Upon indictment for any offense consisting of different degrees, . . . the jury may find the accused not guilty of the offense charged in the indictment and may find him guilty of . . . an attempt to commit such. . .". In consideration of this statute the court held in one case this past year that it was proper to allow the state to amend a burglary charge at time of trial and charge an attempt to commit the same.³²

27. *State v. Hardy*, 276 S.W.2d 90 (Mo. 1955).

28. *State v. Lindner*, 282 S.W.2d 547 (Mo. 1955).

29. Mo. REV. STAT. § 546.270 (1949); Missouri Supreme Court Rule 26.08.

30. Mo. REV. STAT. § 546.270 (1949); *State v. Wyatt*, 276 S.W.2d 86 (Mo. 1955).

31. *State v. Baker*, 276 S.W.2d 131 (Mo. 1955).

32. *State v. Whitaker*, 275 S.W.2d 322 (Mo. 1955).

An approved instruction setting forth the felony-murder doctrine as established in Section 559.010, *Missouri Revised Statutes* (1949), is found in one case.³³ The instruction was complained of by the defendant for failure to hypothesize facts. A study of it indicates that this charge is substantially correct but the court held this not to be error since the instruction was merely an explanatory instruction.

Instructions concerning "malice" rather commonly used are of the sort which instructs the jury that if the defendant pointed a loaded gun at deceased at a vital part and intentionally pulled the trigger it will be presumed he intended death. Such an instruction was held to be error in *State v. Cook*.³⁴ The court indicated that it would hold it to be reversible error to instruct the jury concerning a presumption of intent and malice where there were facts in evidence from which such malice might be inferred.

In the absence of a request from a defendant, the court has held that it will not be reversible error for the trial court to fail to instruct the jury that all twelve of them must agree to a verdict, even though the record fails to indicate whether all twelve did in fact agree or not.³⁵

D. Trial Procedure

In the case of *State v. McQueen*³⁶ it appeared on review that the prosecuting attorney had failed to file an information in the circuit court after the case had been sent there following the preliminary hearing. The affidavit for warrant filed in the magistrate court may have been designated "Information." The defendant apparently made no objection to this procedure until after verdict. This was held to be prejudicial error since the circuit court had in fact no jurisdiction in the case until after the information had been filed.

The failure of a juror in a second degree murder case to reveal the fact that he had been convicted in a federal court of a felony was held reversible error where the panel had been interrogated on such a question on voir dire and he had not disclosed the information.³⁷

33. *State v. Reese*, 274 S.W.2d 304 (Mo. 1954).

34. 282 S.W.2d 533 (Mo. 1955).

35. *State v. Burns*, 280 S.W.2d 119 (Mo. 1955).

36. 282 S.W.2d 539 (Mo. 1955).

37. *State v. Herman*, 283 S.W.2d 617 (Mo. 1955).

In a prosecution for rape the jury returned the following verdict: "We the jury find the defendants Lefi Sheard and Loyd Thompson, guilty of rape as charged in the information and assess their punishment at 50 years and 1 day". The court held that the verdict was not in proper form since Section 546.420 *Missouri Revised Statutes* (1949) provides that when several defendants are jointly tried, the punishment of each must be separately assessed. However, the court pointed out that since the verdict did indicate guilt but assessed no punishment lawfully, the trial court under Section 546.420 could assess the punishment, and ordered the case remanded for that purpose only.³⁸

III. APPEAL

In nearly one half of the cases involving criminal law which were reviewed by the Missouri Supreme Court during the year 1955 the court refused to review certain allegations of error contained in the motion for new trial on the ground that the motion for new trial was too indefinite and did not comply with Section 547.030, *Missouri Revised Statutes* (1949), and Missouri Supreme Court Rule 27.20. Counsel who try many civil cases but only a few criminal cases fail to note the demanding requirements of the above statute and rule.

An allegation in a motion for new trial that "The prosecuting attorney misquoted the evidence in his final argument" was held to be too indefinite for review.³⁹ Allegations that "The verdict is against the law and the evidence," and "The verdict is against the weight of the evidence" were ruled to preserve nothing for review.⁴⁰

The following allegation of error in motion for new trial, although in some apparent detail, was held inadequate to preserve anything for review: "The Court erred in allowing the prosecuting attorney to question the defendant on collateral issues and after the defendant having answered, allowing the state to produce and read letters and give other testimony in rebuttal of collateral issues, the State being bound by said answers."⁴¹

38. *State v. Sheard*, 276 S.W.2d 196 (Mo. 1955).

39. *State v. Sheard*, 276 S.W.2d 196 (Mo. 1955).

40. See 39, *supra*.

41. *State v. Crocker*, 275 S.W.2d 293 (Mo. 1955).

In one case the defendant in his motion for new trial asserted an instruction to be error, "Because such instruction is a misstatement of the law, misleading, and a comment on the evidence, and conflicts with other instructions." This was held inadequate to preserve any error in the instruction for review.⁴²

Evidence

JOHN DAVID COLLINS*

From December 6, 1954, until December 5, 1955, the Missouri appellate courts handed down fifty-eight decisions touching upon questions of evidence which the writer deems worthy of note. All of the decisions are, generally, within well-established rules.

JUDICIAL NOTICE

*Winter v. Lashley*¹ was a suit on an account involving the sale of tires. The answer set up the seller's fraudulent representations that the tires were "first line rubber and to be guaranteed." At the trial the defendant contended that the seller had represented that the tires were to be 100% rubber. The court said that it was a matter of common knowledge that tires were made up of materials in addition to rubber, so the defendant was not entitled to rely upon the alleged representation that the tires were 100% rubber.

*Schwartz v. Kansas City Southern Railway Company*² was a suit for the death of the plaintiff's husband which occurred when the tractor which he was riding turned over. He was cutting weeds and brush on the defendant's right-of-way at the time. The court said that it is common knowledge that sometimes tractors do turn over when used on embankments, so re-

42. *State v. Reese*, 274 S.W.2d 304 (Mo. 1954).

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1. 274 S.W.2d 40 (Mo. App. 1954).
2. 275 S.W.2d 236 (Mo. 1955).

covery could not be based upon a failure to warn of the dangerous condition by reason of the contour of the ground because any information which would have been imparted by such a warning would have been information which the deceased already knew. A judgment for the plaintiff was reversed.

*State v. Johnson*³ was an appeal from a judgment affirming an order which revoked the appellant's permit to sell liquor. There was testimony that a bottle of Jim Beam whiskey and a bottle of Sunny Brook whiskey were sold on Sunday. Appellant contended that there was no evidence that the merchandise sold was intoxicating liquor. The court took judicial notice of the fact, without allegation or proof, that this whiskey was intoxicating liquor.

In *Lemasters v. Willman*⁴ the court took judicial notice of the fact that city and town school districts of this state, or many of them, were employing school superintendents as early as fifty years ago, even though they were not expressly authorized by statute to do so.

In *State ex rel. Toberman v. Cook*,⁵ a writ of prohibition was sought to prohibit a circuit judge from asserting and exercising jurisdiction over the persons of relators in a declaratory judgment action. The declaratory action was brought by certain trucking companies against the Secretary of State, the Chairman of the State Highway Commission, the Director of Revenue and the Superintendent of the State Highway Patrol seeking a declaration that the plaintiff's drivers were not guilty of any criminal violation of a statute relating to the registration of commercially operated motor vehicles, and also seeking an injunction to keep the highway patrolmen from arresting the drivers. The relators contended that the venue was improperly laid in Jackson County. The court took judicial notice of the fact that the Secretary of State, Director of Revenue, and Superintendent of the State Highway Patrol were heads of executive departments of the state government and that their offices were located in and their principal official duties were required to be performed at Jefferson City. The court held, therefore, that the Circuit Court of Jackson County did

3. 281 S.W.2d 34 (Mo. App. 1955).

4. 281 S.W.2d 580 (Mo. App. 1955).

5. 281 S.W.2d 777 (Mo. 1955).

not have jurisdiction over the persons of relators and the provisional rule in prohibition was made absolute.

In *Mallow v. Tucker*⁶ the court held, in a personal injury damage suit resulting from a collision between two automobiles, that it could not take judicial notice of the exact distance within which a certain automobile may be stopped under given conditions. There have been instances, however, in which the court has taken judicial notice of certain limits within which a stop could be made.⁷

In *Miller v. Medley*,⁸ a suit to quiet title, the patent recited "the above described lands, granted by the Government of the United States to the State of Missouri, and by the State of Missouri to the said County of Dunklin as Swamp lands lying and being in said county." The Court held that it could judicially know, therefore, that equitable title to the land emanated from the Government more than ten years ago.

In *Hurley v. Hurley*⁹ a divorced husband moved to modify a custody decree. In passing upon the husband's moral fitness to have custody of the children, the court said that although it was not required to profess ignorance of matters known to the general public, the moral implications flowing from the right to wear a "good conduct medal," cherished as that right may be, were not matters of which the court could take judicial notice.

In *Bunch v. Mueller*,¹⁰ a pedestrian case submitted under the humanitarian doctrine, the court once again took judicial notice that the ordinary walking speed of the average man is two or three miles per hour, or 2.9 to 4.4 feet per second and that a ten-year-old child would walk at approximately the same speed.

6. 281 S.W.2d 848 (Mo. 1955).

7. *Dister v. Ludwig*, 362 Mo. 162, 240 S.W.2d 694 (1951).

8. 281 S.W.2d 797 (Mo. 1955).

9. 284 S.W.2d 72 (Mo. App. 1955).

10. 284 S.W.2d 440 (Mo. 1955).

RELEVANCY, MATERIALITY AND COMPETENCY

A. *In General*

*Missouri Public Service Company v. Hunt*¹¹ was a condemnation case to acquire right-of-way for a power line. The opinion does not show the date of the appropriation, but the trial was held in July of 1953. The court held that it was proper to admit evidence of the sale of property similarly located in a neighborhood reasonably near the land in question, which sales were made in 1946, 1947 and 1948. The court pointed out that the trial court should be allowed great latitude in determining the relevancy of such evidence, keeping in mind that the opposite party could show by cross-examination or by other evidence any distinguishing features of which the jury should be informed. The court also held that proof of a mere offer to buy was properly excluded because it was not competent evidence to determine the value of real estate.

*Brown v. Sloan's Moving & Storage Company*¹² was a suit for failure to return personal property which had been stored. Count III was for fraud and deceit. Plaintiff offered in evidence defendant's letterhead which contained the words "new modern storage warehouse." Plaintiff also offered a page from the classified telephone directory bearing a picture of a seven-story building situated at 5619 Delmar Boulevard. Beside the picture appeared the words, "fireproof storage—sprinkled warehouse—low insurance rates—DElmar 3500." Plaintiff offered to prove that she acted in reliance upon the statements in the advertisement in the telephone directory and that she did not know that defendant had a warehouse other than the one on Delmar. The trial court excluded the letterhead, the page from the telephone directory and plaintiff's offer of proof. There was evidence that plaintiff's personal property had been stored in one of defendant's warehouses which was not fireproof. The court held that it was reversible error to exclude this evidence because it could have been reasonably found that the advertisement in the telephone directory was intended to convey to the public the impression that all of the defendant's storage facilities were fireproof and sprinkled.

11. 274 S.W.2d 27 (Mo. App. 1954).

12. 274 S.W.2d 310 (Mo. 1954).

*Ensign v. Home for the Jewish Aged*¹³ was a suit to cancel a promissory note. The plaintiffs were two sisters and a brother. The suit was based upon the theory that the note was executed under duress. Plaintiffs offered in evidence conversations with each other, which occurred outside of the presence of the defendant or any of its representatives, which related to plaintiffs' understandings about what was necessary in order to obtain plaintiffs' mother's admittance to the defendant Home. Objection was made that the conversations were self-serving. Plaintiffs' counsel then explained that they were not offered to show the truth of the matters stated in the conversations, but were offered to show the state of mind of the plaintiffs when executing the note. The trial court sustained the objection. The conversations were then given in the form of an offer of proof. The court held that the trial court's ruling was erroneous because evidence tending to show physical, mental or financial condition of the plaintiffs during the negotiations and at the time of the signing of the note was admissible on the issue of duress. The court relied upon *White v. Scarritt*.¹⁴

*State ex rel. Headrick v. Bailey*¹⁵ was a proceeding to prohibit a trial judge from compelling relator, who was the plaintiff in a personal injury suit arising out of an automobile wreck, to produce for inspection and transcription tape-recorded statements of the plaintiff, a witness and defendant which had been obtained by the lawyer now representing relator-plaintiff. Shortly after the wreck a friend of the defendant telephoned Mr. Charles M. Cook, a lawyer of Carthage, Missouri, and asked him to come to the defendant's home and discuss the collision. Upon arriving at defendant's home Mr. Cook interviewed the defendant and her two passengers, one of whom later became the plaintiff. While there Mr. Cook took a tape-recorded statement from the defendant, the plaintiff and the other passenger. In her statement, the plaintiff had said that she was not injured in the accident. The defendant was under the impression that Mr. Cook was going to represent her in any litigation growing out of the collision. At the conclusion of the interview, the defendant and her husband signed and delivered a written contract employing Mr. Cook as their attorney, but he did not sign the contract. Two days later plaintiff employed Mr. Cook to file suit on behalf of her and her husband against the

13. 274 S.W.2d 502 (Mo. App. 1955).

14. 341 Mo. 1004, 111 S.W.2d 18 (1937).

15. 278 S.W.2d 737 (Mo. 1955).

defendant and others who were the owners and operators of other vehicles involved in the collision. On the same day Mr. Cook returned to the defendant the contract of employment with this notation written upon it, "Withdrawal because of conflict of interest, 3-24-54-Charles M. Cook." Shortly thereafter Mr. Cook filed the damage suit on behalf of the plaintiff. The defendant then employed other attorneys to represent her and filed a motion seeking an order requiring the plaintiff to produce the tape-recorded statements for inspection and transcribing. Evidence was heard in support of the motion, resulting in an order requiring the production. Thereupon the application for the writ of prohibition was filed. Relator contended that the statements did not contain "competent and admissible evidence" and that "good cause" was not shown. Those were the only questions briefed. The court said that in the trial court the burden was upon the moving party to show relevancy and materiality and good cause, but that in this proceeding for prohibition the burden was upon the relator to show that the statements which had been ordered produced were not relevant or material or that good cause had not been shown, the presumption being in favor of the right action of the trial court. The court, discussing the production of the plaintiff's own statement for inspection by defendant, distinguished the cases in which production was sought of the written statement of a plaintiff which had been given to one of the defendant's investigators on the ground that in those cases the plaintiff would be seeking an order to inspect his own statement, which would not be competent or material evidence. The court pointed out that in the instant case the defendant was seeking the production of a statement by the plaintiff which allegedly contained the plaintiff's admission that she was not injured. If her statement did contain that admission, it would be admissible in evidence. Consequently, the court held that the statements sought contained "evidence material" to the issues in the pending action. Discussing the statement of the witness, the court said that it merely related her version of the facts surrounding the accident and would not be admissible in evidence because it was hearsay. The court went on to say, however, that there was another reason, independent of the production statute, which authorized the court to order the production of the statements of both the witness and the defendant. That reason was that at the time the statements were taken Mr. Cook was the defendant's "agent performing a service for his client. Her interest in the statements has some elements of a property right." Under these circumstances the defendant

would be entitled to the production of these statements as part of the work product of her own attorney.

In *re Armory Site in Kansas City*¹⁶ was a condemnation suit. The court held that although an expert witness may testify concerning the basis for arriving at his opinion he may not, under the guise of giving the basis of his opinion, put in evidence which is incompetent or irrelevant, nor should he be permitted to go into the grounds of his opinion in such a way as to confuse or mislead the jury. The scope of this examination is committed to the discretion of the trial judge who should be careful to see that false issues are not suggested nor the jury otherwise misled. The court reiterated the rule that the admissibility of evidence of the sale of other property was left to the discretion of the trial judge and that his discretion is to be exercised in the light of the time of such sales, the similarity of location and the similarity of the use to which the properties may be adaptable. In order to establish error in rejecting evidence of this nature the burden is upon the objecting party to show by offer of proof or otherwise that the evidence is admissible.

*Jones v. Farm Bureau Mutual Insurance Company*¹⁷ was a suit to recover for fire loss of an automobile. The court said that, "As a general rule evidence of mere offers to buy are not admissible to prove value." It went on to hold that "if it was error" to refuse to strike such testimony, such error was harmless in view of other testimony in the case. The court held that it was proper to admit an invoice showing the purchase price of the automobile in question on August 11, 1952, the date of the loss being September 29, 1953. There was other evidence as to the age of the car, the treatment it had received, the mileage and its general condition.

B. *Cross-Examination*

In *Keely v. Arkansas Motor Freight Lines*¹⁸, a personal injury case, the defendant objected to the introduction of a certified transcript of the proceeding in the magistrate court relating to the defendant's plea of guilty to the charge of careless and reckless driving. The objection was made on the ground that at the hearing in the magistrate court the defend-

16. 282 S.W.2d 464 (Mo. 1955).

17. 284 S.W.2d 11 (Mo. App. 1955).

18. 278 S.W.2d 765 (Mo. 1955).

ant did not have an opportunity to enter a plea of *nolo contendere*. The court held that it was proper to admit the transcript, which did not show that the defendant had offered to enter such a plea.

*Kieffer v. Bragdon*¹⁹ was a personal injury suit. Doctors testified on behalf of plaintiff that they had examined x-rays of her body and that they were negative for injuries. After the plaintiff had testified that she had discussed the results of the x-rays with her doctors, defendant sought to elicit from her what the doctors who had taken the x-rays had told her about them—that they were negative for fractures or broken bones. The court sustained plaintiff's objection to this question and refused the offer of proof on the ground that plaintiff's statement of what the doctors had told her would be hearsay. On appeal defendant claimed that the testimony was not sought on the theory that it was competent to prove the fact that the x-rays were negative, but rather on the theory that the testimony was competent to show that plaintiff knew, as she came forward with new complaints from time to time, that her complaints were unsupported by any of the various x-rays which were taken. The court held that the trial court's ruling was correct, remarking that the pleadings did not raise an issue of a fraudulent claim of injuries. The court further commented that by so restricting the defendant's cross-examination, the defendant was not deprived of an opportunity to argue that plaintiff knew she had no fractures because other evidence showed that the doctors knew the x-rays were negative. There was ample evidence, therefore, upon which to base such an argument.

*Hoffman v. Illinois Terminal Railroad*²⁰ was a suit by a passenger for injuries received when a bus suddenly stopped. On direct examination plaintiff's doctor testified that the accident aggravated a pre-existing hypertrophic arthritis, causing pain, and in his opinion "that condition" would be permanent. On cross-examination the doctor admitted that the permanent condition to which he was referring was the presence of the calcium deposits, i.e., the hypertrophic arthritis. The court held that this explanation on cross-examination destroyed the probative force of the testimony on direct, and consequently the testimony on direct could not be used as evidence to support a damage instruction authorizing recovery for per-

19. 278 S.W.2d 10 (Mo. App. 1955).

20. 274 S.W.2d 591 (Mo. App. 1955).

manent injuries. The original petition had charged that the plaintiff was thrown from the bus "to the pavement." Plaintiff testified that he was thrown from the bus into a pole and reeled around and struck a building. He did not testify that he fell to the pavement at any time. On cross-examination of the plaintiff, the defendant offered in evidence the original petition. The trial judge suggested to defendant's counsel that such an offer would constitute a waiver of the defendant's right to request a directed verdict. The offer was not pressed. The court then sustained the plaintiff's objection to further reference to the petition unless it be introduced in evidence. Then defendant's counsel inquired of the court if its ruling meant that he could not cross-examine the plaintiff on the contents of the petition, and the court replied, "Yes, sir." The court held that this action of the trial court unduly restricted the scope of the defendant's cross-examination and constituted reversible error.

*Houfburg v. Kansas City Stockyards Company of Maine*²¹ was a suit for personal injuries in which the plaintiff had received workmen's compensation benefits from his employer's insurer. One of these benefits was the payment to Dr. Ingham for a series of operations. At the trial this doctor testified for the plaintiff. On cross-examination the defendant made an extended offer of proof, out of the hearing of the jury, to show that the doctor had made five reports to the workmen's compensation insurer wherein statements appeared which were in conflict with his testimony at the trial. The offer of proof also included evidence that the doctor was paid for his services by the compensation insurer and while the compensation proceeding was pending the doctor was prepared to testify on behalf of the insurer that the plaintiff's disability did not exceed 25% in the left leg, and that plaintiff was, at that time, free from pain. The offer of proof also included evidence that the doctor and his associate had performed other services for the compensation insurer for which they had received substantial payment, and that the doctor knew that if his testimony was favorable to the plaintiff the compensation insurer would recover all that it had paid to the plaintiff by way of subrogation. The court rejected the offer and ruled that no evidence would be admitted which would disclose to the jury the name of the compensation insurance company or that that company had employed or paid the doctor or had any interest

21. 283 S.W.2d 539 (Mo. 1955).

in the case. The court held that these rulings by the trial court were reversible error. It said that the ordinary rule, that the fact of payment of workmen's compensation benefits and the consequent subrogation of the insurer is irrelevant, does not apply where it becomes necessary to make such a disclosure in order that the jury may properly evaluate the testimony of a witness and the possible interest or bias of the witness growing out of his relation to or feelings toward the parties. The court said that to exclude this evidence would be creating an exception to the universal rule that the pecuniary interest of a witness or his bias or prejudice can always be shown.

*Winn v. G. M. & O. R. R.*²² was a personal injury suit which presented an extremely important and interesting practical problem concerning the trial of such cases. Plaintiff testified that he was sitting on a step just below the catwalk at the rear of a locomotive and was facing north, that he was holding to the grab iron with his left hand, that he held a lantern in his right hand, that when he wished to arise he grabbed the railing to his right, turned so that he faced south, and at the same time transferred his left hand to the east railing and the right hand to the west railing, that as he faced south and was holding as indicated, the locomotive gave a sudden lurch, causing him to be thrown to the ground north of the tracks. Plaintiff offered Instruction A, which the trial court refused to give, and, over plaintiff's objection, modified that instruction by the insertion of a phrase and then gave it. Verdict was for the defendant. On appeal plaintiff contended that it was reversible error to refuse to give Instruction A and to give the modified version of that instruction. The court sustained this contention and reversed the case because of the giving of that instruction. The court said, however, that it was desirable to pass upon another of plaintiff's contentions. This contention was that it was error to give defendant's sole cause instruction which hypothesized plaintiff's alleged negligence in failing to "hold on to anything" as he stood up and turned. Plaintiff's argument was that there was no evidence having a substantial probative value of the fact (not holding on) hypothesized in that instruction. Defendant contended that there was such evidence—that it was in the form of plaintiff's admission contained in Exhibit 1. That exhibit was a written statement made by plaintiff to defendant's claim agent, in which the plain-

22. 284 S.W.2d 455 (Mo. 1955).

tiff purportedly said, "I recall that as I raised up and started to turn I was not holding on to anything but as I started to fall made a grab, struck something with the ends of my fingers on left hand but did not catch hold of anything." The principal opinion said that in this connection "the only pertinent question is whether there was sufficient evidence from which a jury reasonably could find that the admission contained in the statement was in fact made by the plaintiff." The principal opinion held that there was such evidence, that evidence being the physical appearance of the statement which showed on its face that it was in the longhand writing of one person, except for the plaintiff's signatures and the plaintiff's own handwriting at the end of the statement which said, "I have read this statement of two sheets and it is correct," the fact that the plaintiff's signatures at the bottom of each page were immediately below the writing, that there were no blank spaces left between the writing and the signatures, that the plaintiff admitted that it was his signature at the bottom of each page and at the end of the statement, and the fact that plaintiff did not testify that the part of the statement containing the admission that he was not holding on was not a part of the statement at the time he signed it, but merely testified that he did not know whether or not that admission was a part of the statement at the time he signed it. In arriving at this result the principal opinion cited a case from Nebraska which held that a plaintiff's signed statement is *inadmissible* if the only showing is that plaintiff admitted his signature at the end of the statement but says that he did not read the statement. The Nebraska Court said that "ordinarily, the proper foundation for the admission of such a statement must be made by calling the person who procured the statement and establishing by him that it was correctly typed or correctly read to or by the plaintiff and contains the statements by the plaintiff." The Court then pointed out that the question decided by the Nebraska Court was one of admissibility and not whether or not an admission contained in the statement constituted evidence of substantial probative value. The court then said that it was unable to follow the Nebraska case upon the exact questions "there or here presented." Later on in the principal opinion the court said, "We rule herein only the exact facts of the instant case." Commissioners Van Osdol and Holman concurred in the result of the principal opinion, but Van Osdol wrote a separate memorandum. In it he agreed that the written statement was admissible and was substantial evidence of the fact that plaintiff did not hold on, but he did not agree that any further showing than the identification of a party's signature to the statement was necessary in order to show

prima facie, its execution, authenticity and consequent admissibility. He said that the fact alone that plaintiff admitted his signature at the bottom of the statement was a sufficient prima facie showing of the authenticity of the statement to render it admissible. He said that the effect of the prima facie showing of authenticity could not be destroyed and the statement thereby rendered inadmissible by the party who had admitted his statement at the bottom of the statement testifying that he had not read the statement before signing, or by his testifying that he had not made the admission as written, or by his otherwise testifying in disapproval of the accuracy of the statement, or by his denying that the statement shown him is in fact the statement he signed. In his opinion such testimony should go only to the weight of the admissions contained in the statement and not to the admissibility of the statement. Judges Hyde, Dalton and Westhues adopted Van Osdol's memorandum as a concurring opinion.

C. *Hypothetical Questions*

*Bunch v. Wagner*²³ was a suit for personal injuries. A doctor was asked a hypothetical question covering 2½ pages in the transcript. The question was objected to because it assumed facts not proven and included facts different from the evidence offered. The objection was overruled. The court held this was reversible error, saying that a hypothetical question cannot be predicated upon testimony which assumes facts as existing when the evidence did not show that such evidence did exist. The question also assumed facts to be true which the evidence had shown to be different.

*Burns v. Property Servicing Company*²⁴ was an action by a tenant for personal injuries sustained as a result of an arsonous fire set by another tenant. Fire marshal had testified as to the rapidity of the spread of the fire. He was then asked a hypothetical question reciting in summary his testimony about the spread of the fire, and then asked if he had an opinion whether or not an individual on a stairway could have escaped from the fire. The objection to the question was sustained upon the ground that the answer would have invaded the province of the jury. The witness was not an expert upon how long it took to leave the building from the stairway, and that was a subject upon which the jury could make their own determination.

23. 275 S.W.2d 753 (Mo. 1955).

24. 276 S.W.2d 177 (Mo. 1955).

*Huffman v. Terminal R.R. Assn. of St. Louis*²⁵ was a damage suit for personal injuries. Doctors were asked hypothetical questions relating to the cause of plaintiff's physical condition and disability. Defendant contended that the questions did not require the witness to assume the truth of the facts shown in the hospital records, which records the plaintiff had introduced. The records disclosed the diagnosis that the plaintiff suffered from a condition different from what he was claiming at the trial. The court first indicated that the timeliness and sufficiency of the objections to these questions was highly questionable. It then remarked that it was not absolutely essential that a hypothetical question include all material facts supported by the evidence—such a question may be based upon the party's own theory and may be elicited upon any combination or set of facts, provided (1) the question fairly hypothesizes facts which the evidence tends to prove and (2) the question fairly presents that party's theory of the case—so that the answer will be of assistance to the jury on that issue. The court pointed out that in the questions with which it was concerned the witness had been asked to first read the hospital records and then assume their validity, and further assume that they contained certain other information. The questions also asked the witness to assume other facts as being true. The court held that these particular questions were proper and that it was not error to permit them to be answered.

INFERENCES

*Forbis v. Forbis*²⁶ was a suit for separate maintenance brought by the guardian of the wife, who had been declared insane. Judgment for the plaintiff. Defendant contended that the evidence showed that the plaintiff was insane at the time of the alleged marriage, therefore there was no marriage, therefore there was no right to separate maintenance. The evidence showed that plaintiff had been a mental problem for years, had become mentally ill before 1951, and was insane on January 4, 1952. The marriage was February 12, 1951. The court held that this evidence was not sufficient to rebut the presumption of sanity because it did not relate to the exact time of the marriage. The court held that evidence of sanity on January 4, 1952, did not raise an inference that the same mental condition existed on

25. 281 S.W.2d 863 (Mo. 1955).

26. 274 S.W.2d 800 (Mo. App. 1955).

February 12, 1951. The court recognized the rule that where there is evidence of a condition or state of facts at any given time and that said condition is such that it would not ordinarily have existed except for its existence at a prior time, the inference of its prior existence may be indulged retrospectively. The court held that that rule did not apply to insanity because it is a matter of common knowledge that it is a condition which may be transient.

*Brooks v. Terminal Railroad Association*²⁷ was a wrongful death case submitted upon the humanitarian doctrine. The court held that the reasonable inferences which could be drawn from the most favorable evidence were sufficient to make plaintiff's case submissible.

ADMISSIONS AND DECLARATIONS AGAINST INTEREST

*Smith v. Siercks*²⁸ was a personal injury case arising out of an automobile accident. The plaintiff was traveling north and overtook and passed the northbound automobile of defendant Siercks and thereupon collided with a southbound automobile operated by defendant Murphy. Plaintiff alleged that as he was passing the Siercks automobile, Siercks negligently and deliberately increased the speed of his automobile, thereby delaying plaintiff's passage and prompt return to the right side of the highway. The trial court directed a verdict for defendant Siercks upon the theory that the plaintiff himself has testified that he had completely passed Siercks and completely returned to the right side of the highway before the collision with defendant Murphy. Therefore, the negligence, if any, of defendant Siercks could not have been a proximate cause of the accident. In other words, the trial court invoked the rule that plaintiff could not recover upon a factual theory inconsistent with his own testimony, and his own testimony showed that he had completely returned to his side of the highway, consequently even if Siercks did speed up as plaintiff was passing that negligence had no causal connection with the accident. The supreme court reversed the trial court and pointed out that there is an exception to the rule that a party's testimony may be of such a nature as to have the effect of a judicial admission—that exception being that if the party gives some reasonable explanation of his previous statement as having been the result of

27. 276 S.W.2d 600 (Mo. App. 1955).

28. 277 S.W.2d 521 (Mo. 1955).

a mistake or misunderstanding, then he is not conclusively bound by that previous statement. The court carefully pointed out that on re-direct examination the plaintiff "*undertook to explain* these conflicting answers by stating, in effect, that due to the darkness of the night and his pre-occupation with the act of passing plaintiff's car, *he was not certain* of his position; that he had believed he had fully returned to his side of the highway before the collision until Mr. Allman, the highway patrolman, exhibited certain pictures to him which showed the gouged-out spot on the highway to be west of the centerline; and that these pictures had convinced him *he had been mistaken* in his conclusion that he had gotten back to his side before the collision occurred." (emphasis added)

*Zimmerman v. Young*²⁹ was a personal injury suit resulting from an automobile accident. The husband was the sole defendant. The court held that the defendant's wife's admissions were not admissible against the defendant in the absence of a showing that she was acting as his agent at the time she made the admission. Her admissions could have been used to impeach her under the prior-inconsistent-statement rule, but they were not admissible as substantive evidence. The court also held that where one calls the adverse party he is bound by the adverse party's testimony if that testimony is uncontradicted.

*Davis v. Sedalia Yellow Cab Company*³⁰ was a personal injury case resulting from an automobile collision. Both the cab company and its driver were defendants. The plaintiff had taken the deposition of the driver and at the outset of the trial plaintiff offered this deposition in evidence. The cab company objected upon the ground that it was admissible only against the driver and that it was hearsay as to the cab company. It was also pointed out that the driver was present in the courtroom and could be called to testify. The court admitted the deposition over this objection. At the close of the plaintiff's evidence the plaintiff dismissed as to the driver. Thereupon the cab company moved to strike all of the testimony contained in the driver's deposition upon the ground that it was inadmissible as hearsay as to the cab company. That motion was overruled. The Kansas City Court of Appeals held that this was error. It pointed out that it has long

29. 280 S.W.2d 457 (Mo. App. 1955).

30. 280 S.W.2d 869 (Mo. App. 1955).

been the settled law of this state that an admission of a servant which is not a part of the *res gestae* and which is not made in the performance of the servant's duties is inadmissible against the master. It held that that rule was applicable to this case. Plaintiff contended that since the admissions were contained in a deposition, the above rule did not apply. The court held that this was not correct—that the fact that the admissions were contained in a deposition did not alter the rule nor its applicability. The court further said that the mere fact that the driver was a party at the time the deposition was offered did not make it admissible as to the cab company. The court also said that the motion to strike was a proper means of removing evidence which was properly admitted but which became inadmissible upon the dismissal as to the driver.

*Dawson v. Scherff*³¹ was a personal injury action resulting from an automobile wreck. Defendant contended that plaintiff's testimony was so contradictory that it had no probative value. Defendant relied upon the case of *Steele v. Kansas City Southern*³², in which plaintiff first testified that without looking or listening he stepped from a place of safety onto the tracks and was immediately struck, but on the following day, without any explanation of mistake, his testimony contradicted that factual theory, and in which the court held that the plaintiff's testimony given on the first day constituted a judicial admission and was conclusive upon the plaintiff, and therefore plaintiff did not make a submissible case. In the *Dawson* case the court pointed out that they were not referred to any conflict or misstatement contained in the plaintiff's testimony which was at war with any essential element of the plaintiff's case. The court said that unless the testimony of a party or his witnesses, or both, is so contradictory as to render it valueless, its probative value and weight is for the jury. That rule, of course, has no application to an instance where the plaintiff's uncontradicted testimony is at war with the factual theory upon which he submits the case.

In *Machetinger v. Grenzebach*³³, a suit upon an open account, defendant's counsel, during the trial, admitted the veracity of plaintiff's invoices which were introduced in evidence. Defendant did not concede that the

31. 281 S.W.2d 825 (Mo. 1955).

32. 265 Mo. 97, 175 S.W. 177 (1915).

33. 282 S.W.2d 200 (Mo. App. 1955).

total of these invoices was correctly added, but, on the other hand, he did not charge that it was incorrectly added. The court held that under these circumstances the defendant's admission of the veracity of the invoices was tantamount to an admission that the gross amount due was as shown upon those invoices.

*Donnelly v. Goforth*³⁴ was a suit for the wrongful death of the plaintiff's wife and for personal injuries sustained by the plaintiff. At the close of the plaintiff's evidence, the trial court sustained the defendant's motion for a directed verdict. Plaintiff was unable to remember the circumstances of the collision, but he testified that after the accident the defendant had explained to him "that we were in an accident and traveling down the highway and passed a truck, and that he waved at the driver of the truck, and that he may have gone on the wrong side of the road." (emphasis added) Defendant objected to the "what might have been" and asked that it be stricken. The trial court sustained the objection and the motion and ordered the jury to disregard the part of the answer that defendant "might have turned to the left side of the road." The court said that in order for a statement of a party to be competent as an admission, it is unnecessary that it be a direct admission, it may be competent if it bears on the issue incidentally or circumstantially. An admission, however, should possess the same degree of certainty as would be required in the evidence it represents. The court continued by citing cases in which it was held that statements that fruit "might" have been damaged in transfer from one car to another and that the fire was "supposed" to have been started from sparks from a locomotive, were not admissions because they did not possess the same degree of certainty that would have been required of the evidence which they were intended to represent. The court said that in the instant case the statement that the defendant "may have gone on the wrong side of the road" expressed a mere possibility that he had gone on the wrong side of the road, but it did not have the definite imputation of the fact which should be required to constitute substantial evidence of the fact. The court said that it would be a strained construction of the statement to interpret it as an admission that the defendant went on the wrong side of the road. The court pointed out that in reaching this conclusion, they were considering the circumstances and setting in which the statement

34. 284 S.W.2d 462 (Mo. 1955).

was made. The court distinguished asserted admissions such as "I feel" or "probably" on the grounds that those statements, in the cases being considered, were made in circumstances which indicated that the statement could be considered as a definite expression of an opinion of the existence of a fact. The court's reliance upon the circumstances in which the asserted admission was made indicates that whether or not a particular statement possesses the requisite degree of certainty to constitute an admission depends upon all of the surrounding circumstances existing at the time the alleged admission was made. The court did not elaborate upon which particular circumstances were considered in the instant case.

PRESUMPTIONS

*Branstetter v. Gerdeman*³⁵ was a suit for personal injuries arising out of an automobile accident. Plaintiff was a passenger in a westbound car which was hit in the rear by an Austin automobile which in turn was hit in the rear by defendant Gerdeman's automobile. The driver of the first car, in which plaintiff was a passenger, was one of the defendants. The jury returned a verdict in his favor. The trial court sustained the plaintiff's motion for a new trial as to this defendant because of error in that defendant's instruction on the plaintiff's contributory negligence. That defendant appealed, contending that plaintiff failed to make a submissible case against him, and that his instruction on contributory negligence was good. In attempting to establish this defendant's negligence, the plaintiff relied upon the presumption that the drivers of the two following cars were in the exercise of due care and would have seen and heeded a hand, arm or stop-light signal if this defendant had given one before he stopped. The plaintiff adduced no affirmative proof that the drivers of the two following cars were exercising such care. The court held that the presumption passed out of the case when testimony came in that the driver of the third car was looking out the side window instead of looking ahead just before the collision. The court said that such a presumption of the exercise of due care was of a rebuttable character and when evidence is introduced to the contrary the presumption disappears—it cannot be used to carry the party relying upon it to the jury in the face of contrary evidence.

35. 274 S.W.2d 240 (Mo. 1955).

*Baker v. Baker*³⁶ was a divorce case in which no alimony was awarded. Twenty-nine days after the granting of the divorce the trial court, upon its own motion, "modified" the decree by ordering \$5.00 per month alimony. The case deals with whether or not defendant's counsel had reasonable notice of the intended action of the trial court. After holding that he did have such notice, the court remarked that in the absence of proof to the contrary there is always a presumption of the jurisdiction and right action by a court of general jurisdiction.

*Willis v. Willis*³⁷ was a husband's suit for divorce. Insanity was not pleaded by the defendant. The court found for the husband. Defendant filed a motion for new trial and there was a hearing upon that motion. At that hearing defendant offered evidence intended to show that defendant was insane at the time she committed the acts which constituted the grounds for divorce. Thereafter, but within thirty days from the date of the decree, the court, upon its own motion, set aside the decree of divorce and dismissed the plaintiff's petition. Upon appeal the court noted that a divorce may not be granted upon acts committed while insane, even though insanity is not affirmatively pleaded. It pointed out that there is a legal presumption that every person is sane and that that presumption obtains until there is evidence to the contrary. The burden of proving insanity is upon the party asserting it. The appellate court held that there was insufficient evidence of insanity and granted the plaintiff a divorce.

*State ex rel. School District v. Robinson*³⁸ was a certiorari proceeding to review an award of a Board of Arbitration fixing the boundary between two school districts. The first school district had voted to change the boundary line between itself and the second district. The second district voted not to make the change. The first district appealed to the County Superintendent of Schools and he appointed a Board of Arbitration which met and then rendered a report. The report stated that after careful consideration of the question, the Board voted three for the change and one against the change. The second district applied for the writ of certiorari. The second district contended that the report filed by the Board of Arbitration was fatally defective because it did not show upon its face that the

36. 274 S.W.2d 322 (Mo. App. 1954).

37. 274 S.W.2d 621 (Mo. App. 1954).

38. 276 S.W.2d 235 (Mo. App. 1955).

Board had considered the necessity for the change of boundary. The court held that although there is no presumption of jurisdiction, there is a presumption that a tribunal which does have jurisdiction has properly exercised that jurisdiction, and that the exercise of the jurisdiction was regular, lawful, based upon proper grounds and the end result honestly arrived at. In the instant case the jurisdiction of the Board of Arbitration was conceded and the court held that the presumption of the regularity and right exercise of that jurisdiction had not been overcome.

*Forbis v. Forbis*³⁹ was a suit for separate maintenance brought by a guardian of an insane wife. The court held that the evidence was not sufficient to rebut the presumption of sanity at the time of the marriage. The court said that the presumption of the validity of a marriage is one of the strongest known to the law and that the burden of proving the invalidity of a marriage rests upon the one asserting it. In the instant case, that presumption was not overcome.

*State v. Cook*⁴⁰ was a prosecution for assault with intent to kill with malice aforethought. Defendant and his wife were separated, but he occasionally visited at the rooming house which she operated. One Olive Squires, the victim of the assault charged, was rooming there. On the day in question defendant appeared at the front door with a 20-gauge double-barrelled shotgun and knocked. His wife opened the door, made some outcry and started to retreat. Defendant fired, perhaps at her or perhaps to scare her, but apparently it hit the jamb of the door through which she was leaving. Olive Squires, who was sitting in the same room, "went to leave" through a door. She said that defendant shot at something and then promptly fired a shot at her, which hit her in the left hip. All of this occurred within a minute or two after defendant appeared upon the scene. Defendant testified that he was merely trying to scare his wife when he fired the first shot, that he did not see Olive Squires, and that the gun went off accidentally the second time. The court condemned an instruction upon the presumption of intent to cause death and upon a presumption of malice. The court held that where the jury had before it an eyewitness account of the facts and circumstances, there was no room for any such presumption or for any instruction upon such a presumption. The giving of the in-

39. 274 S.W.2d 800 (Mo. App. 1955).

40. 282 S.W.2d 533 (Mo. 1955).

struction was held to be reversible error. The court pointed out that it was not holding that the jury could not be instructed upon its right to draw reasonable *inferences* from the evidence, which is an entirely different thing. The court said that the applicable rule is similar to that in civil cases which is, in effect, that in the face of substantial evidence of the actual facts a presumption of fact disappears and has no evidentiary value, even though the facts from which the presumption arose remain in the case.

In *Grauf v. City of Salem*⁴¹ it was held that all persons are presumed to know the corporate powers of municipalities, the authority of their officers and the manner prescribed by statute for the exercise thereof.

*Suarez v. Thompson*⁴² was a suit by a husband for his wife's death, allegedly caused by the defendant's negligence in permitting a door on one of its cars to remain open while the train was in motion. The court held that upon a showing that the car door was opened by the conductor, any presumption which arose that it remained open until the wife fell through it, disappeared from the case when two people testified to the contrary.

EXPERT AND OPINION EVIDENCE

*Proceedings, etc. v. International Engineering*⁴³ was a proceeding to condemn private property for a city expressway. The damages were to be apportioned between the owner and the lessee. The lessee was awarded more than any witness testified his interests were worth. The court held that the opinion evidence by the experts was merely advisory and the jury was not bound thereby. The court said that the jury could have reached a verdict based solely upon its own examination of the property and that such a verdict would be conclusive absent a showing that the jury erred in the principle upon which they made their appraisal.

*Rodefeld v. St. Louis Public Service Company*⁴⁴ was a personal injury suit brought by a pedestrian. Appellant claimed that it was error for a doctor to testify as to history told to him by the plaintiff and that it was error for the doctor to give an opinion based upon that history and also

41. 283 S.W.2d 14 (Mo. App. 1955).

42. 283 S.W.2d 584 (Mo. 1955).

43. 274 S.W.2d 490 (Mo. App. 1955).

44. 275 S.W.2d 256 (Mo. 1955).

based upon the opinions of other doctors who had treated or examined the plaintiff. The history given was that plaintiff said she had been injured a year before and hospitalized for a skull fracture. This fact was not in controversy. The court re-stated the old rule that "If, however, the so-called 'history' is made up of facts which in themselves are competent evidence, and which are in evidence, then any objection to the use of such 'history' must fall." When the doctor was relating the complaints which the plaintiff had made when she came to his office, he stated that she complained of difficulty with her memory. Objection was made on the ground that this was hearsay. The plaintiff had already testified as to the difficulty with her memory and the court held that the objection was properly overruled, citing *Amick v. Kansas City*⁴⁵ which specifically held that a doctor could testify about a patient's complaint of difficulty with memory—the theory being that the symptoms were presently existing.

*Heiter v. Terminal Railroad Association*⁴⁶ was a case in which the doctor testified that plaintiff came into his office complaining of trouble with his hand following an injury which he had sustained. Defendant objected on the ground that the doctor's testimony should be limited to complaints which the plaintiff was suffering while he was in the doctor's office. The objection was overruled. This was held to be error, the court saying that a doctor may not relate to the jury statements of pain, symptoms, etc., made by the patient to the doctor which were experienced by the patient before the time of the doctor's examination.

*Haley v. Edwards*⁴⁷ was an automobile wreck case in which it was held that a witness who had testified that he was familiar with the value of automobiles in general and that he had seen plaintiff's automobile shortly before the collision, was properly permitted to express his opinion as to the value of the car both before and after the accident—the matter of his qualifications being within the discretion of the trial court.

In *re Armory Site in Kansas City*⁴⁸ held that although an expert witness may testify as to the basis for his opinion of the value of property, he may not, under the guise of giving the basis of his opinion, bring in evidence

45. 187 S.W. 582 (Mo. App. 1916).

46. 275 S.W.2d 612 (Mo. App. 1955).

47. 276 S.W.2d 153 (Mo. 1955).

48. 282 S.W.2d 464 (Mo. 1955).

which is otherwise incompetent and irrelevant in such a way as to confuse or mislead the jury by the injection of false issue into the case.

HEARSAY

*Ellis v. Department of Public Health and Welfare*⁴⁹ held that hearsay evidence, in the form of a medical report, a "certification" from a doctor, and a "report from the medical review team," did not qualify as "competent and substantial evidence" which is essential to the validity of the final decision of an administrative officer.

*Houfburg v. Kansas City Stockyards*⁵⁰ held that a "Report of Injury" filed with the Division of Workmen's Compensation was properly excluded. It was offered because it recited that the injury occurred in a certain manner. The objection to it was that it was hearsay.

*Smith v. Dilschneider*⁵¹ was a suit to recover for the reasonable value of work and labor. The answer pleaded breach of contract, and a counterclaim was filed for such breach. On appeal plaintiff contended that the court erred in striking out evidence of the cost of performing the work which he undertook to do, the evidence being in the form of certain records which had been kept by plaintiff's son. These records covered items of repair on several other jobs which plaintiff was carrying on at the same time. They did not specifically show where or to what job all of the labor items should be charged. It was not claimed that the information was within the personal knowledge of the witness. The court held that the evidence was properly stricken because it was hearsay.

*Truck Insurance Exchange v. Great Northern Electric Company*⁵² was an action to recover premiums alleged to be due upon insurance contracts. The court held that a payroll audit, which was the work product of a third person not in any way connected with the defendant and of which the witness had no independent knowledge or information, was clearly hearsay and inadmissible.

49. 277 S.W.2d 331 (Mo. App. 1955).

50. 283 S.W.2d 539 (Mo. 1955).

51. 283 S.W.2d 631 (Mo. 1955).

52. 284 S.W.2d 60 (Mo. App. 1955).

*State ex rel. Land Clearance Authority v. Southern*⁵³ was a proceeding in prohibition to prevent a circuit judge from enforcing an order authorizing the issuance of a subpoena duces tecum directed to three appraisers commanding them to produce certain records in their possession upon the taking of depositions in the pending condemnation case. The records were those "used in arriving at the value of the property described in this action belonging to this defendant." The court said that the burden was upon the relator to show that the records were not admissible as substantive evidence in the condemnation proceeding. It was conceded that the records sought consisted of notes as to the condition of a building, notes as to the rental values of comparable property, notes pertaining to building replacement cost and depreciation, a certificate of a title company purporting to show recent sales of comparable property and the prices paid for such property, and an appraisal report. The court said that it was clear that the certificate of the title company was hearsay and not admissible, that the same was true of the various notes and also of the appraisal report. The court held, therefore, that these records would not be admissible except for possible impeachment purposes, and therefore the trial court exceeded its jurisdiction in making the order.

For other cases involving the alleged application of the hearsay rule, see *Kieffer v. Bragdon*⁵⁴ and *Heiter v. Terminal Railroad Association*⁵⁵.

BEST EVIDENCE RULE

*Nibler v. Coltrane*⁵⁶ was a suit in two counts. The first was upon an express contract and the second was for reasonable value of services. The case was submitted to the jury only on the second count. The plaintiff contended the express contract was made in correspondence between her and her aunt while the plaintiff was in California. Appellant's main contention was that the court erred in permitting plaintiff to testify about the content of the correspondence which supposedly gave rise to the express contract. The objection was that this testimony was "secondary evidence" for the admission of which a proper predicate had not been laid. Plaintiff's sister

53. 284 S.W.2d 893 (Mo. App. 1955).

54. See note 19, *supra*.

55. See note 46, *supra*.

56. 275 S.W.2d 270 (Mo. 1955).

had testified that all of the correspondence had been burned and that the particular letters in question had been destroyed. There was no evidence that plaintiff had participated in the destruction of these letters. The court held that it was proper to permit oral testimony as to the contents of the letters with reference to the offer and the acceptance. The court said that the sufficiency of the preliminary proof was a matter within the discretion of the trial court and the exercise of that discretion would not be disturbed in the absence of a clear abuse.

DEAD MAN'S STATUTE

There were no cases involving the dead man's statute, handed down during the past year, which were deemed worthy of note.

WEIGHT AND CONCLUSIVENESS

*Vinson v. East Texas Motor Freight Lines*⁵⁷ was an automobile wreck case and the appeal involved the question of submissibility. The court said that facts essential to submissibility may be shown by circumstantial evidence but the circumstances must be such that the necessary facts may be inferred from them and they must reasonably follow. The court further said that the circumstances must "exclude guesswork, conjecture, and speculation as to the existence of the necessary facts." The terms "guesswork, conjecture and speculation" are used in the sense of reaching a conclusion by theorizing upon assumed factual premises outside of and beyond the scope of the evidence.

*Goodwin v. Kansas City Life Insurance Company*⁵⁸ was a suit on a life insurance policy. The defense was that insured was suffering from cancer at the time the policy was issued and delivered, that the insured knew this but in his application had fraudulently misrepresented that he was in good health and concealed the information that he had had medical and surgical treatments. Verdict was for the plaintiff. The trial court set it aside and rendered judgment for the defendant. The appellate court affirmed the trial court. Hospital records introduced by the plaintiff established the cause

57. 280 S.W.2d 124 (Mo. 1955).

58. 279 S.W.2d 542 (Mo. App. 1955).

of death to have been cancer. The court said that these records constituted prima facie evidence of the facts therein shown and, since they were unimpeached and unchallenged, they became conclusive.

*Ferguson v. Union Electric Company*⁵⁹ was a suit by landowners against the owner of the Bagnall Dam for flood damages. The plaintiffs alleged that the lake was maintained at a level which was too high and that this maintenance contributed to the flooding of their lands. Defendant contended that the height of the lake did not and could not affect the height of the water on plaintiffs' farms during flood times. Defendants' theory and the evidence supporting it were completely at war with and contrary to plaintiffs' fundamental recovery theory, *i.e.*, that the height of the water at the dam did affect the height of the water on plaintiffs' farms. The court held, therefore, that plaintiffs could not use defendant's evidence or defensive theory as a part of their case.

*Dugan v. Rippee*⁶⁰ was a personal injury suit arising out of an automobile accident, but principally involved the question of whether or not the defendant's liability insurance policy bore a "military endorsement" restricting its applicability to liability incurred when the insured himself was operating the car. To prove the insurance contract, the plaintiff put on the insurance agent who wrote the policy. He said that the policy had the endorsement on it at the time of its issuance and delivery and also at a later date when he put a change-of-car endorsement upon it. On cross-examination he admitted that upon inspecting the policy at the trial, he did not see any evidence indicating that a glued or stapled endorsement had been removed from it. He also stated that if the paper had been heated or steamed, the endorsement could have been lifted off. The court held that plaintiff did not make a submissible case, saying that to constitute sufficient circumstantial evidence to carry a civil case to the jury, the proof of the circumstances must be such that the necessary facts to support a verdict may be inferred and must reasonably follow, and that evidence must be such as to exclude guesswork and must "have a tendency" to exclude every other reasonable conclusion. It is not enough to carry the case to the jury that the circumstances be merely consistent with the desired conclusion.

59. 282 S.W.2d 505 (Mo. 1955).

60. 278 S.W.2d 812 (Mo. App. 1955).

*Rubinstein v. Rubinstein*⁶¹ was a suit to set aside a deed, plaintiff alleging fraud, deceit, forgery and mutilation. The consideration recited was \$1.00 and "certain valuable considerations." The court said that in the absence of affirmative proof to the contrary such recital is conclusive.

In *Smith v. Siercks*⁶² it was held that where plaintiff undertook to explain his previous testimony, said that he was not certain about it and finally said that he had been mistaken about it, he was not conclusively bound by it.

PAROL EVIDENCE

*Walters v. Tucker*⁶³ was a suit to quiet title. The court said that where there is no inconsistency on the face of a deed and, on application of the description to the ground, no inconsistency appears, parol evidence is not admissible to show that the parties intended to convey either more, less or different ground from that described. However, where there are conflicting calls, or the description may apply to two or more parcels, and there is nothing in the deed to show which parcel is meant, then parol evidence is admissible.

In *Dowd v. Lake Sites*⁶⁴ the court recognized the rule that parol evidence is admissible to show, for the purpose of invalidating a written instrument, that its execution was procured by fraud. The court held, however, that that rule was not applicable to the instant case, and further held that parol testimony establishing fraud in the procurement of a written contract cannot be used to control or vary the terms of the contract.

The other cases involving the parol evidence rule turned upon whether or not the particular instrument involved was or was not ambiguous in its terms. *Kalberg v. Gilpin Company*⁶⁵ involved a real estate contract, *Fischer v. Morris Plan Company*⁶⁶ involved a contract of deposit, *National Corporation v. Allan*⁶⁷ involved an employment contract, *Diehr v. Thompson Chem-*

61. 283 S.W.2d 603 (Mo. 1955).

62. See note 28, *supra*.

63. 281 S.W.2d 843 (Mo. 1955).

64. 276 S.W.2d 108 (Mo. 1955).

65. 279 S.W.2d 177 (Mo. App. 1955).

66. 275 S.W.2d 393 (Mo. App. 1955).

67. 280 S.W.2d 428 (Mo. App. 1955).

*icals Corporation*⁶⁸ involved an agreement concerning the settlement of an open account, *Francis v. Saleeby*⁶⁹ involved a real estate listing agreement, *Keeton v. Sloan's Moving & Storage Company*⁷⁰ involved a contract to store goods in a fireproof warehouse, and *Green v. Cooke Sales & Service*⁷¹ involved a purchase order for used tractor and dozer.

The Humanitarian Doctrine

WILLIAM H. BECKER, JR.

[*Editor's Note.* Mr. Becker has already reviewed most of the 1955 cases in this field in the January issue of the *Review* (21 *Missouri Law Review* 45). A summary of more recent developments will appear in the January 1957 issue.]

Insurance

ROBERT E. SEILER*

In 1955, the court again dealt with relatively few cases primarily involving insurance law. *Boring v. Kansas City Insurance Company*¹ was an action for double indemnity accidental death. The trial court refused to give plaintiff's instruction to the effect that death from gunshot wounds created a legal presumption the death was accidental and not suicidal. The Missouri Supreme Court affirmed, stating defendant had produced substantial and virtually unquestioned evidence of physical facts showing suicide. Hence, the court said, the presumption against suicide vanished from the case.

68. 281 S.W.2d 572 (Mo. App. 1955).

69. 282 S.W.2d 167 (Mo. App. 1955).

70. 282 S.W.2d 194 (Mo. App. 1955).

71. 284 S.W.2d 880 (Mo. App. 1955).

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1. 274 S.W. 2d 233 (Mo. 1955).

In *Aetna Life Insurance Co. of Hartford v. Durwood*² the principal question was whether disability benefits under certain life insurance policies accrued from the date of total disability or from a date not more than six months prior to the date due proof of such disability was received by the insurance company. The policies provided that if the insured became totally and permanently disabled there would be a waiver of premiums and payment of a monthly income; further that if the insured were so disabled for 90 days, then, if due proof had not previously been furnished, the disability would be presumed permanent, and, in such case benefits would accrue from the expiration of the 90 days, "but not from a date more than six months prior to the date that due proof of such disability is received" by the company; further that no benefit would accrue prior to the 90 days unless during that period due proof was received, in which event benefits would accrue from commencement of disability. The policyholder became totally and permanently disabled February 11, 1946, but did not submit due proof until November 28, 1950. The court held the disability provisions were not ambiguous, that they were reasonable, and that where due proof was not made until after expiration of the 90 day period, benefits would not accrue from more than six months prior to receipt of due proof. The holding is in accord with the weight of authority. The court refused to adopt the views of the St. Louis Court of Appeals in *Taylor v. Aetna Life Insurance Co.*,³ where identical provisions were described as "extremely puzzling," "a subsequent enigmatic restrictive clause."

*Traders Mutual Fire Insurance Company v. Leggett*⁴ was a declaratory judgment action, of limited general interest, where the court held that an insurance company organized under the "Town Mutual Insurance Companies" sections of the statutes is not authorized to write automobile insurance.

*Dixon v. Business Men's Assurance Co. of America*⁵ is an unusual case. Plaintiff, a railroad machinist, in his application for an accident and health policy, stated he had never had arthritis, that he was in good health and as to medical consultation or treatment within the previous five years men-

2. 278 S.W. 2d 782 (Mo. 1955).

3. 236 Mo. App. 435, 154 S.W. 2d 421 (1941).

4. 284 S.W. 2d 586 (Mo. 1955).

5. 285 S.W. 2d 619 (Mo. 1955) (en banc).

tioned an operation on his jaw bone about a month earlier. Twenty-seven days after the policy was issued he injured his low back, which totally disabled him continuously to trial time. After paying monthly indemnities for about six months the insurance company obtained a letter report from the hospital, which stated plaintiff was in the hospital eight days a short time prior to his application, that on admission he complained of pain and contraction of the fingers after about two hours of work, that these spells had existed for over a year, at first one to three times per week but increasing to one or more daily; that x-rays were made of the thoracic spine; that some root fragments were removed from the upper jaw; that he was discharged with a final diagnosis of occupational neurosis and hypertrophic arthritis of the spine. The report from the hospital also showed the readmittance of plaintiff in connection with his current back injury, with a diagnosis of low back strain while lifting with his back in an awkward position, and a superimposed pre-existing arthritis of the spine.

When the insurance company received this report it notified plaintiff it would not have issued the policy had it known these conditions and asked plaintiff to refund the payments made. Following negotiations, in which plaintiff was represented by counsel, a settlement was made, whereby plaintiff was paid \$275 and the company released its claim for refund, in return for a complete release from plaintiff.

Several years later plaintiff sued on the policy, claiming the release was invalid because there was no consideration for the reason no bona fide dispute existed between the parties at the time of the release. Plaintiff recovered \$8,187.50, including penalties and attorneys' fees.

The supreme court, in a four to three decision, affirmed. Since the policy did not contain a sound health provision, did not provide that the answers in the application would constitute warranties or that falsity would avoid the policy, a misrepresentation, to avoid the policy, would have to be fraudulent and material. There was nothing in the hospital report to indicate plaintiff knew or should have known at the time he executed the application that he had arthritis in his spine.⁶ Hence, the trial court

6. However, it would be unusual for the hospital report to state whether the patient had been informed of the diagnosis. Hospital records do not ordinarily have a space for such a notation. See *Hospital Records, Potentialities in Personal Injury Claims*, III CURRENT MEDICINE FOR ATTORNEYS, pp. 2-9 (May

did not err in refusing to declare as a matter of law that the hospital letter constituted a reasonable investigation from which information was obtained that could have caused a reasonable person in good faith on that basis to believe plaintiff had knowingly misrepresented any matter which contributed to his latter low back injury.

As to the penalties, since the company defended on the sole theory of the validity of the release (rather than whether there was a bona fide dispute as of time of trial) and since the jury found, in effect, defendant did not have at the time of the release information on which a reasonable person could have believed there was no liability, the question of vexatious refusal was for the jury.

Judge Hyde dissented, joined by Judges Leedy and Storekman, on the ground the company could reasonably have believed from the hospital report alone that plaintiff knew or should have known that he had some type of arthritis and that the same did actually contribute to plaintiff's disability.

The majority opinion holds that reasonable men could not differ on the proposition that the insurance company could not reasonably believe from the hospital report that plaintiff knew or should have known he had arthritis at the time he executed the application. Ordinarily issues do not become a question of law unless the acts constituting such issues are of such character that all reasonable men would concur. Here, however, if the situation was such that the insurer could reasonably have believed plaintiff misrepresented, even though other reasonable men might have believed he did not misrepresent, then the release became a question of law. Where out of seven judges, four feel one way and three the other, such a close division would seem to indicate that the issue upon which they split was certainly one over which reasonable men could differ, which, in turn, would seem to make it clear that the insurer was reasonable in believing as it did. But the difficulty is that the ultimate issue (whether the insurer was reasonable) having been ruled in the negative, the apparent reasonableness of the insurer's position as illustrated by the fact that three of the judges found it was reasonable, is of no avail.

1955). *Query*: Can't the average patient in a hospital (where, as in this case, the patient is rational, not a critical case) be counted upon, in the exercise of normal curiosity, to inquire what those in charge of his case believe is wrong with him, and with a final diagnosis of the type here involved what reason would there be for not satisfying his curiosity?

Labor Law

AUSTIN F. SHUTE^{*}

The past year has seen an increasing amount of labor unrest and an increasing inability on the part of labor and management to solve the problems outside of the court room. Most of these breakdowns in the collective bargaining system have been terminated at the trial court level. Some have gone to the appellate courts. It is with the latter that we will now deal.

The case of *Tallman Company v. Latal*¹ was a suit to enjoin picketing and to recover damages from the defendant union. The picketing was of an organizational type. Defendant union was attempting to induce enough of the plaintiff's employees to join the union so that a contract with the company could be signed. The picketing in many instances was alleged to have been somewhat less than peaceful.

After the company filed its petition for a restraining order and damages, and while the court had the case under advisement, plaintiff's employees elected a company union as their bargaining representative. Their selection was approved by the National Labor Relations Board. Thereafter the picketing ceased and the trial court proceeded to dismiss plaintiff's petition as being moot. The company appealed alleging that the trial court should have determined the question of damages prior to dismissing the suit.

The Missouri Supreme Court overruled the union's contention that exclusive jurisdiction over the labor dispute was in the federal agency because of interstate commerce. This argument was fallacious, the court ruled, because picketing had not been peaceful. The state court reasoned that the state must have the authority to enjoin disorderly picketing. Therefore, jurisdiction having attached, the trial court was in error in dismissing plaintiff's petition without first ascertaining the question of damages.

The case of *Bellerive Country Club v. McVey*² was an action by a non-profit country club to enjoin the defendant union from picketing the

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1. 284 S.W. 2d 547 (Mo. 1955).

2. 284 S.W. 2d 492 (Mo. 1955).

club's entrance. The trial court had denied the relief, and the club appealed. No question of interstate commerce was involved.

Plaintiff pleaded a violation of Section 29, Art. 1, Constitution of Missouri, 1945, stating that the union was attempting by its picketing to coerce the plaintiff into coercing his employees to join the union. Defendant union claimed that the sole purpose of the picketing was to inform the public that plaintiff's employees were non-union. The picketing was peaceful.

The reasoning in this case is difficult to follow. The supreme court appears to have followed the practice of balancing the equities in determining whether or not the picketing was against the public policy of Missouri and, therefore, constituted picketing for an unlawful purpose. There was no question but what the picket line had an adverse economic effect on the country club. Since it had, the court reasoned that the union knew it would have this adverse effect and that the union intended that it should have this adverse effect. The constitutional section, *supra*, guarantees the right "to organize and to bargain collectively through representatives of their own choosing."

The court stated, that this "is a free choice, uncoerced by management, union, or any other group or organization, so that picketing with an objective in violation of that guaranty must be regarded as equally unlawful as where coercion to violate a statute is involved."³

Citing *Katz Drug Co. v. Kavner*,⁴ the court stated that peaceful picketing may be enjoined if one of its objectives or purposes is unlawful. But even if the picketing is unlawful, the court reasoned, it still may not be prohibited unless there is first a clear cut determination that the picketing is of such a nature as to violate some fundamental rule of public policy.

The rule of public policy in this case was that the union was attempting to coerce the employer into coercing his employees to join the union—in violation of the constitutional guaranty of free collective bargaining. Unfortunately, the court indicated that peaceful picketing of the exact same nature and for the exact same purpose might be lawful in the case of a business in economic competition with some other business. Appar-

3. *Id.* at 500.

4. 249 S.W. 2d 166 (Mo. 1952).

ently, therefore, the court is laying down one rule for non-profit organizations and another rule for businesses in economic competition with each other.

The court attempted to distinguish between so called organizational or advertising picketing and picketing of a coercive nature. It is submitted that any such distinction has no existence in reality for any picket line is established per se to effect economic coercion of the employer. Without such economic coercion, the right of peaceful picketing has very little value to the union. The matter of public policy is, in the absence of a legislative determination, a function for the supreme court to determine—and a rather difficult one.

Graybar Electric Co. v. Automotive P. & A.I. Emp. Un.,⁵ was again a suit to enjoin picketing and for damages. The employer was engaged in interstate commerce and subject to the provisions of the Labor Management Relations Act of 1947.⁶ After an unsuccessful attempt to organize plaintiff's warehousemen the union began picketing the premises. Picketing was at all times peaceful. Plaintiff had filed unfair labor practice charges against the union before the National Labor Relations Board alleging that the picketing was to coerce the employer into coercing or compelling his employees to join the union. This, of course, would be in violation of Section 157, Section 158 (a) (1) and possibly Section 158 (a) (3). The Board after investigation refused to issue a complaint. The regional director's ruling was sustained by the general counsel of the board.

Both plaintiff and defendant cited the cases of *Garner v. Teamsters*⁷ and *Weber v. Anheuser-Busch*⁸ as in their favor. The plaintiff argued that the refusal of the Board to issue a complaint amounted to a refusal to accept jurisdiction rather than a decision on the merits. The court felt that the decision of the case before the Board was a decision on the merits of the case. Even if it had not been so, it still did not follow that jurisdiction which had been in the Board would then revert to the state court.

Section 160 (a) of the Labor Management Relations Act empowers the Board by agreement with any state agency to cede to such agency

5. 287 S.W. 2d 794 (Mo. 1956).

6. 29 U.S.C.A. Secs. 141 *et seq.*

7. 346 U.S. 485 (1953).

8. 348 U.S. 468 (1955).

jurisdiction over labor disputes involving interstate commerce if the regulating labor laws of such state are not inconsistent with the act. Of course, Missouri has no such agency and no contention was made that the Board had ceded or could cede any of its jurisdiction to our Missouri courts under this section. Unless there is an express ceding of jurisdiction to a proper agency exclusive jurisdiction remains in the federal agency. *Retail Clerks Local No. 1564 v. Your Food Stores of Santa Fe.*⁹

This case then would seem to solve one dilemma raised by the *Garner* case, *supra*, and the cases which followed. The majority opinion seems to be basically sound. If the labor dispute is within the federal jurisdiction, it seems that is where it should have to stay, in the absence of disorderly picketing.

*Heath v. Motion Picture Machine Operators' Union #170*¹⁰ was an action brought to enjoin defendant motion picture operators' union from picketing a drive-in theatre. The trial court enjoined the picketing and the union appealed.

The court first determined the status of the operator of the projecting machine and came to the conclusion that he was a partner and co-owner of the drive-in business. Since the avowed policy of the union was to discourage owners from operating their own projection machines and to replace said owner with a union operator, the problem became whether such a purpose violated the public policy of Missouri.

Here again, as in *Bellerive Country Club* case,¹¹ the court appears to be balancing the equities between the individual's right to earn a livelihood and the constitutional guarantee of free speech. The court felt that the mere fact that picketing may interfere with an individual's right to earn a living does not necessarily make that picketing unlawful. In balancing the equities, the court took into consideration the relatively slight economic improvement in the union's position were the picketing to continue and were a union operator hired in the place of the owner. Further, under the rules of this particular union, the union policy would not be satisfied even if the owner-operator could and did join the union. The

9. 225 F. 2d 659 (10th Cir. 1955); 29 U.S.C.A. Secs. 160 (a).

10. 290 S.W. 2d 152 (Mo. 1956)

11. *Supra*, note 2.

court took into consideration the importance to our economy in encouraging the small business man and the fact that to encourage picketing for the avowed purpose would be to encourage the elimination of the owner-worker type of enterprise.

Considering all of this, then, the court found that the rights of the owner operator would prevail over defendant's rights in free speech and picketing, and that such picketing would be prohibited as against public policy.

*Donahoo v. Thompson*¹² involved an alleged wrongful discharge of plaintiff by defendant railroad. The trial court entered judgment for the plaintiff. Plaintiff argued that his right to sue for the alleged wrongful discharge was a federal right rather than a state right due to the National Railway Labor Act.¹³ Further, that his right to recover should be determined as of federal law, and that the federal legislation had pre-empted the field.

The court cited the case of *Jenkins v. Thompson*¹⁴ as holding that the particular collective bargaining agreement in dispute was an Arkansas contract and not a Missouri contract.

The court pointed out that the railroad adjustment board does not have exclusive jurisdiction in any cases of alleged unlawful discharge. An employee in such a case may proceed by his administrative remedy under the terms of his employment, or, if the state court recognizes such a claim, he may resort to his action at law for alleged unlawful discharge. The case of *Transcontinental and Western Air v. Koppal*¹⁵ was cited as holding that some states do not require an exhausting of the administrative remedy prior to coming into court on the alleged unlawful discharge, but that Missouri does.

Even though individual rights may arise from the collective bargaining agreement it is not a contract of employment. Thus, it was necessary for the plaintiff to prove, in addition to the collective bargaining agree-

12. 291 S.W. 2d 70 (Mo. 1956).

13. 450 U.S.C.A. Secs 151-161.

14. 251 S.W. 2d 325 (Mo. 1952).

15. 345 U. S. 653 (1953).

ment, his contract of employment and that he became an employee under circumstances making the terms of the collective bargaining act applicable to him. In this case, plaintiff entered the employ of the defendant in Arkansas, worked in Arkansas, and was discharged on a run out of Arkansas. Thus, his contract of employment was an Arkansas contract and must be governed by the substantive law of Arkansas under the law as laid down in *Jenkins v. Thompson*.¹⁶ Since plaintiff could not recover under the laws of Arkansas, the court found he could not recover in Missouri.

Disregarding the *Donahoo* case, then, we find that the Missouri Supreme Court has concerned itself mainly with picketing cases. The problem presented by such cases appear to be decided on a basis of public policy, that is, through a process of balancing the equities. Whether or not the constitutional guaranty of freedom of speech should be abridged on a public determination is debatable—particularly where the picketing is peaceful. It is submitted that what the court may actually be doing in these cases is to act more in the role of arbitrators than as judges. This is certainly not meant as a criticism. It may very well be that in this particular field of litigation, with its numerous social and economic ramifications, judges should concern themselves more with the matter of public policy and with the results of their decisions on the complexities of labor-management relationships than with the legal precedent. Certainly, if one approaches law on the theory it is a science, then it is not what is “right” or “wrong” as a matter of legal precedent which counts, but rather what is “right” or “wrong” in the particular fact situation presented.

Property

WILLARD L. ECKHARDT*

DEEDS—DESCRIPTION OF LAND

Quantity Description—“West 50 Feet of” Certain Lot

*Walters v. Tucker*¹ would seem to be the most important property case decided by the Missouri Supreme Court in 1955, not only because it is a case

16. *Supra* n. 14.

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1. 281 S.W.2d 843 (Mo. 1955).

of first impression in Missouri and may be a case of first impression in the United States, but also because it may upset many Missouri titles.

Walters v. Tucker was an action by the grantee's successor in title against the grantor's successor in title to quiet title to a disputed strip of land, and involved essentially the construction of the description in a deed conveying "The West 50 feet of Lot 13." A survey of the lot is shown at 281 S.W.2d 843, 845. For the purposes of this discussion, lot 13 can be considered as a quadrilateral, roughly in the form of a parallelogram. The east and west sides are within 1° of being parallel; the north and south sides diverge by about 4°. The west side does not run due south from the front line, but its course is approximately south 15° east. The lot fronts on Oak Street on the north and abuts a railroad on the south.

The plaintiff, owner of "the west 50 feet," contended that the description was clear, definite, and unambiguous, both on its face and when applied to the land, and that he owned a strip of land fifty feet wide as measured on perpendiculars erected on the west boundary line; and that this gave him a frontage of a little more than 58 feet on Oak Street on the north, and almost 54 feet on the railroad on the south.

The defendant, owner of the balance of the lot, conceded that the description was not ambiguous on its face, but contended that when the description was applied to the land it was subject to a dual interpretation; that parol evidence was admissible to resolve the latent ambiguity; and that the plaintiff owned a strip of land with a 50 foot frontage on Oak Street, a strip about 42 feet wide as measured on perpendiculars erected on the west boundary line.

The trial court found there was an ambiguity, heard extrinsic evidence, and entered judgment for the defendant. The case was reversed on appeal. The Missouri Supreme Court took the view that there was no ambiguity on the face of the deed, nor when the description was applied to the ground. The court expressed no opinion as to whether reformation on the ground of mistake would have been granted if the defendant had sought reformation of the description.

Unless "the west 50 feet" is to have the unalterable meaning assigned to it by the court, there are four ways of measuring off the west 50 feet. One method is the one adopted by the court, a strip of land fifty feet wide as measured on perpendiculars erected on the west boundary line. But the 50

feet may be measured along the north boundary, Oak Street, and the east boundary line may be drawn parallel to the west boundary line; this would give a strip about 42 feet wide, and was contended for by the plaintiff. In the alternative, the 50 feet may be measured along the south boundary, the railroad, and the east boundary line may be drawn parallel to the west boundary line; this would give a strip about 46 feet wide. A fourth possibility would be to measure fifty feet along each of the north and south boundaries and to let the east boundary line connect these two points; the resulting strip would vary in width from 42 feet at the north to 46 feet at the south.

The writer respectfully disagrees with the court's conclusion that there is no ambiguity when the description, "the west 50 feet of lot 13," is applied to the land. The basic source of the court's error, if there be error, is on p. 848, col. 1. The court's line of reasoning is as follows. If the description read "a strip of land 50 feet in width off the west side of lot 13," there is no latent ambiguity, and parol evidence would not be admissible to prove the parties meant "a strip of land 42 feet in width." With this as the major premise, the court sets up as its minor premise the proposition that "the west 50 feet" is exactly the same thing as "a strip of land 50 feet in width." It is submitted that in the minor premise the court is equating things that are not necessarily equals, and the court does this without any examination of the problem as to whether they really are equivalent. The court's ultimate conclusion may be sound if one grants the soundness of the minor premise, but the court's ultimate conclusion may be unsound if the minor premise is unsound. Taking the words "a strip of land 50 feet in width," the emphasis is on "strip" and "50 feet in width" has reference to "strip." Taking the words "the west 50 feet," where "strip" is not expressly mentioned, "50 feet" may refer to the width of a strip, but it may also refer to a measurement along the front boundary, or the rear boundary, or both.

On its facts, *Walters v. Tucker* does not involve a parallelogram or the conveyance of "the west 50 feet" of a parallelogram. The principle of the case, that "the west 50 feet" necessarily means "a strip 50 feet wide," would seem to be applicable to similar descriptions of parts of parallelograms.

As stated at the beginning, if *Walters v. Tucker* is noticed by the bar it will upset many titles. To the writer's own knowledge, this type of description has been employed in Missouri in conveying out parts of parallelograms where the intention was that the specified distance was to be measured along the front line of a lot and not on perpendiculars erected on a side line.

In fact, the writer's personal reaction to "the west 50 feet of lot 13" is that prima facie the parties meant a frontage of fifty feet and not a strip fifty feet wide. A leading title lawyer in Michigan has written me that a decision such as *Walters v. Tucker* in his state would upset many boundary lines. Adverse possession, which cures so many defects in title, may be of little assistance in this type of case in Missouri if the view is taken that the possession was initiated under a mistake as to the location of the boundary line.² The actual possession taken by the parties is significant as a practical construction of the description by the parties, but under the theory of the case it would seem that such evidence of such practical construction would not be admissible.

As noted above, *Walters v. Tucker* is a case of first impression in Missouri, and it may well be the only decision on the point anywhere. No case in point is cited in the opinion, and a brief survey of the authorities by the writer has not turned up any case in point.³

Whether one agrees or disagrees with *Walters v. Tucker* that parol evidence is not admissible to explain a description such as "the west 50 feet of lot 13," the case serves a useful purpose in reemphasizing that such a description never should be used unless the lot is a rectangle. It never should be used where the lot is a parallelogram (other than a right-angled parallelogram) and never should be used where the tract is irregular in shape. Rather the description should run all the boundaries of the part conveyed, or otherwise make it clear where the specified distance is to be measured.

2. See *Eckhardt, Work of Missouri Supreme Court for 1952*, 18 Mo. L. REV. 366, 380-381 (1953); *Eckhardt and Peterson, Possessory Estates, Future Interests and Conveyances in Missouri*, 23 Vernon's Ann. Mo. Stat. p. 81, § 97, n. 33 (1952) citing six law review notes.

3. See PATTON, LAND TITLES § 95, n. 292 (1938); Patton, 3 AMERICAN LAW OF PROPERTY § 12.107, n. 6 (1952); 18 C.J. *Deeds*, § 269, n. 91; 26 C.J.S., *Deeds*, § 30(c), p. 216.

Taxation

ROBERT S. EASTIN*

The following is a brief summary of the decisions of the Missouri Supreme Court in the field of Taxation in 1955.

I. SUBJECTS AND INCIDENCE OF TAXATION

A. *State Income Tax*

The supreme court, in *A. P. Green Fire Brick Co. v. State Tax Commission*,¹ continued its liberal policy of excluding income of Missouri corporations received from sources outside the state from the Missouri income tax. It was there held that royalties received by a Missouri corporation for the use of its trade names, trade marks and manufacturing processes were not subject to a tax where the payor of the royalties was a corporation of a foreign country doing no business in the United States, where the place of payment was in the foreign country and the medium of payment the currency of that country. Although, technically, the trade marks, trade names, etc., constituted property interests which had a situs at the domicile of the Missouri corporation, the source of the income was where these trade names, trade marks, etc., were used.

The Federal excise tax on a fur coat is properly deductible in determining net income under the Missouri income tax. Technically the tax is on the retailer but the incidence of the tax is on the purchaser; it is invariably added as a separate item to the purchase price and it is, therefore, for all practical purposes on the buyer.² The same case stands for the proposition that under Sections 143.100 and 143.160, Missouri Revised Statutes (1949), prior to the 1953 amendment,³ the limitation of \$1,000 on capital losses extends only to long term and not to short term losses. In view of the 1953 amendment referred to, which changed the language of Section 143.100

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1. 277 S.W.2d 544 (Mo. 1955).

2. *Tiger v. State Tax Commission*, 277 S.W.2d 561 (Mo. 1955).

3. Mo. Laws 1953, p. 745.

substantially, it is not clear whether this rule applies to that section in its present form.

B. *General Real Estate Taxes*

Following many earlier decisions it was held in *St. Louis Gospel Center v. Prose*⁴ that *any* use of property by strangers to a religious or charitable corporation prevents a tax exemption, because in this situation the property is not used exclusively for religious or charitable purposes. In this case one apartment in a substantial building was rented to a woman who had no connection with the religious organization which owned the property and which utilized the remainder of it either as a meeting place or living quarters for its members, etc. This was enough to eliminate the exemption.

The amendment of Section 151.080, Missouri Revised Statutes (1949) (a part of the provisions relating to the taxation of public utilities and railroads), to include fire, sewer and other similar districts as units among which taxes on distributable utility and railroad property should be *apportioned* does not authorize the *levy* of a fire district tax upon such distributable property, since the vital return and levy provisions⁵ were not amended and there is, therefore, no authority for a levy.⁶

The Metropolitan St. Louis Sewer District was organized under the provisions of Sections 30(a) and 30(b) of the 1945 Constitution of Missouri. Section 30(b) contains a provision that "the plan shall provide for the assessment and taxation of real estate in accordance with the use to which it is being put at the time of the assessment" This provision (a) does not prohibit the assessment of tangible personal property by the District; (b) it does not change the general rules of assessment for general taxes on the basis of value; and (c) it therefore applies to special taxes only. Consequently, the provisions of Section 7.180 of the plan creating the District which, in essence, provide for a different rate of taxation in that portion of the District located within the City of St. Louis and in that portion located without the city, is unconstitutional and void, even though the assessment base in the City of St. Louis may be higher than in the County, since it

4. 280 S.W.2d 827 (Mo. 1955).

5. MO. REV. STAT. §§ 151.020, 151.090 and 151.140 (1949).

6. *State ex rel. Hatten v. Kansas City Power & Light Co.*, 281 S.W.2d 784 (Mo. 1955).

is the duty of the State Tax Commission, and not that of a taxing district, to equalize assessments.⁷

C. Licenses

*Food Center of St. Louis, Inc. v. Village of Warson Woods*⁸ presents a unique situation. There a supermarket was located on the line dividing the City of Rock Hill from the village of Warson Woods. The check-out stands, cash registers, etc. were all in Rock Hill. Part of the shelves of merchandise were in Rock Hill and part in Warson Woods. A large parking lot and other auxiliary facilities were located in Warson Woods. In this situation it was held that *each* community might levy an occupation tax measured on the *full amount* of the sales at the supermarket. This was, in part, based upon the language of Warson Woods' occupation license ordinance which, as a basis for the tax, included not only the sale of goods but rendering of services in connection with sales. Query if the same result would have obtained had this language not been in Warson Woods' ordinance.

II. COLLECTION OF TAXES AND TAX SALES AND TITLES

A. Limitation of Actions

Under the provisions of the tax collection statute, applicable to St. Louis (now Sections 141.820 to 141.970, Missouri Revised Statutes (1949), as amended), failure to bring suit to collect taxes delinquent when the act was passed in 1939 for more than five years after passage of the act constitutes a bar to collection.⁹

B. Tax Titles

A purchaser at a sale for special taxes takes subject to general taxes assessed for prior years, and the property may be sold again for such general taxes and the title of the purchaser at the special tax sale defeated.¹⁰ In a proceeding brought to sell property under the tax collection statutes

7. State *ex inf.* Dalton v. Metropolitan St. Louis Sewer District, 275 S.W.2d 225 (Mo. 1955) (*en banc*).

8. 277 S.W.2d 573 (Mo. 1945).

9. Evans v. Buente, 284 S.W.2d 543 (Mo. 1955).

10. Evans v. Buente, *supra* note 9; St. Louis Housing Authority v. Evans, 285 S.W.2d 550 (Mo. 1955).

applicable to St. Louis,¹¹ it may be that service of process was bad by reason of the fact that it was had by publication while the defendant was a resident of the city, but in an equitable proceeding in the nature of a redemption, commencing such a suit tolls the statute of limitation and the redeeming party, to do equity, must pay the tax and penalty, having no good defense to the action.¹²

While the general rule is that a life tenant who is obligated to pay taxes and who purchases the property at a tax sale must be deemed to have thereby paid the taxes and not to have acquired title to the property, where it appears that the person who purchased the property at the tax sale was a widow whose only right was the right of homestead, where it appears that the value of the property exceeded that of the homestead exemption, so that, at least as to part of the property, she was claiming adversely to the children of decedent, where the name in which the title was taken did not disclose that she was the widow of decedent, where the land itself was not inventoried as a part of the estate of the decedent or of any of his children, where no effort was made to redeem the property, although two years elapsed between the date of the sale and the date of delivery of deed, and where the holder of the tax title has subsequently deeded to third persons who have made valuable improvements and who have no actual knowledge of the facts, the children of the decedent will not be permitted to recover against the grantees of the tax title purchaser.¹³

III. TAXING DISTRICTS

A. *Organization and Powers*

The plan for the organization of the Metropolitan St. Louis Sewer District, adopted by a vote of the people in the City of St. Louis and part of St. Louis County, although it confers very broad and extensive powers on the District, and vests in the District many powers previously exercised by the City of St. Louis and other municipalities, is, nevertheless, in accordance with the provisions of Sections 30(a) and 30(b) of the 1945 Constitution and valid, except for Section 7.180 noted above.¹⁴

11. MO. REV. STAT. §§ 141.820-141.970 (1949).

12. *Evans v. Buente*, *supra* note 9.

13. *Hunott v. Critchlow*, 285 S.W.2d 594 (Mo. 1955).

14. *State ex rel. Dalton v. Metropolitan St. Louis Sewer District*, *supra* note 7.

A reorganized school district is validly organized where notice of the election approving the creation of the district was published in a newspaper in an adjoining county. In this case an attempt was made to publish the notice in several newspapers in the county in question but the publications did not meet the statutory requirement. However, publication of a similar notice in a newspaper in an adjoining county did. It was held that all that is required by the law is publication in a newspaper of *general circulation* in the county and that *publication* in the county is not required.¹⁵

In 1947, Paragraph 1 of Section 165.263, *Missouri Revised Statutes* (1949), respecting the organization and enlargement of city, town and consolidated school districts, was amended to provide that the extension of the limits of any town or city contained in a county of the first class should not be affected by the provisions of the section. This was given a very broad construction in *State ex inf. Wallach v. Zeibig*¹⁶ to prevent the separate organization of a city or town district in a first class county where the city limits were extended and thereby gave occasion for the possible application of Section 165.263.

The Sawyer Act (Section 71.015 *Missouri Revised Statutes*. (1955 Supp.)) which requires, as a condition precedent to the extension of the city limits of a city, the commencement of a declaratory judgment proceeding, was held unconstitutional insofar as special charter cities are concerned, since Sections 19 and 20 of Article VI of the 1945 Constitution contain certain time schedules which make no provision for the delay necessary for the purposes of obtaining such a judgment. The court raised many interesting questions as to what the issues would be in a Sawyer Act proceeding where applicable and what sort of a "judgment" must be obtained but did not decide them because of the grounds stated for its decision.¹⁷

The court also gave consideration to the matter of the amendment to the St. Louis County Charter and again very broadly construed the provisions of Section 18, Article VI of the 1945 Constitution with respect to county charters and the power of the freeholders of a county to adopt such a charter.¹⁸

15. *State ex rel. Reorganized School District R-6 of Daviess County v. Holman*, 275 S.W.2d 280 (Mo. 1955) (*en banc*).

16. 275 S.W.2d 353 (Mo. 1955) (*en banc*).

17. *McConnell v. City of Kansas City*, 282 S.W.2d 518 (Mo. 1955).

18. *State ex inf. Dalton ex rel. Shepley v. Gamble*, 280 SW.2d 656 (Mo. 1955) (*en banc*).

B. *Tax Levies*

In 1950 the provisions of Section 11(e) of the Constitution of 1945 were amended to permit school districts to increase the tax rate over the constitutional limitation "for school purposes". In an opinion in which the court very sharply divided (4-3) it was held that "school purposes" included levies for the purpose of erecting school buildings and the like and were not limited to tax levies for current school operating expenses.¹⁹

C. *Operational Matters*

A drainage district may sue a county for drainage taxes assessed against the public highways in the district. The taxes are not a lien upon the property of the county and therefore statutes such as the Land Tax Collection Act²⁰ applicable to Jackson County do not apply. The fact that for many years annual meetings of the taxpayers were not held regularly, that members of the Board of Supervisors held over and that some supervisors who were elected to fill vacancies held office after their terms expired was not sufficient to defeat a suit for such taxes where the members of the Board of Supervisors were acting *de facto*, where there was no objection by any person and where they acted within the powers and authorities of a Board of Supervisors.²¹

IV. MISCELLANEOUS

*State ex rel. Spink v. Kamp*²² is not a tax case but involves the matter of what is the "general revenue fund" of Kansas City as used in Section 84.730 *Missouri Revised Statutes* (1949) which requires the City to appropriate for the use of its police force at least one-sixth of the "general revenue fund". The opinion is lengthy but it contains an analysis of the revenues of Kansas City and their sources which is very instructive in these tax conscious days and, for this reason, it is worthy of some consideration.

19. *Rathjen v. Reorganized School District R-2 of Shelby County*, 284 S.W.2d 516 (Mo. 1955) (*en banc*); *State ex inf. Wheeler ex rel. Berhorst v. Reorganized School District R-6 in Lewis County*, 284 S.W.2d 535 (Mo. 1955) (*en banc*).

20. MO. REV. STAT. §§ 141.210-141.810 (1949).

21. *Fort Osage Drainage District v. Jackson County*, 275 S.W.2d 326 (Mo. 1955).

22. 283 S.W.2d 502 (Mo. 1955) (*en banc*).

Torts

GLENN A. McCLEARY*

Excluding the cases based on the humanitarian doctrine which are treated elsewhere in the *Review*, the writer found fifty-five decisions written in 1955 which raised some point of tort law. More than half of all the cases in this field of the law had to do with accidents arising in the use of motor vehicles. The number of cases arising from railway accidents has declined to such an extent, in so far as injuries to the members of the public are concerned, that this phase of tort law has become relatively inactive, most of the cases against railroads arising from injuries to employees. Along with the increase in the decisions involving motor vehicles, come increased activity in the application of the doctrine of *res ipsa loquitur*, the doctrine of imputed negligence, and the defenses in negligence cases.

While it is doubtful that it could be said that any of the decisions in this year under review may be labeled as landmark cases, or great questions and great cases, yet a number of them, as so well put by Mr. Justice Holmes, "have in them the germ of some wider theory, and therefore of some profound interstitial change in the very issue of the law."

I. NEGLIGENCE

A. *Duties to Persons in Certain Relations*

1. Possessors of Land

Growth and change come slowly in that area of tort law in which injuries are received on the premises of the owner or possessor. Interests in property require stability in the law for adequate protection, hence changes in legal thinking as to the liability of possessors and owners have developed slowly and only after a period of changing emphasis in the interests to be balanced. The liability of a possessor to one upon his premises has resisted the modern law of negligence due to long established concepts of property rights. During the year under review the court took a fresh look at some of these situations, resulting in interesting decisions.

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Since the liability of a possessor of land developed about a three-fold classification of persons injured on the premises—trespassers, licensees and invitees (business visitors)—the courts have been hard-pressed to classify firemen on the premises in performance of their public duties. Their permission to enter the premises is given by law; not by the consent of the possessor as in the case of licensees generally. A fireman is not on the premises wrongfully as a trespasser, and it cannot be said that the possessor has invited him. Neither can it be said that the possessor permitted him to enter, because the possessor's refusal of consent would not deprive the fireman of his privilege and duty to enter. Therefore, a fireman cannot be placed under any one of the older categories. Since he is on the premises in the larger social interest it would seem desirable to give him some protection from dangerous conditions on the premises, but how much? In most jurisdictions the courts have classified him as a bare licensee, to whom the occupant owes no greater duty than to refrain from an infliction of wilful and wanton injury in his affirmative conduct. The possessor owes him no duty as to dangerous conditions, neither to warn or to make safe, the reasoning being that it would be an unreasonable burden to require possessors to keep the whole of their premises in such condition as to make every part of it safe for those whose entry cannot be anticipated either as to the precise point or as to time. Further, the entry may never occur.

The court *en banc*, in *Anderson v. Cinnamon*,¹ gave consideration to the obligation of the possessor to warn a fireman of known dangerous conditions when the fireman's presence on the premises is known to the possessor. The trial court had dismissed plaintiff's petition on defendant's motion, on the ground of failure to state a claim on which relief could be granted. The defendant owned an apartment building with a three story porch which was alleged to be in a dangerous condition, in that it was insecurely fastened to the building and insecurely supported. The plaintiff-fireman was injured from the collapse of the porch when he and other firemen went upon the porch with a fire hose and other fire fighting equipment to fight a fire in the building. It was alleged that his presence upon the porch was known to the defendant who also knew of the dangerous condition of the porch. The court recognized and agreed with those cases

1. 282 S.W. 2d 445 (Mo. 1955) (*en banc*).

that have found a duty to warn a fireman of unusual hazards from highly dangerous substances kept on the premises, such as gasoline, chemicals and explosive materials, especially where the fire on the premises is likely to explode them, but refused to find a duty to warn "of structural conditions due to age and natural deterioration or to improper construction," on the reasoning that "such structural conditions are capable of being observed and ascertained," and further that "to require such a warning would place a very great burden on the possessor of land, especially as to firemen, because he would not know when they might come, what part of the premises they might use or how they would use them." The latter reasoning would seem to overlook the allegations in the petition that the defendant himself "was on the premises and had full knowledge of the presence of the plaintiff and the other fireman on said porch . . ." The opinion concludes: "We limit our decision herein to holding, where it is not alleged that the possessor of land was informed that firemen intended to enter and use the porch of his building with their fire fighting equipment before they went on it, he cannot be held liable for failure to warn them to leave it after he knew of their presence there." Judge Westhues, who had written the opinion in this case when it was in Division One, which held that a duty was owed to warn the plaintiff fireman of this dangerous condition on the possessor's property where the possessor had an opportunity to do so, dissented from the *en banc* opinion on the ground that he could not draw a distinction between failing to warn firemen if the possessor had the opportunity to do so before the fireman went onto a porch that he knew was likely to fall, and failing to warn, while standing idly by, after the firemen had entered upon the porch.

In another *en banc* decision, *Wolfson v. Chelist*,² the court looked again into the liability of a possessor for injuries received on the premises by a social visitor. There the plaintiff had recovered a judgment for injury sustained as the result of a fall on the porch floor of a residence owned and occupied by a sister. There was evidence showing that the plaintiff, in walking out through a rear or side door of the house, had stepped and slipped on fragments of meat or grease which remained on the concrete porch floor after the cat had been fed by the sister the night before. The St. Louis Court of Appeals reversed the judgment on the ground that the

2. 284 S.W. 2d 447 (Mo. 1955), noted more fully in 21 Mo. L. REV. 220 (1956).

plaintiff was only a licensee and, barring wantonness or some form of intentional wrong or active negligence on the part of the possessor, there was no liability for injuries resulting from dangerous conditions in the property. There was dictum to the effect that failure "to warn his guest of a hidden peril highly dangerous to life or limb, such as a trap, pitfall or dangerous hole would subject him to liability under this rule." The decision was certified to the Missouri Supreme Court by the dissenting judge on the ground that the majority opinion was in conflict with a previous decision of the Missouri Supreme Court. Here the court concluded that a social guest was only a licensee and that there was "solid and just foundation or reason for the rule that the guest should accept the premises as he finds them." To the contention of the plaintiff that a host-guest relation is *sui generis* and should be given a classification and protection not extended to licensees generally, the court was of the opinion that "the duties and liabilities in occupier-entrant cases will be quite as justly if not more justly considered and with less confusion determined by generally continuing the classification of relationships of occupiers-entrants, and by generally continuing the use of terminology long employed by the profession and by the courts in advising and in determining what is right as between occupant-entrant adversaries, although we take no austere and unrelenting position on these matters." A stronger case for a guest will some day be presented to the court where the relation between the occupant-entrant is purely social, without the weakening effect of a family relationship between the parties, and where the dangerous condition is something more than a small grease spot on a concrete landing.

A case of first impression in Missouri on the facts was that of *Blatt v. George H. Nettleton Home for Aged Women*,³ where the liability of a charitable organization was declared in a case brought for injuries received by a business visitor of one of the tenants of a building which the charitable organization did not occupy but which was rented to various business tenants. It was held by the court *en banc* that the doctrine of immunity of charitable organizations did not apply because the mere use of the net profits of the rent did not constitute a direct relation to the enterprise for which the particular charity was founded and operated, and that the Missouri charitable immunity doctrine has never been ex-

3. 275 S.W. 2d 344 (Mo. 1955) (*en banc*), noted more fully in 21 Mo. L. Rev. 97 (1956).

tended to protect funds derived by charitable organizations from commercial enterprises wholly unconnected with their charities.⁴

2. Landlord-tenant

*Gaines v. Property Servicing Co.*⁵ and *Burns v. Property Servicing Co.*⁶ were actions by tenants against the owner of a three-story apartment building for injuries sustained as a result of an arsonous fire set by another tenant in the defendant's apartment building which was not properly equipped with a fire escape as required by statute. In both cases it was contended by the defendant that the criminal act of a responsible human agency constituted an independent efficient intervening cause of the plaintiff's injuries so that the defendant's negligence was not the legal cause of the plaintiff's injuries. The court held that the purpose of the statute requiring fire escapes was to protect tenants against injury from any fire which might occur, regardless of its origin, and that it was "wholly immaterial whether the fire had its origin in accident, act of God, negligence or wilful, intentional and wrongful conduct."

3. Carriers

No new questions of liability were presented in the cases involving carriers, the grounds of the appeals presenting only the usual problems as to whether a submissible case had been made, the adequacy of instructions, and other general grounds.

Where the carrier was a bus, the usual principle relative to skidding automobiles was applied in *Rodefeld v. St. Louis Public Service Co.*⁷ The Missouri decisions have seemingly approved, by *dicta*, the rule that the mere skidding of an automobile is not of itself negligence, nor of itself

4. *Ferguson v. Electric Company of Missouri*, 282 S.W. 2d 505 (Mo. 1955). Landowner's action against owner of dam for damages from flooding. Held that electric company which maintained dam on a natural watercourse could not be found negligent because of alleged failure to maintain impounded waters at a sufficiently low level to avoid flooding of plaintiffs' farms which were situated on tributaries, in the absence of finding that the company, in the exercise of care, knew or should have known that, unless it opened its floodgates, plaintiff's lands would be flooded.

5. 276 S.W. 2d 169 (Mo. 1955).

6. 276 S.W. 2d 177 (Mo. 1955).

7. 275 S.W. 2d 256 (Mo. 1955).

will permit an inference of negligence. However, this applies only where the evidence proves that the skidding is the sole factual cause of the occurrence. In the instant case, the action was by a pedestrian for personal injuries allegedly sustained when the defendant's bus ran into, and knocked down upon the plaintiff, a metal stop sign. The evidence showed that, in starting up, the right rear end of the bus, had skidded against the curb, but instead of stopping or proceeding straight ahead the driver of the bus endeavored to make a left turn which necessarily caused the right rear end of the bus to go beyond the curb line and strike whatever was in its path. The metal sign was some 35 feet or more from the place of skidding into the curb. The driver did not lose control of the bus. It was held that the injuries sustained were not from the skidding, but in allowing the bus to roll forward and to the left after striking the curb.⁸

8. Other cases may be noted involving carriers but which do not present new problems. *Huffman v. Terminal R.R. Ass'n of St. Louis*, 281 S.W. 2d 863 (Mo. 1955), was an action for injuries sustained by a switchman when he slipped and fell in an oily, slick, unlighted area during switching operations. The evidence was held sufficient to make a submissible case as to whether the defendant failed to exercise ordinary care to provide the switchman with a reasonably safe place to work.

A railroad operating a switch engine on the tracks of a manufacturing plant for the joint benefit of railroad and manufacturer, knowing that employees of the plant were required to and did frequently cross the tracks, had a duty to warn such employees by some method, such as by bell or whistle. *Dickerson v. Terminal R.R. Ass'n of St. Louis*, 284 S.W. 2d 568 (1955).

In *Willis v. Wabash R.R.*, 284 S.W. 2d 503 (Mo. 1955), the action was for injuries sustained by a railroad fireman who had gone from the cab to the catwalk of the engine to answer a call of nature, and who fell from the catwalk when the engine was started without warning from the engine bell. Evidence as to whether the railroad company's engineer was negligent in moving the engine when he knew or should have known that the fireman was then on the catwalk for his stated purpose, and also whether it was negligence not to give warning signal on bell of engine to the fireman, made a submissible case.

In an action by hostler's helper for injuries sustained when struck by water-spout as the hostler moved the railroad engine which was being filled with water, an instruction that if the hostler moved the engine without ringing bell and without ascertaining that the helper had finished filling the water tank and replacing the spout, in violation of railroad rules, was guilty of negligence, was held not to be erroneous. *Sandifer v. Thompson*, 280 S.W. 2d 412 (Mo. 1955).

Safety rules, such as gyrating headlights and whistles, while usually intended to warn automobiles and persons on crossings or about the tracks of the approach of trains, are also intended for the protection of employees of other trains. In *Adams v. Atchison, Topeka and Sante Fe Ry.*, 280 S.W. 2d 84 (Mo. 1955), had these safety rules been complied with, the presence of the train would have been known and would have prevented the plaintiff, the engineer of defendant's train, from mistaking the headlights of the other train appearing in a dense fog for a yellow home signal located in that area, and would have enabled him to avoid a collision with that train. Due to this mistake, the plaintiff sustained injuries when the engine and train operated by plaintiff, a locomotive engineer, ran a red home signal and collided with the side of the other train at a crossover. A submissible case of negligence was made on these facts in an action under Federal Employees Liability Act.

4. Automobiles

Although there was a large number of cases appealed to the court arising out of automobile accidents, no new problems of liability were presented, the grounds of the appeals being based on the usual grounds of whether a submissible case had been made, the adequacy of the instructions, and other common allegations of error. While not raising problems of sufficient value to be discussed at length, many of these cases are noted below and under the headings of *res ipsa loquitur* and defenses in negligence cases discussed *infra*.⁹

In *Rogers v. Thompson*, 284 S.W. 2d 467 (Mo. 1955), the plaintiff brought the action under the Federal Employers' Liability Act for injuries sustained when, during the course of his employment, he was burning weeds on the defendant's right of way. While running from the fire started by him, he slipped on loose gravel which had rolled down on a culvert on defendant's right of way. A judgment for \$40,000 damages was reversed. It is not clear whether the ground of the reversal is the absence of any foreseeable risk of injury on the part of the defendant in failing to maintain a sufficiently wide path across the culvert, or in permitting the path to become covered with crushed rock or gravel, or whether the basis of the reversal is, assuming negligence, the absence of any causal connection in fact so that the defendant's act could be said to have contributed to the plaintiff's injury. ,

A judgment for the plaintiff was reversed in *Schwartz v. Kansas City Southern Ry.*, 275 S.W. 2d 236 (Mo. 1955), in an action under the Federal Employers' Liability Act for the death of husband who was killed when his tractor overturned on him while he was mowing weeds on railroad right of way pursuant to contract. The evidence was insufficient to establish railroad's negligence in failing to furnish decedent a safe place to work, to warn him of dangerous condition of ground by reason of contour thereof and guy wires on the right of way, and to provide a helper or guide to assist him. "Cutting weeds and brush on railroad right of way whether by tractor power, or horse-drawn mowing machines, or by scythes in the hands of the employees", said the court, "is accompanied by dangers of various degrees that cannot be avoided. A man cutting weeds on a steep embankment with a scythe may strike a wire, rock, or other substance causing him to fall to his injury. So, in this case, if Schwartz had been warned that there were present on the right of way such obstacles as telephone and telegraph poles, guy wires, uneven terrain, etc., it would not have conveyed to Schwartz any information which he did not already know."

9. Other cases may be noted for their fact situations rather than for new developments of law. *Branstetter v. Kunzler, Gerdeman and Beghtol*, 364 Mo. 1230, 274 S.W. 2d 240 (1955), was an action by a passenger in the first automobile to recover for injuries suffered when, after the first automobile had stopped in traffic, a third automobile crashed into the rear of the second automobile causing it to strike the first automobile. It was held that the negligence of the driver of the third automobile was the proximate cause of the collision and that the alleged acts of omissions of the driver of the first automobile, in stopping suddenly when no emergency existed and in failing to give a timely warning, in addition to the warning given by his stop lights, by extending arm in horizontal position, were too remote to be the cause of plaintiff's injuries.

5. Electricity

The liability of electric power companies for the condition of their charged wires passing through trees along a public street was presented

Caldwell v. St. Louis Pub. Serv. Co. and Beck, 275 S.W. 2d 288 (Mo. 1955), was an action against automobile driver and bus company for injuries sustained when the automobile struck plaintiff-pedestrian who was crossing highway in front of the bus. The verdict was in favor of the automobile driver and against the bus company. That part of an instruction given for the automobile driver that the plaintiff could not recover unless the jury found that the automobile driver's negligence "was the direct and proximate cause of the injuries complained of" was erroneous since the theory of the plaintiff's case was that the negligence of the automobile driver concurred with the negligence of the driver of the bus. Therefore, the phrase "the direct and proximate cause" should have been "a direct and proximate cause," otherwise the jury may have returned a verdict in favor of the automobile driver, even though it believed that he was negligent as submitted and that his negligence concurred with the negligence of the defendant bus company in causing the accident.

Where both parties were approaching a highway intersection at 50 miles an hour and neither did anything to avoid the collision until it was too late, both were held negligent as a matter of law in *Wilson v. Toliver*, 285 S.W. 2d 575 (Mo. 1955).

By the case law of Missouri, a motorist is not necessarily contributorily negligent as a matter of law because he drives at a speed which prevents his stopping within the range of his visibility. It was held in *Haley v. Edwards*, 276 S.W. 2d 153 (Mo. 1955), due regard should be given to such matters as the speed of the automobile, other traffic in the vicinity, the condition of the highway, the visibility of the atmosphere, the character of the obstruction, and all other facts and circumstances which might aid in determining the issue of due care.

An emergency instruction should hypothesize the conduct of the defendant prior to his coming into the position where the hypothesized emergency arose, so that it may be found that the emergency was not caused by his own conduct. In *Jones v. Hughey*, 283 S.W. 2d 550 (Mo. 1955), an instruction which in effect told the jury that if it found that the collision resulted from the fact that the defendant lost control of his automobile by reason of striking the dog, or by reason of the application by the defendant of the brakes of his automobile in an effort to avoid striking the dog, then it should find for the defendant if it also found that at all times referred to in the evidence the defendant was exercising the highest degree of care in the operation of his automobile, did require the jury to find that the defendant was not negligent in creating the emergency.

In an action by automobile passenger for injuries sustained when the automobile collided with the rear end of defendant's truck, after the automobile's foot brake failed to work, an instruction directing a verdict for truck driver if the jury found either that the unexpected failure of the foot brake or failure to use the emergency brake was the sole cause of the accident was held, in *Martin v. Crabtree*, 283 S.W. 2d 573 (Mo. 1955), to constitute reversible error, where there was no evidence as to distance in which automobile could have been stopped by the use of the emergency brake, and no evidence of the distance separating the vehicles after the unexpected failure of the foot brake.

Keely v. Arkansas Motor Freight Lines, 278 S.W. 2d 765 (Mo. 1955), was an action for damages sustained by plaintiff when plaintiff's automobile, proceeding over the crest of a hill, struck oncoming defendant's tractor-trailer which had used a "no passing zone" to pass another tractor-trailer proceeding in the same direction. The evidence was held not to establish that the plaintiff was negligent

in *Gladden v. Missouri Public Service Co.*,¹⁰ which was an action for injuries sustained by the plaintiff when he climbed a tree to catch a tame parakeet and fell after his hand touched an electric wire of the defendant. Due to the risk involved, an electric company must exercise the highest degree of care to keep its electric wires in such condition as to prevent injury to others who lawfully may be in close proximity to them and may reasonably be expected. This may be done by fully insulating wires carrying such high voltage as these, or by placing the wires at a height where persons are not likely to come into contact with them. Another way is to trim the trees so that the wires will not be close to the branches. It could not be held as a matter of law, the court concluded, that there was no reasonable basis to anticipate an adult in a tree in this location; on the contrary, the court held that there was substantial evidence of failure to exercise the highest degree of care for submission to the jury. On the issue of contributory negligence, the court said if the evidence was conclusive that the plaintiff knew these wires were electric wires he would have been held to be contributorily negligent as a matter of law in getting so close to them. Here, there was evidence from which the jury could find that the plaintiff knew or should have known that these wires were, and the question of contributory negligence was properly submitted to the jury. The plaintiff had lived nearby in plain view of the line for about three years, he knew that the wires which carried electricity to his house came off of this line, and plaintiff's service and employment experience

as a matter of law because he failed to take to the shoulder of the road which was five feet wide and covered with gravel, in order to avoid the collision. The jury was instructed that if the plaintiff exercised the care of a very careful and prudent person under the same or similar circumstances with which he was confronted, and in so doing did not swerve his automobile to the right in the fear of endangering his own life and limb, he could not be found negligent for failing to swerve.

In *Floyd v. St. Louis Pub. Serv. Co.*, 280 S.W. 2d 74 (Mo. 1955), an action for the death of a 15 year old bicyclist in collision with a passing bus or parked truck or both, provisions of city ordinance regulating the parking of vehicles and requiring the operator of overtaking vehicle desiring to pass another vehicle to sound signaling device, were admissible in evidence, though plaintiff did not intend to submit the case to the jury on negligence based on violation of the ordinance. Exclusion of this evidence resulted in reversal of the judgment for the defendant obtained in the trial court and the cause was remanded for a new trial. The court held: "It is well settled that, in an action based upon common-law negligence, an injured party may prove a violation of an ordinance as tending to prove negligence on the part of the defendant or in an effort to disprove the defense of contributory negligence."

10. 277 S.W. 2d 510 (Mo. 1955).

had been such as to make it reasonable to find that he should have recognized what they were. The judgment for the defendant was affirmed.

6. Imputed Negligence

An interesting application of imputed negligence is found in the unusual fact situation in *Donahoo v. Illinois Terminal R.R.*,¹¹ an action for injuries sustained in a collision with an automobile in which plaintiff was a passenger and defendant's train. In order to provide economical transportation to and from their work and save wear and tear on their own individual automobiles, some thirty of the Shell Oil Company's employees, including plaintiff, residing in Staunton, Illinois, but employed at the company's refinery in Wood River, Illinois, had organized a non-profit corporation known as the Staunton Shift Workers. The principal asset seems to have been a Chevrolet carryall, a passenger vehicle built along the general lines of the ordinary station wagon. It accommodated the driver and six passengers and was employed exclusively as a means of transportation to and from work for the thirty men who had organized the corporation. It was in use for the full twenty-four hours of the day, one group of men going on shift would ride in it from their homes to the plant; another group coming off shift would then ride in from the plant to their homes; and so on for the three shifts each day that the plant was in operation. For meeting the expenses incurred, a monthly assessment would be made against the thirty members. There was no designated place where any one of the men would sit when riding in the vehicle, and any one who expressed a desire to drive would be permitted to do so, with the choice of route apparently left to him. One of the grounds of the defense was that the driver, at the time of the collision, was guilty of negligence which was imputable to the plaintiff, on the theory that the two were engaged in a joint enterprise in connection with the use and operation of the carryall at the time. The court held with this contention: "certainly they had a community of interest in the single venture upon which they were engaged, and they apparently shared a common right of control. The undertaking was for their mutual benefit and profit; and its fundamental character was in nowise altered or affected by the fact of their organization of a corporation whose only function, so far as the record discloses, was to hold title

11. 275 S.W. 2d 244 (Mo. 1955).

to the carryall in which they were riding on their way home from work when the accident occurred.”¹²

7. Humanitarian Negligence

The cases based upon 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*

For a *res ipsa loquitur* situation, the instrumentalities involved must be under the management and control of the defendant before injury and the surrounding circumstances may be said to point to negligence by the defendant. However, this does not mean that the management and control is limited to actual physical control, but refers to the right of control at the time the negligence was committed. Nor does it mean that the inference may not in some cases be permitted against multiple defendants in

12. An application of the rule that the principle of respondeat superior does not apply where an employee is driving a co-employee to his home, for the accommodation of the latter, even though the automobile may be owned by the employer, was made in *Beckwith v. Standard Oil Co.*, 281 S.W. 2d 852 (Mo. 1955). There the employee driving the car was employed as a salesman by Standard, his duties being to call upon Standard Oil dealers and to sell them company products. He was furnished the car in question for use in his work. He was allowed to keep it at his home overnight after making his last call. No permission was given to use it for other purposes. On the night of the accident, the company had given a dinner at a hotel in honor of an assistant manager who was being transferred to another locality. The company paid for the dinner. The employee having the company car was not ordered to attend but was told by one of his superiors that it would be a good idea for him to do so. Plaintiff was employed by the same company in the credit department and had attended the latter part of the same company function. The two employees started to leave the hotel at the same time, and the plaintiff either asked for a ride to Kingshighway or he was offered a ride to that point. As they approached this point, the driver decided to take the plaintiff to his home. Plaintiff lived 3 or 4 miles south of Kingshighway and the employee driving the company car lived about 10 miles west and then 4 or 5 miles north of Kingshighway. The collision occurred about 4 miles south of the point which the driver would have taken had he gone straight home. The court held this to be a material deviation and not merely a circuitous journey to his home. The driver testified that he intended to drive back, after taking plaintiff to his home, to the place of departure from his usual route.

13. Becker, *The Missouri Supreme Court and the Humanitarian Doctrine in the Year 1955*, 21 Mo. L. REV. 45 (1956).

concurrent control of the instrumentality involved. *Barb v. Farmers Insurance Exchange*¹⁴ was an action against the office building landlord and its tenant for injuries resulting to the plaintiff, an invitee, in the passageway outside the leased space, when boxes stored in the passageway by the tenant fell upon the plaintiff, an invitee. The lease agreement provided that the passageway "shall be under the exclusive control of the lessor, and shall not be obstructed by any of the tenants, or used by them for any other purpose than for ingress and egress to and from their respective offices or places of business." The passageway was used by the public, including the patrons and employees of the various tenants. In this action the plaintiff alleged general negligence by both lessor and lessee. The lessor contended that it did not have exclusive control or management so that the doctrine was not applicable to it. The court held that the two defendants "were in concurrent control in a legal sense and in a factual sense with incidental duties to plaintiff although their duties were of different factual bases in the circumstances surrounding the occurrence."

Where the plaintiff submits the case on the *res ipsa loquitur* theory, which permits the jury to *infer* the ultimate fact of defendant's negligence from the showing of injury and the surrounding circumstances, does an instruction, given at defendant's request, "that negligence is not in law *presumed*, but must be established by proof as explained in other instructions," deprive the plaintiff of the permissible *res ipsa loquitur* inference of defendant's negligence as submitted in plaintiff's verdict-finding instruction based on the doctrine? (our italics) This was contended by the plaintiff in *Stephens v. St. Louis Public Service Co.*¹⁵ An additional paragraph in the same instruction was as follows: "Neither are you permitted to base a verdict entirely and exclusively upon mere surmise, guess work and speculation; and if upon the whole evidence in the case, fairly considered, you are not able to make a finding that defendant was liable without resorting to surmise, guess work and speculation *outside of and beyond the scope of the evidence*, and the reasonable inference deductible therefrom, then it is your duty to, and you must, return a verdict for defendant." (italics the court's) The court held that there was no prejudicial error, on the ground that the meaning of an instruction must be determined

14. 281 S.W. 2d 297 (Mo. 1955), noted more fully in 21 Mo. L. Rev. 195 (1956).

15. 276 S.W. 2d 138 (Mo. 1955).

by its entirety and not by considering only isolated words and phrases, and that instructions must be read and construed together. However, the opinion expressly states that the court does not commend the use of this instruction in any case which is based, in whole or in part, upon circumstantial evidence. Query, does not an instruction such as the one given go a long way to deprive a plaintiff of the benefit of his *res ipsa loquitur* case based on general negligence, where specific negligence cannot be pleaded or proved without losing or abandoning the doctrine on which his case is predicated.¹⁶

C. Defenses in Negligence Cases

*Grace v. Smith*¹⁷ was a death action arising out of a collision between defendant's train and an automobile in which the decedent was riding. The railroad, its engineer and fireman was named as defendants. The case was submitted on the theory that the railroad was liable for the negligent operation of its train by its employees at an excessive rate of speed, under

16. Other cases involving application of the *res ipsa loquitur* doctrine may be noted. A petition alleging that the defendant negligently caused, suffered, and permitted bus to run upon sidewalk and strike iron pole was held, in *Rodefeld v. St. Louis Public Service Co.*, 175 S.W. 2d 256 (Mo. 1955), not a charge of specific negligence, but rather of general negligence for the application of *res ipsa loquitur*. The same conclusion in *Burr v. Kansas City Pub. Serv. Co.*, 276 S.W. 2d 120 (Mo. 1955) (*en banc*), where plaintiff submitted her case under the *res ipsa loquitur* doctrine for damages for personal injuries sustained when a passenger on defendant's bus which collided head-on with an automobile. Her testimony that the bus was operated "right in the middle of the street" did not show specific negligence in failing to operate the bus as near the righthand side of the street as practicable, absent a showing that the condition of the street to the right of the bus was not occupied and was in such condition that it was in fact practicable to have operated the bus further to the right.

In the employer-employee cases the doctrine of *res ipsa loquitur* is confined within narrower limits than when the relation of carrier and passenger is involved, since the facts must reasonably exclude all defensive inferences attributable to the negligence of a fellow employee and the assumption of the usual hazards of the employment. In *Frazier v. Ford Motor Co.*, 276 S.W. 2d 95 (Mo. 1955) (*en banc*), an action for injuries received by plaintiff, an employee of the defendant, when the conveyor belt on which was suspended an automobile body in which plaintiff was working, suddenly jerked causing plaintiff to be thrown against automobile body. There was no evidence to give rise to a more reasonable inference that plaintiff's injuries were the result of negligence chargeable to the defendant than to negligence for which the defendant was not legally liable, for instance some act of a coemployee of plaintiff under their common foreman causing the movement of the conveyor to be momentarily stopped. Since the conveyor started up again and continued to work until quitting time, there is no inference that it had stopped because of some defect therein.

17. 277 S.W. 2d 503 (Mo. 1955) (*en banc*).

the doctrine of *respondeat superior*, combined and concurring with its independent negligence in maintaining its signalling device in a defective condition. The wigwag signalling device failed to display its customarily swinging red light when trains approached the crossing, and the evidence was sufficient to warrant the jury in finding that, in the exercise of ordinary care, the railroad should have known of the defective condition of the signalling device. The jury had found in favor of the engineer and fireman but against the railroad company. This judgment was affirmed on the ground that although the engineer and fireman were negligent in operating the train at excessive speed, they were not chargeable with any negligence attributable to the maintenance of the signalling device and, therefore, not liable because the deceased would have been guilty of contributory negligence as to them, but for the assurance given her by the nonfunctioning light on the wigwag that the car in which she was riding could enter upon the crossing in safety; but that the railroad was liable on the ground that its negligence in maintaining the defective device relieved the decedent of contributory negligence, thus answering the railroad's contention that it could not be held liable for a tort committed by its agent when the agent is exonerated of the tort.

The rescue doctrine frees the rescuer from the charge of contributory negligence, where his conduct would otherwise prevent his recovery from a negligent defendant. It is based on the policy of the law which regards human life to such an extent that it will not impute negligence to the rescuer provided his attempt is not made under circumstances constituting recklessness. The usual type of fact situation is where the rescuer is injured while trying to rescue a third person who is in need of rescue as a result of the negligence of the defendant. Another type is where the person injured is attempting to rescue the defendant himself after the latter has negligently placed himself in a position necessitating rescue. The case of *Hammonds v. Haven*¹⁸ involved a type of rescue of a third class. There the plaintiff, while driving home on a dark night, encountered a tree which had blown down upon the highway. Knowing that the defendant would be passing along the same road soon, plaintiff decided to warn approaching motorists of the dangerous condition. Noticing the lights of a car approaching, he attempted to warn the driver by waving his arms while

18. 280 S.W. 2d 814 (Mo. 1955), noted more fully in 21 Mo. L. REV. 193 (1956).

standing in the center of the road. The defendant was the driver of this car and did not see the plaintiff in time to stop, the car striking the plaintiff. It was contended by the defendant, on appeal from a judgment in favor of the plaintiff, that the rescue doctrine was not applicable because the defendant was not responsible for the dangerous situation, but the court extended the doctrine to the situation where the defendant was negligent toward the rescuer after the attempt at rescue was begun. In this case, after the plaintiff had stationed himself on the roadway to warn oncoming travelers, the defendant negligently operated his car with relation to the plaintiff, the rescuer. Therefore, it was held that the plaintiff was not contributorily negligent as a matter of law even though he stood in the center of the highway to warn others, whom he expected to be traveling that way, of the danger ahead, and the trial court's submission of the question to the jury was affirmed.¹⁹

19. Other cases may be noted in which defenses to actions based on defendant's negligent conduct may be noted. *Rhyne v. Thompson*, 284 S.W. 2d 553 (Mo. 1955), was a wrongful death action resulting from decedent being struck and killed by one of defendant's railway cars during a switching movement. It was held where elderly, hard-of-hearing woman had lived in house located in area of defendant's switchyard for two years, crossed yard several times daily, knew or should have known that certain track was used by defendant's switching crew daily, and that crew was at that time engaged in switching operations in the area, and decedent was struck from behind and killed by railroad car while walking down track away from the switching area, that decedent was contributorily negligent as a matter of law, under Illinois law.

Where a railroad company provides a watchman at a crossing, and thus gives other warnings of danger that a train is about to pass, the absence of such warnings may lead a traveler to believe that he can safely proceed or that there will be time to cross before a train will pass. The fact that a watchman is provided will not justify the traveler in closing his eyes and ears when passing over railroad tracks, but it is a circumstance to be weighed by the jury in determining whether at the time he was using the care that a reasonable and prudent man would and should use. *Day v. Union Pacific R.R.*, 276 S.W. 2d 212 (Mo. 1955) (applying Kansas law and holding that plaintiff was not contributorily negligent as a matter of law).

Whether the plaintiff as a guest in an automobile, in the exercise of ordinary care under the facts and circumstances, should have seen the dangerous situation and have warned the driver was fully considered in *Ketcham v. Thomas*, 283 S.W. 2d 642 (Mo. 1955). In the absence of visible lack of caution by the driver or known imminence of danger, the guest may ordinarily rely upon the driver. The fact that the guest might reasonably be inferred to have known that the driver took a drink at a social function preceding the trip and that he was traveling somewhat in excess of the speed limit were not such evidence of visible lack of caution on his part as would give rise to duty on part of guest to maintain lookout.

D. *Burden of Proof*

Although the court for some time has criticized the use of the word "satisfaction" in a burden of proof instruction as being "subject to construction, meaning, and requirement of proof 'beyond a reasonable doubt'", it is still used. Where the word "reasonable" qualified the meaning of "satisfaction", the phrase "reasonable satisfaction" has not been held to be prejudicially erroneous. In *Barker v. Crown Drug Co.*,²⁰ the court pointed out that "up to the present the court has not seen fit or has not been impelled by the circumstances of the particular case to reverse a judgment, in favor of either a plaintiff or a defendant, solely because of the use of the word 'satisfaction' or some equivalent of the word in a burden of proof instruction. It was repeatedly said that if a trial court considered an instruction employing the word prejudicially erroneous and granted a new trial for that reason that the trial court's action would be sustained, and when the event came to pass the trial court's action was approved." (citing case) In the instant case the phrase "to your complete satisfaction" was used. The court recognized that the phrase was subject to the construction of "compelling proof and belief even 'beyond a reasonable doubt', a burden which neither a plaintiff or defendant need sustain in an ordinary civil action for damages." In this case, the plaintiff's submission was on the *res ipsa loquitur* theory. The jury was "peculiarly dependent upon their understanding of the burden of proof and the precise drawing of inferences." Therefore, the objection to the phrase "complete satisfaction" was held to be "an objection of substance materially affecting the merits of the case and the right to a fair trial and a further, more compelling reason demanding the granting of a new trial."

II. LIBEL

In determining the sufficiency of a petition which sets forth a claim for damages for libel, the question for the court is whether the communication set forth, together with matters of inducement and innuendo which may be stated therein, is capable of a defamatory meaning. In *Coots v. Payton*,²¹ an action against newspaper publishers and editors for libel, the

20. 284 S.W. 2d 559 (Mo. 1955).

21. 280 S.W. 2d 47 (Mo. 1955) (*en banc*).

question on the appeal from the trial court was whether counts in the amended petition stated claims upon which relief may be granted. The trial court had dismissed the action. To publish an article in which plaintiff was called the town's "infamous ex-marshall" was held to state a cause of action in libel; and to state that the city council should put him "in a cage and charge admission to tourists" was also held capable of defamatory meaning, as reasonably being construed that the plaintiff was mentally deficient or otherwise devoid of normal human characteristics as to require restraint. These written communications were held by the court *en banc* capable of harming the reputation, character, and integrity of the plaintiff as to lower him in the estimation of the community, and tended to expose him to public hatred, contempt, and ridicule, so as to deprive him of the benefits of public confidence and social intercourse.²²

III. ABUSE OF LEGAL PROCESS

There is a good treatment of a little used tort, known as abuse of legal process, in *Moffett v. Commerce Trust Co.*,²³ and a comparison of the nature and essentials of that tort with the tort of malicious prosecution. The two torts are often confused as they were by the plaintiff in the instant case, but are quite different in the nature of the interest which is protected by each one. A study of the facts in that case is necessary to understand this difference. An attempt to summarize them here would be of little value.

22. Another count in the petition was held not capable of defamatory meaning: "Personally I'd still like to put in a plug for having a city marshall who looks like a law enforcement officer. Put him in something that looks like a uniform even if its just matching khaki shirt and pants. Insist that his badge and belts and weapons be worn out in the open. Nobody likes to be ticketed by a guy who looks like anybody else loafing on the curb, and who reaches way down deep in his longies under his unbuttoned overalls to drag out his horse pistol or black jack." While these words might subject the plaintiff to jests and banter, affecting his personal feelings, the court held that, reasonably construed, they did not affect his reputation or character or his integrity as to tend to expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse.

23. 283 S.W. 2d 591 (Mo. 1955).

The New General Code for Civil Procedure and Supreme Court Rules Interpreted¹

CARL C. WHEATON²

PARTIES

a. *In Whose Name Action May Be Prosecuted*

Where the legal title to a decedent's corporate stock was in the decedent's administrator, the decedent's heir was not a "shareholder" within the statute providing for liquidation upon a shareholder's suit, and the heir could not maintain an action for the dissolution, liquidation, and distribution of the proceeds of the corporation.³

Where a landlord breaches his covenant to repair, the tenant alone has a cause of action for damages for a breach of contract.⁴

b. *Interpleader*

Section 507.060 of the Missouri Revised Statutes of 1949 was intended to and did extend the remedy of interpleader, as heretofore recognized by the decisions of the courts of this state in actions referred to as equitable interpleader or in the nature of interpleader, to include another form of personal property referred to in the statute as "claims." And in this connection, it is expressly provided by said section as follows: ". . . It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. . . ."⁴

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1. These interpretations are based on Volumes 279 through 289 of Southwestern Reporter, second series.

2. *Haley v. Horjul, Inc.*, 281 S.W. 2d 832 (Mo. 1955).

3. *Houfburg v. Kansas City Stock Yards Co. of Maine*, 283 S.W. 2d 539 (Mo. 1955).

4. *Plaza Express Company v. Galloway*, 280 S.W. 2d 17 (Mo. 1955).

“Double liability” under this statute means “exposed to double recovery for a single liability.”⁵

This statute eliminates the necessity that the same thing, debt, or duty be claimed by each of the parties against whom relief is sought. This is so, because the section provides that the claims need not be identical. So, also, it is not necessary that the claims of the parties be dependent or derived from a common source because the section specifically provides that the claims may be independent of one another and that they need not have a common origin. And it is not necessary that a plaintiff, in order to use the machinery of the section, have no claim or interest in the subject matter or that he stand perfectly indifferently between the claimants in the position of a stakeholder. This, because the section provides that one seeking relief may deny liability to any or all of the claimants.⁶

Further, one is not precluded from the right to a bill in the nature of interpleader simply because one of the defendants is demanding more than the plaintiff has paid into court, for, if the converse were true, the right to interplead could always be defeated by a defendant demanding more than the plaintiff had tendered and the right of equity to inquire would be left in the hands of the pleader rather than in the court.⁷

c. *Class Actions*

A taxpayer has the right and legal capacity to bring and maintain an action for himself, and on behalf of all others similarly situated, to enjoin the alleged illegal expenditure of public funds. In such a case, proof of the expenditure of such public funds for illegal purposes and under void contracts is sufficient to show a private pecuniary injury, because of the taxpayer's equitable ownership of such funds and his liability to replenish any deficiency resulting from the misappropriation.⁸

Where, in an action by a nonprofit country club, which was a pro forma decree corporation, to enjoin the defendants from picketing the club entrance, the club did not adduce evidence that the individual defendants were fairly chosen and adequately and fairly represented the

5. *Ibid.*

6. *Ibid.*

7. *American Life & Accident Insurance Co. v. Morris*, 281 S.W. 2d 601 (Mo. App. 1955).

8. *Everett v. County of Clinton*, 282 S.W. 2d 30 (Mo. 1955).

whole class, an injunction would be directed against the individual defendants in their alleged and admitted representative capacities but not specifically against the classes alleged to have been represented by the individual defendants.⁹

d. *Third-Party Practice*

The statutory provision for bringing in a third party is Section 507.080 of our Revised Statutes. This is part of the Civil Code of Missouri, but by the express provision of Section 506.010 it applies only to the supreme court, courts of appeals, circuit courts and common pleas courts. There is no statutory authority for such procedure in the magistrate courts and a magistrate is without jurisdiction to pass upon the right of a third party. Further, if an appeal is taken from a magistrate judgment in a case involving a third party, the circuit court can not pass on the third party's rights, since, on an appeal from the magistrate court, the circuit court's jurisdiction of the cause is not original but derivative and cannot therefore exceed that possessed by the magistrate.¹⁰

e. *Intervention*

Our intervention statute provides a remedy whereby a person not joined may become a party so as to enable him to protect his rights in the existing subject matter of a pending action.¹¹

Subsections 1 (2) and (3) of section 507.090 of our Revised Statutes provide that anyone shall be permitted to intervene upon timely application "(2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) When the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof." These grounds are mandatory and if intervenors have brought themselves within one or both of the categories specified the intervention is proper; otherwise, it is not.¹²

9. *Bellerive Country Club v. McVey*, 284 S.W. 2d 492 (Mo. 1955).

10. *American Life & Accident Insurance Co. v. Morris*, *supra* note 7.

11. *Pine Lawn Bank & Trust Company v. City of Pine Lawn*, 285 S.W. 2d 679 (Mo. 1956).

12. *Ibid.*

Not every "interest" will furnish legal grounds of intervention. As used in the above quoted portion of Section 507.090, "interest" means a direct and immediate claim to, and having its origin in, the demand made or proceeds sought or prayed for 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 will either gain or lose by the *direct operation* of the judgment that may be rendered therein.¹³

While the intervention statute should be liberally construed in favor of the applicant, it must be substantially followed.¹⁴

The language of our statute discloses no purpose or intent to permit the issues between the original parties to be changed or to permit the intervenors to inject new issues foreign to the original action.¹⁵

Thus, where a bank brought an action against a city for a declaratory judgment to adjudicate the rights and the liability of the bank and a city as to the city's bank deposit deficiency, caused by the unlawful acts of the city clerk, the city clerk's petition for intervention, which in effect purported to set up a cause of action against the bank to annul and cancel a note and deed of trust given by the city clerk and his wife to satisfy any deficiency in the city's account, injected an independent action and issue in the case and it was held to be error to permit the intervention.¹⁶

PLEADINGS

a. *Stating a Cause of Action*

The form of an action is determined by the substance of the pleading in which the cause of action is alleged.¹⁷

The prayer of a petition is not a part of the cause of action.¹⁸

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. *Ibid.*

17. *Young v. Hall*, 280 S.W. 2d 679 (Mo. App. 1955).

18. *Hartley v. Williams*, 287 S.W. 2d 129 (Mo. App. 1956).

b. Defenses

1. Denials

During the year it has been held that a defendant under a general denial was entitled to show that he was not negligent and that the injury of the plaintiff was caused solely through the negligence of another.¹⁹ However, one should never forget that a general denial is not permitted, unless one honestly denies every allegation of the pleading so denied.

2. Affirmative defenses

It has recently been held that lack of jurisdiction,²⁰ contributory negligence,²¹ payment,²² and *res judicata*²³ are affirmative defenses. It has also been decided that, in an action for false imprisonment, the fact that the defendant has acted as a duly qualified and acting county sheriff under an order to arrest the plaintiff and to commit him to jail, which order was made by a court having jurisdiction to do so, was a defense of avoidance and must be pleaded affirmatively.²⁴

Again, where a licensor authorized a licensee to sell the licensor's bottled drink, in an action by the former against the latter on a note given for the price of syrup sold to the licensee, a defense that part of the price paid for the syrup was to be held by the licensor in a trust fund to be used for advertising; that it had not been so used; wherefore the defendant had legal title to the unused money and could have it credited on the note, was an affirmative defense, since it rested on facts not necessary to the support of the plaintiff's claim, and, not having been pleaded affirmatively, could not be taken advantage of.²⁵

It is interesting to notice that, in an action to set aside a quitclaim deed on the ground that it was forged, it appeared in the evidence that

19. *Clemons v. Becker*, 283 S.W. 2d 449 (Mo. 1955).

20. *McDougal v. McDougal*, 279 S.W. 2d 731 (Mo. App. 1955).

21. *Seiler v. W. H. Powell Lumber Company*, 283 S.W. 2d 929 (Mo. App. 1955).

22. *Machtinger v. Grenzbach*, 282 S.W. 2d 200 (Mo. App. 1955).

23. *McDougal v. McDougal*, *supra* note 20; *Snyder v. Jensen*, 281 S.W. 2d 819 (Mo. 1955).

24. *Pogue v. Smallen*, 285 S.W. 2d 915 (Mo. 1956).

25. *Grapette Company v. Grapette Bottling Company*, 286 S.W. 2d 34 (Mo. App. 1956).

the quitclaim deed was made by the plaintiff, but that it was void because of blanks in it. Evidence was introduced by the defendant which, if true, would estop the plaintiff from denying the validity of the deed, though estoppel was not pleaded. It was ruled that, though estoppel was an affirmative defense, which had not been pleaded, the evidence was admissible, for the pleading of the plaintiff of forgery did not present an opportunity to plead estoppel, since it did not admit the execution of the deed.²⁶

3. Joinder of Defenses

A defendant may plead as many defenses as he has so long as they are not inconsistent, and the test of inconsistency is whether proof of one defense necessarily disproves the other.²⁷

In an action for specific performance of an agreement of the defendants to sell property to the plaintiff or, alternatively, for recovery of a payment made on the purchase price, a plea that the payment was to be applied to the rentals was not necessarily inconsistent with a general denial which was also pleaded, but it was said that, even if it were, the specific plea would overcome the general denial, as a general denial does not raise an issue, if it is followed by a special plea of confession and avoidance.²⁸ To the writer this appears to be a weird conclusion.

3. Averments of Legal Capacity

An answer in the nature of a general denial raises no issue as to a plaintiff's legal capacity to sue.²⁹

c. *Counterclaims*

Where a defendant failed to offer any instruction submitting his counterclaim in an automobile accident case and offered no evidence in support of his claims for personal injury and property damage, the defendant was deemed to have abandoned the affirmative claim presented.³⁰

26. *Rubinstein v. Rubinstein*, 283 S.W. 2d 603 (Mo. 1955).

27. *Payne v. White*, 288 S.W. 2d 6 (Mo. App. 1956).

28. *Ibid.*

29. *Darr v. Darr*, 287 S.W. 2d 118 (Mo. App. 1956).

30. *Palmer v. Lasswell*, 279 S.W. 2d 535 (Mo. App. 1955).

d. *Cross-claims*

Section 509.460 of our Revised Statutes relating to cross-claims is designed to accommodate and facilitate the whole litigation among the parties growing out of the transaction or occurrence giving rise to the original action, including a claim that the party against whom a cross-claim is asserted "is or *may be* liable" to the cross-claimant for all or a part of a claim asserted in the same action against the cross-claimant.³¹

The word "transaction" in this statute is of broad meaning. It has been defined as including the aggregate of all the circumstances which constitute the foundation for a claim.³²

It is not fatal to the assertion of a cross-claim against a codefendant that it was a contingent or unmatured demand.³³

Hence, where a lease contained a provision that the tenant could not keep anything in a passageway, outside of the leased premises which would in any way interfere with or injure other tenants, and where another tenant's employee was injured when boxes stored in the passageway by the first tenant fell upon her, and the employee maintained an action for her injuries against both the landlord and the tenant, the landlord could properly cross-claim against the tenant for indemnity, as his claim arose out of the transaction or occurrence out of which the plaintiff's cause arose.³⁴

Also, where two drivers of automobiles were sued by the passenger of one of them for injuries alleged to have been caused by their joint negligence, one of them may cross-claim against the other for a claim arising out of the collision which is the basis of the plaintiff's action against them.³⁵

e. *Amendments*

A statute or rule providing for the amendment of a pleading as of course permits such amendment as a matter of right, and confers a procedural right which may not be denied.³⁶

31. *Barb v. Farmers Insurance Exchange*, 281 S.W. 2d 297 (Mo. 1955).

32. *Ibid.*

33. *Ibid.*

34. *Ibid.*

35. *Snyder v. Jensen*, *supra* note 23.

36. *Savings Finance Corporation v. Blair*, 280 S.W. 2d 675 (Mo. App. 1955).

A defendant's motion to make the petition more definite and certain was not a "responsive pleading" within the statute providing that a party may amend his pleading as a matter of course at any time before a responsive pleading is filed and served.³⁷

Hence, though a case was pending on a defendant's motion to make more definite and certain, the plaintiff's amended petition properly was filed without leave of the court and without the defendant's consent.³⁸

First, it appears in a recent case, that the defendant complained that he had not received any copy of the original petition with which to supply the file, which the defendant claimed the court had ordered the plaintiff to send to him when the plaintiff asked the court permission to replace a lost or misplaced original with a copy. It was held that, where the plaintiff's amended petition was filed as a matter of right, the original petition became an abandoned pleading, and whether or not the court file had been supplied with a copy of the plaintiff's original petition, as permitted by the court when the plaintiff said the original had been misplaced or lost, became wholly immaterial as the amended petition replaced the original thereof.³⁹

A court may, during a trial, permit a petition to be amended to plead injuries in addition to those originally pleaded.⁴⁰

Where evidence of an unplead, though relevant, fact has been admitted without objection, the pleading in which it would properly be pleaded is considered as amended to include it.⁴¹

MOTIONS

a. Motions to Dismiss Petition

The objections specifically authorized to be raised by motion in Section 509.290 of the Revised Statutes are not directed at the merits of the alleged claim of the pleader. They raise only questions which challenge the pleader's right to proceed in the manner proposed because of his in-

37. *Ibid.*

38. *Ibid.*

39. *Ibid.*

40. Creech v. Riss & Company, 285 S.W. 2d 554 (Mo. 1956).

41. Dickerson v. Terminal Railroad Association of St. Louis, 284 S.W. 2d 568 (Mo. 1955); Jackson v. Ricketts, 288 S.W. 2d 10 (Mo. App. 1956).

capacity to sue, because of jurisdiction or venue reasons, or because of procedural irregularities.⁴²

This section is authority for the use of a motion to dismiss for the purpose of objecting to the plaintiff's legal capacity to sue whether or not the objection appears from the pleadings and other papers filed in the cause. When the matter raised by motion to dismiss is not apparent from the petition, the motion performs the office of a "speaking demurrer."⁴³

An objection predicated on the plaintiff's want of legal capacity to sue, which does not go to the court's jurisdiction to try the case, but raises only a question of procedure, is waived by a failure to assert it by a motion within the time allowed the defendant for responding to the plaintiff's pleading or, if no responsive pleading is permitted, within twenty days after service of the last pleading.⁴⁴

Under Section 510.150 of our Revised Statutes, a dismissal *without notice and opportunity to be heard* is without prejudice, irrespective of whether the judgment of dismissal so shows.⁴⁵

However, any failure to give a notice of the time for a hearing on a defendant's motion to dismiss a petition is waived by the movant's joining in the later proceedings and arguing and submitting such motion and others to the court.⁴⁶

Further, a dismissal is with prejudice where the requirements of due process have been satisfied by reasonable notice and an opportunity to be heard and the court has not specified that the dismissal is without prejudice.⁴⁷

A plaintiff's statutory right to dismiss a cause of action without prejudice is not an absolute right.⁴⁸

But the fact that a plaintiff might bring another action against the defendant is not such an injury as would justify denying the plaintiff's

42. Pogue v. Smallen, *supra* note 24.

43. McLaughlin v. Neiger, 286 S.W. 2d 380 (Mo. App. 1956); Darr v. Darr, *supra* note 29.

44. Darr v. Darr, *supra* note 29.

45. State *ex rel.* Wells v. Mayfield, 281 S.W. 2d 9 (Mo. 1955); Levee District No. 4 of Dunklin County v. Small, 281 S.W. 2d 614 (Mo. App. 1955).

46. Moffett v. Commerce Trust Company, 283 S.W. 2d 591 (Mo. 1955).

47. Levee District No. 4 of Dunklin County v. Small, *supra* note 45.

48. Smith v. Taylor, 289 S.W. 2d 134 (Mo. App. 1956).

request to take a voluntary dismissal without prejudice, as the defendant must show that some undue advantage will be given the plaintiff by such a dismissal, or that, under the circumstances, the defendant will lose some right of defense, before the injury will justify refusing such a request.⁴⁹

Admissions made by a defendant by filing a motion to dismiss a petition in one action can not be considered as admitting all of the facts alleged in that petition for the purpose of determining that the petitioner was entitled to a judgment on the merits in another separate and different action brought by said petitioner. The motion only admitted the facts in the petition attacked for the purpose of the hearing on that motion.⁵⁰

A motion that the court enter a judgment in favor of the defendants, and that it dismiss the plaintiff's petition for the reason that, under the law and the evidence in the case, the plaintiff is not entitled to any of the relief prayed for in the petition, is a motion which finally submits the case and is not a motion under section 510.140 of the Revised Statutes to obtain a dismissal, as the first part of the motion requests the court to enter a judgment in the case.⁵¹

b. *Motions for Directed Verdict*

It is error to direct a verdict for parties having the burden of proof, even though defendant has introduced no evidence whatever, except where the defendant has admitted the plaintiff's cause of action or by his evidence has established the plaintiff's claim.⁵²

It has also been stated, in an action to recover judgment for a commission, that, where there was neither any pleading nor proof of fraud, or of harm to the defendant by the non-disclosure by his broker, the plaintiff, of the buyer's name, the court improperly directed a verdict for the defendant upon a mere showing that the plaintiff was the agent for the buyer and that he did not inform the defendant thereof.⁵³

A defendant's motion for a directed verdict at the close of the plaintiff's case is waived by the defendant's proceeding to offer evidence.⁵⁴

49. *Ibid.*

50. *Moffett v. Commerce Trust Company*, *supra* note 46.

51. *Preisler v. Doherty*, 284 S.W. 2d 427 (Mo. 1955).

52. *Holtzman v. Holtzman*, 278 S.W. 2d 1 (Mo. App. 1955).

53. *Francis v. Saleeby*, 282 S.W. 2d 167 (Mo. App. 1955).

54. *Felker v. Metropolitan Life Insurance Company*, 288 S.W. 2d 26 (Mo. App. 1956).

INTERROGATORIES

In an action by the owners of a building against the tenants and subtenants therein to recover for fire damage to the building, on the ground that the tenants and subtenants were negligent, the tenants and subtenants were entitled to have answered their interrogatories inquiring of one of the owners with respect to insurance.⁵⁵

But statements made in answer to interrogatories do not take the place of testimony.⁵⁶

Upon oral or written interrogatories being properly propounded to discover relevant and material facts peculiarly and exclusively within the knowledge of a party, his refusal to answer justifies striking his pleadings. This rule applies without exception to all parties seeking relief in the courts.⁵⁷

CONTINUANCES

A litigant is entitled to be present at his own trial, particularly so if his presence is necessary to a proper presentation of his cause or his presence is necessary as a witness. And the court, for good cause shown, may, in its discretion, grant a continuance because of the absence of a party, especially if the absence is due to illness.⁵⁸

But the granting of a continuance rests largely in the discretion of the trial court.⁵⁹

Where the ground for continuance was the sickness of the client, the illness was not unexpected, and the attorney had notice that the case had been set for trial for some time and was aware of his client's age, and where the attorney made no showing that the client's presence was essential or indispensable to a proper defense of the action or did not claim that the client's presence was necessary as a witness, and where, further, the counsel, with knowledge of his client's condition, made no effort to procure a deposition from him, a denial of a motion for a continuance by the trial court was not an abuse of its discretion.⁶⁰

55. *State ex rel. Hotel Philips v. Lucas*, 284 S.W. 2d 452 (Mo. 1955).

56. *In re Oberman's Estate*, 281 S.W. 2d 549 (Mo. App. 1955).

57. *Franklin v. Franklin*, 283 S.W. 2d 483 (Mo. 1955).

58. *Albi v. Reed*, 281 S.W. 2d 882 (Mo. 1955).

59. *Savings Finance Corporation v. Blair*, *supra* note 36.

60. *Albi v. Reed*, *supra* note 58.

The fact that the defendant's counsel was engaged elsewhere at the time a case was called for trial, in and of itself, does not compel a continuance.⁶¹

Where a request for a continuance, made by an attorney speaking for the defendant's counsel, was presented orally without the plaintiff's consent, such a request was not an application for a continuance within the statute, since an oral motion for a continuance may, under section 510.090 of the Revised Statutes, be made only with the consent of the adverse party.⁶²

Under section 510.120 of our Revised Statutes authorizing a continuance when it appears to the court, by affidavit, that the party's attorney is a member of the General Assembly and is in actual attendance on a session of same, it is necessary that the affidavit be presented to the court; but even if it be assumed that it was only necessary to file the affidavit with a notary in order to procure a continuance as to the taking of a deposition, an affidavit not filed until the taking of the deposition was half completed was not timely filed.⁶³

SEPARATE TRIALS

Trial courts are authorized to order separate trials of any claim, cross-claim, counterclaim, third-party claim, or of any separate issue.⁶⁴

CONTROL OVER JUDGMENT

A notice of appeal from a judgment quashing a writ of garnishment, prematurely filed three days after the entry of the judgment, did not deprive the trial court of jurisdiction to reopen and amend the judgment within thirty days after the entry thereof by including as a part of the judgment an allowance to the garnishee for an attorney fee to be taxed as costs.⁶⁵

61. *Savings Finance Corporation v. Blair*, *supra* note 36.

62. *Ibid.*

63. *Acy v. Inland Security Company*, 287 S.W. 2d 347 (Mo. App. 1956).

64. *Hahn v. Hahn*, 287 S.W. 2d 337 (Mo. App. 1956).

65. *Flynn v. First National Safe Deposit Company*, 284 S.W. 2d 593 (Mo. 1955).

CASES TRIED WITHOUT A JURY

a. *Statement of Grounds of Decision and Findings of Fact*

Section 510.310(2) of the Revised Statutes providing for requests for the trial court's statement of the grounds and findings of fact on which it bases its opinion does not prohibit the trial court from voluntarily making such statements.⁶⁶

Under this statute, failure to make the request for findings of fact before the final submission of the case to the court is fatal. Unless the case is left open for some further act of the parties, the submission is final when the evidence and arguments are finished or waived and the court, as trier of the fact, has taken the case for decision; and this is true when he takes the case under advisement preliminary to rendering his decision.⁶⁷

b. *Presumptions as to Findings of Fact*

That portion of this statute which provides that all fact issues upon which no specific findings are made shall be deemed to have been found in accordance with the result invokes the doctrine of *res judicata*. But courts in other cases are bound only as to the fact issues necessarily determined in reaching the judgment.⁶⁸

c. *Duties of Appellate Courts*

In cases tried without a jury, whether at law or in equity an appellate court determines the cause *de novo*, weighing the competent evidence introduced upon the factual issues; and, although the appellate court will usually defer to the findings of the trial chancellor where there is conflicting oral testimony involving a judging of the credibility of witnesses who appeared before him, the appellate court cannot forego its duty of weighing the competent evidence and reaching its own conclusions.⁶⁹

66. *Abeles v. Wurdack*, 285 S.W. 2d 544 (Mo. 1956).

67. *Payne v. White*, *supra* note 27.

68. *Abeles v. Wurdack*, *supra* note 66.

69. See the following decisions, from among many deciding these points this year: *Hussey v. Robison*, 285 S.W. 2d 603 (Mo. 1956); *Meyer v. Meyer*, 285 S.W. 2d 694 (Mo. 1956); *Wyler Watch Agency v. Hooker*, 280 S.W. 2d 849 (Mo. App. 1955). It has also been said that an appellate court, in a case tried without a jury, should render the judgment which the trial court should have rendered. *Miller v. Coffeen*, 280 S.W. 2d 100 (Mo. 1955); *Anison v. Rice*, 282 S.W. 2d 497 (Mo. 1955); *Spivack v. Spivack*, 283 S.W. 2d 137 (Mo. App. 1955).

But notice that where most of the evidence in an equitable action was either documentary or in the form of depositions, the rule that the supreme court will ordinarily give some deference to the trial court's findings, because of its more favorable opportunity to determine questions of credibility, was not applied to the evidence which was either documentary or in the form of depositions.⁷⁰

These general rules as to the duties of appellate courts upon appeals to them of cases not tried by juries have been applied, during the last year, to actions to recover money judgments for the breach of contracts,⁷¹ and to recover overtime compensation under the federal Fair Labor Standards Act,⁷² as well as to interpleader,⁷³ injunction,⁷⁴ divorce,⁷⁵ separate maintenance,⁷⁶ child custody,⁷⁷ and declaratory judgment proceedings,⁷⁸ and to suits for specific performance,⁷⁹ to enforce an oral contract for adoption,⁸⁰ to establish a resulting trust,⁸¹ to cancel deeds,⁸² and to quiet titles.⁸³

Where an action is tried by a trial court without a jury, rejected testimony, if it is in the record and admissible, will be considered by the ap-

70. *Lukas v. Hays*, 283 S.W. 2d 561 (Mo. 1955).

71. *Staples v. O'Reilly*, 288 S.W. 2d 670 (Mo. App. 1956); *Minor v. Lillard*, 289 S.W. 2d 1 (Mo. 1956).

72. *Emery v. Brown Shoe Company*, 287 S.W. 2d 761 (Mo. 1956).

73. *Postal Life and Casualty Insurance Co. v. Tillman*, 287 S.W. 2d 121 (Mo. App. 1956).

74. *Winslow v. Sauerwein*, 285 S.W. 2d 21 (Mo. App. 1955); *Moley v. Blake-man*, 287 S.W. 2d 111 (Mo. App. 1956).

75. *Simmons v. Simmons*, 280 S.W. 2d 877 (Mo. App. 1955); *Campbell v. Campbell*, 281 S.W. 2d 314 (Mo. App. 1955); *Eikermann v. Eikermann*, 283 S.W. 2d 391 (Mo. App. 1955); *Ames v. Ames*, 284 S.W. 2d 888 (Mo. App. 1955); *Shilkett v. Shilkett*, 285 S.W. 2d 67 (Mo. App. 1955); *Thomas v. Thomas*, 288 S.W. 2d 689 (Mo. App. 1956).

76. *Woodman v. Woodman*, 281 S.W. 2d 555 (Mo. App. 1955).

77. *Long v. Long*, 280 S.W. 2d 690 (Mo. App. 1955); *Hurley v. Hurley*, 284 S.W. 2d 72 (Mo. App. 1955).

78. *Preisler v. Doherty*, *supra* note 51; *Holland Furnace Co. v. City of Chaffee*, 279 S.W. 2d 63 (Mo. App. 1955); *Montgomery v. Getty*, 284 S.W. 2d 313 (Mo. App. 1955).

79. *Shackelford v. Edwards*, 278 S.W. 2d 775 (Mo. 1955); *Schertz v. Blocher*, 288 S.W. 2d 385 (Mo. App. 1956).

80. *Lukas v. Hays*, *supra* note 70.

81. *Meyer v. Meyer*, *supra* note 69.

82. *Kenner v. Aubuchon*, 280 S.W. 2d 820 (Mo. 1955); *Walton v. Van Camp*, 283 S.W. 2d 493 (Mo. 1955); *Lape v. Oberman*, 284 S.W. 2d 538 (Mo. 1955).

83. *Erickson v. Greub*, 287 S.W. 2d 873 (Mo. 1956).

pellate court on appeal, and any incompetent testimony admitted or considered by the trial court will be disregarded by the appellate court.⁸⁴

NEW TRIALS

a. *Grounds for*

The amount of a verdict alone in a personal injury action does not generally in and of itself show prejudice authorizing a new trial.⁸⁵

But if matters which might establish prejudice or other grounds for the disqualification of a venireman have actually been gone into on the voir dire and false answers have been given or other deception has been practiced by him and he is selected as a juror, there can be no fair and impartial trial, and this is a ground for a new trial.⁸⁶

b. *Stating the grounds*

One must, in a motion for a new trial, state his grounds therefor.

Thus, where a plaintiff files a motion for a new trial on the issue of damages only, on the ground that the amount of the judgment is grossly inadequate, the trial court, in ruling that this one issue only may be retried, does not consider any error which may have occurred during the trial of the case in connection with the issue of liability, which has not been specifically called to its attention by the complaining party in his motion for a new trial.⁸⁷

Moreover, general assignments of error in a motion for a new trial preserve nothing for review.⁸⁸

For example, any motion for a new trial which fails reasonably to designate the error complained of in instructions does not preserve the error therein.⁸⁹

84. *Hussey v. Robison*, *supra* note 69; *Ellis v. State Department of Public Health & Welfare*, 285 S.W. 2d 634 (Mo. 1956); *Minor v. Lillard*, *supra* note 71; *Diehr v. Thompson Chemicals Corp.*, 281 S.W. 2d 572 (Mo. App. 1955).

85. *Keely v. Arkansas Motor Freight Lines*, 278 S.W. 2d 765 (Mo. 1955).

86. *Barb v. Farmers Insurance Exchange*, *supra* note 31.

87. *Sapp v. Key*, 287 S.W. 2d 775 (Mo. 1956).

88. *Moon Distributing Company v. Marable*, 287 S.W. 2d 635 (Mo. App. 1956).

89. *Jackson v. Ricketts*, *supra* note 41.

Further, a trial court is not required to grope through the record in search of errors or in order to ascertain what the author of a motion for a new trial really meant.⁹⁰

c. *Authority of Trial Court in Cases of Motions for*

In a case tried to a court without a jury, the court, on a motion for a new trial, may make new findings and direct the entry of a new judgment.⁹¹

Again, in such an instance, a trial court, in the exercise of its judicial discretion, has the power to grant a new trial on the issue of damages alone in a personal injury action, on the ground that the amount of a judgment is grossly inadequate, even though there is substantial probative evidence to sustain the amount of the award, and even though an appellate court on appeal might, if it weighed the evidence, reach an opposite conclusion from that reached by the trial court as to the weight of the evidence.⁹²

But, after a jury trial, a verdict, the discharge of the jury, and the entry of a judgment on the verdict, no power remains in the trial court, on a motion for a new trial, to make and substitute its own findings for those of the jury; for thus to make its own assessment of the proper recovery is an invasion of the province of the jury which was the body constituted to try the facts.⁹³

f. *Motions Granted and Refused*

Where there was a complete failure of proof that the plaintiff had promised and agreed to pay the defendant \$2,000 for 20,000 bricks, since the defendant did not make a submissible case on his counterclaim, which was pleaded on the theory of an express contract, a new trial was granted on the counterclaim following a verdict thereon for the defendant.⁹⁴

Further, a new trial for newly discovered evidence was refused where the proposed evidence was merely cumulative.⁹⁵

90. *Ibid.*

91. Jones v. Atlanta Life Insurance Company, 289 S.W. 2d 438 (Mo. App. 1956).

92. Sapp v. Key, *supra* note 87.

93. Jones v. Atlanta Life Insurance Company, *supra* note 91.

94. Young v. Hall, *supra* note 17.

95. Ensminger v. Stout, 287 S.W. 2d 400 (Mo. App. 1956).

One cannot avoid the effect of an order granting a motion for a new trial by showing, by an affidavit appended to his brief and filed for the first time in an appellate court, that such motion was not passed on within ninety days, and that it is, therefore, to be deemed denied under Section 510.360 of our Revised Statutes, when the recitals of the record show the motion to have been timely ruled, for this was an attempt to impeach such record collaterally. There is no practice, even in a direct proceeding, which would permit the solemn recitals of the court's records to be overthrown upon any such a casual, *ex parte* showing.⁹⁶

g. Stating Reasons for Granting Motion

A trial court's failure to specify on the record the ground upon which a new trial was granted raised the presumption that the court erroneously sustained the motion for a new trial and cast upon the respondent the burden of supporting such action, but such burden was met when the respondent demonstrated that the motion should have been sustained on any ground stated therein.⁹⁷

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED
VERDICT

Where one defendant has filed a separate motion for a directed verdict at the close of all of the evidence, the court has authority to set aside the verdict as to him and to enter a judgment in accordance with his motion for a directed verdict, even though the defendants jointly filed a motion to set aside the judgment and to enter one for the defendants.⁹⁸

It is the duty of the trial court, after sustaining a motion to set aside the verdict and judgment for the plaintiff and rendering a judgment for defendant, to grant the defendant's motion for a new trial in the alternative.⁹⁹

NECESSITY OF PRESENTING ISSUE THROUGH PLEADINGS

Where a plaintiff failed to plead and prove fraud there was no such issue before the appellate court on appeal.¹⁰⁰

96. *Flynn v. Janssen*, 284 S.W. 2d 421 (Mo. 1955).

97. *Young v. Hall*, *supra* note 17.

98. *Acy v. Inland Security Company*, *supra* note 63.

99. *Dawson v. Scherff*, 281 S.W. 2d 825 (Mo. 1955).

100. *Poole v. Campbell*, 289 S.W. 2d 25 (Mo. 1956).

Further, though a petition, in an action against an insurance corporation to reform a policy, failed to allege that the defendant was a corporation, where the defendant's motion attacking the petition was made on the general ground of insufficiency, and the defendant did not specifically raise the issue of capacity to be sued, the defendant could not predicate an error upon such a defect on appeal.¹⁰¹

OBJECTION TO TRIAL ERRORS

The usual rule is that, if a party is to be in a position to complain on appeal of some action of a court, he must promptly make known to the court the action which he desires it to take of his objection to an action which it takes against him, and, at the conclusion of the trial, he must once again call all such matters to the court's attention in his motion for a new trial.¹⁰²

Thus, defendants, who had not objected to a transferred judge trying a case, were in no position to complain on appeal that there had been no legal authority for the assignment judge to designate in what division the judge transferred by the supreme court would sit.¹⁰³

Again, before there is anything to review on an appeal in connection with the exclusion of evidence, a proper question must be asked, and, on objection thereto, an offer must be made at the time showing what evidence will be given if the witness is permitted to answer, the purpose and object of the testimony sought to be introduced, and all of the facts necessary to establish its admissibility.¹⁰⁴

For example, in an automobile collision action, where the plaintiff contended that he was erroneously restricted in his cross-examination of the defendant as the plaintiff's witness, and the only objection made by

101. *Readenour v. Motors Insurance Corporation*, 287 S.W. 2d 135 (Mo. App. 1956).

102. *Mallory Motor Company v. Overall*, 279 S.W. 2d 532 (Mo. App. 1955); *Winslow v. Sauerwein*, *supra* note 74; *Gower v. Lamb*, 282 S.W. 2d 867 (Mo. App. 1955); *Winslow v. Sauerwein*, *supra* note 74; *Grapette Company v. Grapette Bottling Company*, *supra* note 25; *Morse v. Evans*, 287 S.W. 2d 387 (Mo. App. 1956); *Moon Distributing Company v. Marable*, *supra* note 88; *Arkansas-Missouri Power Company v. Hamlin*, 288 S.W. 2d 14 (Mo. App. 1956); *Fuzzell v. Williams*, 288 S.W. 2d 372 (Mo. App. 1956).

103. *Acy v. Inland Security Company*, *supra* note 63.

104. *State of Missouri ex rel. Mooney v. Consolidated School Dist. No. 3*, 281 S.W. 2d 511 (Mo. App. 1955).

the plaintiff was to the court's not permitting the completion of an answer which would not have been responsive to the question asked, and it was doubtful if the completed answer would have been admissible, and the plaintiff did not advise the trial court as to what the answer would have been or its bearing on the issue of the case, there was nothing preserved as to this matter for the appellate court to review.¹⁰⁵

It has also been ruled that the contention that there was no competent evidence that realty appropriated by the state for the improvement of a highway was zoned for commercial use, because the only testimony to that effect was based on hearsay, could not be considered on appeal from a judgment awarding damages for the appropriation of such realty, where no such objection to the testimony as to the zoning of the realty was made at the trial.¹⁰⁶

Recently there have been several rulings exemplifying the necessity of pointing out errors of a trial court in an after-trial motion, if those errors are to be preserved for an appeal.

Thus, it has been held that where, in a proceeding by an administratrix for the discovery of estate assets, no mention was made on the motion for a new trial of the alleged fact that the administratrix' appointment was improperly made, the issue was not preserved for consideration by the appellate court.¹⁰⁷

In another case, it was said that, where defendants in an action upon a note did not, in a motion for a new trial, present to the trial court the contention that an alleged finding was in conflict with the plaintiff's judicial admissions, the defendants could not urge this contention on appeal.¹⁰⁸

Further, an appealing party must, in his motion for a new trial in the trial court, specify and point out the instructions he complains of before they can be considered on appeal.¹⁰⁹

105. *Donnelly v. Goforth*, 284 S.W. 2d 462 (Mo. 1955).

106. *State of Missouri ex rel. State Highway Commission of Missouri v. Williams*, 289 S.W. 2d 64 (Mo. 1956).

107. *In re Oberman's Estate*, *supra* note 56.

108. *Grapette Company v. Grapette Bottling Company*, *supra* note 25.

109. *Jackson v. Ricketts*, *supra* note 41; *Ciardullo v. Terminal Railroad Ass'n of St. Louis*, 289 S.W. 2d 96 (Mo. 1956).

And finally, it has been asserted that, where a plaintiff filed a motion for a new trial on the issue of damages only, on the ground that the amount of the judgment was grossly inadequate and the defendants did not file a motion for a new trial, no claim of error occurring during the trial, affecting the liability issue, was before the trial court, and the defendants were precluded from urging on appeal errors affecting the issue of liability, unless they were plain errors which might be considered under the supreme court rule that plain errors affecting substantial rights may be considered on appeal, though not raised in trial court or preserved for review.¹¹⁰

Sometimes the idea that objections to errors of a trial court must be made before him is expressed by saying that such objections may not be made for the first time on appeal,¹¹¹ as, for instance, in a reply brief.¹¹²

ADOPTED INSTRUCTIONS

Since one may not object on appeal to an instruction to which he does not object at a trial, the holding that a party cannot complain of an error in his opponent's instruction when he, by reference to it, indicates approval thereof and thereby adopts the erroneous or misstated theory of submission seems to be correct.¹¹³

APPEAL

a. *Right Statutory*

The right of appeal is purely statutory and where the statutes do not give such a right, it does not exist.¹¹⁴

Further, a compliance with the mandatory statutory requirements relating to appeals is a prerequisite to the exercise of such right.¹¹⁵

110. *Sapp v. Key*, *supra* note 87.

111. *Belveal v. H.B.C. Development Company*, 279 S.W. 2d 545 (Mo. App. 1955); *Rubinstein v. Rubinstein*, *supra* note 26.

112. *Caldwell v. First National Bank of Wellston*, 283 S.W. 2d 921 (Mo. App. 1955).

113. *Heuer v. Ulmer*, 281 S.W. 2d 320 (Mo. App. 1955).

114. *McNabb v. Payne*, 280 S.W. 2d 864 (Mo. App. 1955); *Hance v. St. Louis San Francisco Railway Co.*, 283 S.W. 2d 879 (Mo. App. 1955); *Hahn v. Hahn*, *supra* note 64.

115. *Hance v. St. Louis San Francisco Railway Co.*, *supra* note 114.

b. *Substitution for Appeal*

A motion to quash an execution cannot be substituted for an appeal.¹¹⁶

c. *Aggrieved Party*

An administrator of an executor has the right to appeal from any judgment affecting him or his duties in such a manner that he is thereby aggrieved by the judgment. But neither an administrator, or anyone else, who does not have the right to control litigation, or who is not a necessary or proper party to a suit, or who has no interest in the subject matter thereof, or who is not injured by a judgment or who, in short, is not "aggrieved" thereby does not have the right to appeal.¹¹⁷

Hence, it has been held that a pro forma decree corporation, members of which owned realty in a city, but which itself owned no realty and had no assets of any kind, was not an "aggrieved person" within the meaning of the statute authorizing a review by certiorari of decisions of the Board of Adjustment of the city.¹¹⁸

d. *Persons Not Appealing*

Ordinarily a party not appealing will not, for the purpose of modifying in any manner the judgment in his favor, be heard to urge a review of errors committed against him.¹¹⁹ However, he may, for the purpose of sustaining the judgment in his favor, attack rulings made below which are erroneous, if there has been a proper assignment of errors.¹²⁰

e. *Piecemeal*

No provision exists for a party to "split" a judgment and to take separate appeals from each part.¹²¹

116. *McDougal v. McDougal*, *supra* note 23.

117. *Davis v. Davis*, 284 S.W. 2d 575 (Mo. 1955).

118. *Lindenwood Improvement Ass'n v. Lawrence*, 278 S.W. 2d 30 (Mo. App. 1955).

119. *Sapp v. Garrett*, 284 S.W. 2d 49 (Mo. App. 1955); *Oertel v. John D. Street & Company*, 285 S.W. 2d 87 (Mo. App. 1955).

120. *Oertel v. John D. Street & Company*, *supra* note 119.

121. *Flynn v. First National Safe Deposit Company*, 284 S.W. 2d 593, appeal transferred 273 S. W. 2d 756 (Mo. 1955).

f. *Final Judgments*

A judgment is not final or appealable unless it disposes of all of the parties and of all of the issues in the cause and leaves nothing for future determination.¹²²

This rule applies to garnishment proceedings.¹²³

During the year, it has been held that a judgment of dismissal of an action, entered in a circuit court, because the petition failed to comply with a circuit court rule requiring the address of the plaintiff, as well as the address of the plaintiff's attorney, to be contained therein was a "final judgment" from which the plaintiff had a right to appeal.¹²⁴

Also, an order granting a former husband's motion to quash his former wife's execution and garnishment upon a Missouri judgment which adopted Arkansas divorce judgments, because the Arkansas judgments invalidly sought to impress a lien on the husband's personal property, was said to be a complete and final disposition of the subject matter of the husband's motion to quash, and was appealable.¹²⁵

Further, it has been decided that, even though a garnishment proceeding in aid of execution is technically not a new suit, but only an incidental means of obtaining satisfaction of the judgment upon which execution has been issued, the nature of the proceeding is such as to require that the issues made up by the pleadings shall be tried as ordinary issues between the plaintiff and the defendant, so that the judgment in a garnishment proceeding is a "final judgment" in that it finally disposes of all of the issues and parties. Hence, an order quashing a writ of garnishment is a "final judgment" from which an appeal may be taken.¹²⁶

The "final judgment" is a partition suit, where the sale of the land is had, is the order whereby the sale is approved and the distribution of the proceeds is provided for.¹²⁷

122. *McNabb v. Payne*, *supra* note 114; *Dyer v. Martin Loan & Finance Company*, 281 S.W. 2d 633 (Mo. App. 1955); *State v. Couch*, 285 S.W. 2d 42 (Mo. App. 1955); *Hahn v Hahn*, *supra* note 64.

123. *Dyer v. Martin Loan & Finance Company*, *supra* note 122.

124. *Douglas v. Thompson*, 286 S.W. 2d 833 (Mo. 1956).

125. *McDougal v. McDougal*, *supra* note 20.

126. *Flynn v. First National Safe Deposit Company*, *supra* note 121.

127. *Hahn v. Hahn*, *supra* note 64.

There have also been late cases holding that final, appealable judgments were not involved.

For example, where a divorced wife, as the defendant in a partition action instituted by her former husband, filed a cross-action in the nature of a counterclaim for the value of improvements made to the property since the divorce, the judgment against the wife on the cross-action was declared not to be a final judgment, in the absence of a separate trial thereof.¹²⁸

Again, in an action in replevin by the lessor of a farm against the lessee for certain chattels wherein the lessee counterclaimed and testified in support of the counterclaim, and the lessor offered an instruction dealing with the burden of proof on the lessee's counterclaim, and there was no mention of a dismissal or abandonment of the counterclaim in the transcript on appeal, the record did not permit the reviewing court to say that the counterclaim was abandoned, and, as the verdict and judgment made no disposition of the counterclaim, it was decided that there was no final judgment from which to appeal.¹²⁹

And, further, it was determined that an order entered in a garnishment proceeding, where there was no separate trial of the main issues, and which merely directed the sheriff to allow the defendant debtor the statutory exemption given to residents of Missouri, was not a "final judgment," as it did not dispose of all of the issues in the case.¹³⁰

Ordinarily, an appeal lies from an order denying a motion for a nunc pro tunc entry to correct an alleged error in the record of a judgment, decree, or order. But, where a wife, who had been awarded an allowance for the maintenance of the children of the divorced parties, moved for a nunc pro tunc correction of the record so as to entitle her to weekly payments, rather than to monthly payments as directed by the judgment as recorded, but, after the overruling of this motion, moved for and obtained a modification of the judgment so as to provide for an increased payment on account of the one child yet a minor, the other child having reached maturity since the rendition of the original judgment, she was deemed to

128. Hahn v. Hahn, *supra* note 64.

129. McNabb v. Payne, *supra* note 114.

130. Dyer v. Martin Loan & Finance Company, *supra* note 122.

have acquiesced in the order overruling the motion for a *nunc pro tunc* correction, and could not appeal therefrom.¹³¹

g. *Interlocutory Judgments*

It has been decided that, where a trial court entered a judgment in a partition action approving the sale of the property involved and the special commissioner's report, but directed the commissioner to hold some of the proceeds of the sale pending a further order of the court, the judgment was not an appealable interlocutory judgment. This was not an interlocutory judgment in an action of partition determining the rights of the parties, as the court contemplated a further order in relation to the distribution of the proceeds of the sale.¹³²

h. *Special Orders after Final Judgment*

An order, upon a motion of the defendant, setting aside a default final judgment is not a special order after a final judgment, because, after the default judgment is set aside, there is no final judgment in connection with which there can be a special order. But an order sustaining a final default judgment is an appealable special order after a final default judgment, as such an order does not eliminate the final judgment.¹³³

i. *Order Overruling Motion for New Trial*

One may not appeal from an order *overruling* a motion for a new trial, for no provision is made for such an appeal. It is an order *granting* such a motion from which a party may appeal.¹³⁴

j. *How Taken*

1. Notice of Appeal

(a) Time for Filing

A claim that a notice of appeal was prematurely filed does not deprive the reviewing court of jurisdiction, in view of Supreme Court Rule 324b, providing that where a notice of appeal has been filed prematurely, such

131. *Wallace v. Wallace*, 284 S.W. 2d 39 (Mo. App. 1955).

132. *Hahn v. Hahn*, *supra* note 64.

133. *Owens v. Owens*, 280 S.W. 2d 867 (Mo. App. 1955).

134. *White v. Nelson*, 283 S.W. 2d 926 (Mo. App. 1955).

notice shall be considered as filed immediately after the time the judgment becomes final for the purposes of the appeal.¹³⁵

2. Transcript

(a) Approval of

When an appeal has been taken to an appellate court, the trial court must approve any abbreviated transcript and also any transcript which the parties fail to agree is correct.¹³⁶

3. Briefs

(a) Abandonment of Grounds for Appeal

Where a ground of appeal, though raised in the trial court, is not preserved in one's brief on appeal, it is treated as abandoned.¹³⁷

(b) Statement of Facts

Though a resume of the pleadings may present the issues before the trial court, that will not relieve an appellant of the duty of making a reasonably fair statement of the facts presented below.¹³⁸

A statement of the facts in a brief may be followed by a statement of the testimony of each witness relevant to the points presented, but merely narrating the testimony of each witness without first making a fair and concise statement of the facts is not a compliance with Supreme Court Rule 1.08(a).¹³⁹

Specific page references to the transcript are required in a statement of facts.¹⁴⁰

135. *Wenzel v. Wenzel*, 283 S.W. 2d 882 (Mo. App. 1952).

136. *St. Louis Housing Authority v. Evans*, 285 S.W. 2d 550 (Mo 1956).

137. *Haley v. Horwitz*, 286 S.W. 2d 796 (Mo. 1956); *In re Off-Street Parking Facilities, Kansas City*, 287 S.W. 2d 866 (Mo. 1956); *Cooksey v. Ace Cab Company*, 289 S.W. 2d 40 (Mo. 1956); *Farmers Mutual Hail Insurance Company v. Minton*, 279 S.W. 2d 523 (Mo. App. 1955); *Price v. Price*, 281 S.W. 2d 307 (Mo. App. 1955); *Snyder v. Jensen*, *supra* note 23; *Readenour v. Motors Insurance Corporation*, *supra* note 101, *Winkel v. Streicher*, 287 S.W. 2d 389 (Mo. App. 1956).

138. *Peterson Company v. Landes*, 280 S.W. 2d 857 (Mo. App. 1955).

139. *Repple v. East Texas Motor Freight Lines*, 289 S.W. 2d 109 (Mo. 1956).

140. *Liddle v. Collins Construction Company*, 283 S.W. 2d 474 (Mo. 1955).

(c) Points and Authorities

Our Supreme Court Rule 1.08(a) (3) requires an appellant in his brief to state "The points relied on, which shall show what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous, . . ." It is not sufficient to state in the argument in the brief the points relied on or to assign errors alleged to have been committed by the trial court. That must be done under "Points and Authorities."¹⁴¹

Points relied on in a brief on appeal should include a concise outline of that part of the brief called "an argument," and a concise statement of what the trial court did that is claimed to be wrong and a concise statement of why it is contended that the court was wrong.¹⁴²

For example, the following assignment of error was said to be inadequate: "The referee and commission erred when they permitted the physicians in the case to give opinions on whether the incident of August 3, 1952, was or was not an accident or new injury, said opinions being legal conclusions and usurping the function of the referee and commission as to what is and what is not accident and injury."¹⁴³

Further, a defendant's assertion that the plaintiff failed to prove facts upon which relief could be granted and that the judgment should have been entered for the defendant *non obstante veredicto* was held to present nothing for review.¹⁴⁴

The same view was taken of two points, one of which asserted that "Instruction No. 1 given for the plaintiff is erroneous,"¹⁴⁵ and the other of which stated that the judgment appealed from was against the evidence and against the weight of the evidence and against the law.¹⁴⁶

141. Clemons v. Becker, *supra* note 19.

142. Mallory Motor Company v. Overall, *supra* note 102; White v. Nelson, *supra* note 134; Lomax v. Sawtell, 286 S.W. 2d 40 (Mo. App. 1956).

143. Oertel v. John D. Street & Company, *supra* note 119.

144. Jones v. Farm Bureau Mutual Insurance Co., 284 S.W. 2d 11 (Mo. App. 1955).

145. E. A. Mabes & Company v. Fishman, 284 S.W. 2d 21 (Mo. App. 1955).

146. King v. Pruitt, 280 S.W. 2d 872 (Mo. App. 1955). This same rule was applied to a verdict in Lomax v. Sawtell, *supra* note 142.

It has also been said that abstract statements of law present nothing for appellate review.¹⁴⁷

This has been said of a point which read as follows:

"1. The welfare of the children is the controlling consideration in awarding their custody.

"2. Change in custody of minor children, subjecting them to new routines, and different standards of discipline, is undesirable except in cases of necessity.

"3. Parent seeking custody must prove moral fitness."¹⁴⁸

The same decision has been reached as to statements by appellants that interest runs on compensation payments from the date on which they are due until they are paid;¹⁴⁹ that, in workmen's compensation cases, appellate courts may examine the record and set aside the decision of the Industrial Commission;¹⁵⁰ and that the defendant "was not guilty of any of the four counts of negligence alleged by the respondent in his petition."¹⁵¹

Supreme Court Rule 1.08 contemplates the citation of authorities to the specific point to which they apply, and a point not supported by the citation of authorities will not be considered on appeal.¹⁵²

(d) Argument

The argument in a brief should have specific page references to the pages in the transcript where the material referred to in the argument may be found,¹⁵³ for it is not the duty of the appellate court to search the entire record in order to discover, if possible, error committed by the trial

147. *Dansker v. Dansker*, 279 S.W. 2d 205 (Mo. App. 1955); *State of Missouri ex rel. Rueseler Motor Co. v. Klaus*, 281 S.W. 2d 543 (Mo. App. 1955); *White v. Nelson*, *supra* note 134; *Coleman v. Hercules Powder Company*, 284 S.W. 2d 32 (Mo. App. 1955); *Komosa v. Monsanto Chemical Company*, 287 S.W. 2d 374 (Mo. App. 1956); *Ensminger v. Stout*, 287 S.W. 2d 400 (Mo. App. 1956); *Repple v. East Texas Motor Freight Lines*, 289 S.W. 2d 109 (Mo. 1956).

148. *Dansker v. Dansker*, *supra* note 147.

149. *Komosa v. Monsanto Chemical Company*, *supra* note 147.

150. *Coleman v. Hercules Powder Company*, *supra* note 147.

151. *Ensminger v. Stout*, *supra* note 147.

152. *Lomax v. Sawtell*, *supra* note 142.

153. *State ex rel. State Highway Commission v. Goodson*, 281 S.W. 2d 858 (Mo. 1955); *Liddle v. Collins Construction Company*, *supra* note 140.

court, but it is the obligation of the appellant to point out distinctly the alleged errors of the trial court.¹⁵⁴

k. *Burden of Proof*

On an appeal, the presumption is that the trial court's decision was correct and the burden is on the appellant to show affirmatively that reversible error was committed.¹⁵⁵

1. *Changing Theories on Appeal*

A cause must be reviewed on appeal on the same theory upon which it was brought and tried.¹⁵⁶

Thus, it has been decided that one can not appeal a judgment on the theory that the case was based upon a certain statute, if it was originally tried on the theory that it was based on another statute,¹⁵⁷ and that he cannot try a case on the theory that he was contributorily negligent and appeal it on the theory that he was not negligent.¹⁵⁸

m. *Matters Considered on Appeal*

Usually, where a specific issue is not presented to or ruled upon by the trial court, it can not be considered on appeal.¹⁵⁹

But, where the plaintiff, in a motion for a new trial inadvertently gave the wrong number for an instruction concerning which he was complaining, but the inadvertence was obvious, no one could have been misled, and the trial court undoubtedly understood the plaintiff's complaint and ruled

154. *McFarland v. St. Louis Cab Company*, 282 S.W. 2d 861 (Mo. App. 1955).

155. *Staples v. O'Reilly*, *supra* note 71.

156. *Kenner v. Aubuchon*, 280 S.W. 2d 820 (Mo. 1955); *Parks v. Thompson*, 285 S.W. 2d 687 (Mo. 1956); *Holtzman v. Holtzman*, *supra* note 52; *State of Missouri ex rel. Mooney v. Consolidated School Dist. No. 3*, *supra* note 104; *Moon Distributing Company v. Marable*, *supra* note 88.

157. *State of Missouri ex rel. Mooney v. Consolidated School Dist. No. 3*, *supra* note 104.

158. *Parks v. Thompson*, *supra* note 156; Compare *Rubinstein v. Rubinstein*, *supra* note 26, which holds that an action to set aside a quitclaim deed on the ground of fraud, deceit, mutilation and forgery was an equity case, and the reviewing court in determining whether the deed should have been set aside could consider any theory supported by the evidence and within the general scope of the pleadings.

159. *Bedenk v. St. Louis Public Service Company*, 285 S.W. 2d 609 (Mo. 1956); *Oertel v. John D. Street & Company*, *supra* note 119; *Arkansas Missouri Power Company v. Hamlin*, *supra* note 102.

against it, the appellate court considered the plaintiff's assignment of error concerning the instruction.¹⁶⁰

Although the point is not raised by the parties, it has been decided that an appellate court must, on its own motion, notice whether an appeal is premature.¹⁶¹

Moreover, an appellate court may consider plain errors affecting substantial rights, though they are not raised in the trial court nor properly preserved for review.¹⁶²

However, in an action by a pedestrian for personal injuries sustained when he was struck by an approaching motorist while attempting to cross a highway, introduction of evidence that the highway patrolmen, who investigated the accident, did not arrest or file charges against the motorist, was not patently inflammatory or such plain error affecting substantial rights as to have deprived the pedestrian of a fair trial or to require the supreme court to grant a new trial.¹⁶³

Again, where the defendants' counsel obtained the trial court's approval for the reading of a deposition of the defendants' deceased intestate in a personal injury action, but did not obtain permission to omit a portion of the deposition stating that the intestate had insurance, and, when the defendants' counsel reached the place in the deposition where a reference to insurance was made, he omitted such reference, error of the trial court in permitting the plaintiff's counsel to read the omitted reference to insurance was not "plain error" from which manifest injustice or a miscarriage of justice resulted.¹⁶⁴

n. *Duties of Appellate Courts*

1. Taking Record as It Comes to Appellate Courts

It has been ruled that a reviewing court must take the record as it comes to it.¹⁶⁵

160. *Jackson v. Ricketts*, *supra* note 41.

161. *State of Missouri v. Couch*, *supra* note 122; *Hahn v. Hahn*, *supra* note 64.

162. *McClard v. Morrison*, 281 S.W. 2d 592 (Mo. App. 1955); *White v. Nelson*, *supra* note 134.

163. *Parmley v. Henks*, 285 S.W. 2d 710 (Mo. 1956).

164. *Sapp v. Key*, *supra* note 87.

165. *McNabb v. Payne*, *supra* note 114.

Thus, when, in a brief, assignment number 2 complained of an error of the court in rendering a judgment on September 24, 1954, and in rendering another and different judgment on October 12, 1954, but the only judgment, or minute in reference to a judgment, found in the record related to the decree of October 12, 1954, the appellate court was held to be bound by the record, and it was decided that there was nothing to consider in respect to the appellant's assignment number 2.¹⁶⁶

2. Testimony in Record

Testimony, the competency of which was not questioned by the parties on appeal, should be treated by a reviewing court as being in the record for whatever it may be worth.¹⁶⁷

3. Appealability of Judgment

It is the duty of a reviewing court to determine whether an appealable judgment has been entered in an appealed cause.¹⁶⁸

4. In Connection with Pleadings

An appellate court, in passing on the sufficiency of a petition to state a cause of action, as against a motion to dismiss, considers properly pleaded facts to be true and such facts are given all reasonable intendments in favor of the sufficiency of the petition.¹⁶⁹

In connection with this holding, the question arises as to what is meant by "properly pleaded facts." In early law there were many special rules as to how to state facts properly. Since this is not true today, are not properly pleaded facts those which are properly included in a pleading?

It has been decided that, on appeal from a judgment dismissing a petition for failure to state a cause of action, a reviewing court should

166. *Payne v. White*, *supra* note 27.

167. *John Hancock Mutual Life Ins. Co. v. Dawson*, 278 S.W. 2d 57 (Mo. App. 1955).

168. *McNabb v. Payne*, *supra* note 114.

169. *Hudson v. Jones*, 278 S.W. 2d 799 (Mo. App. 1955); *Judge v. Durham*, 281 S.W. 2d 16 (Mo. App. 1955); *Lozier v. Bultman*, 286 S.W. 2d 43 (Mo. App. 1955).

Compare the holding that, on an appeal from a judgment dismissing a petition with prejudice for failure to state a cause of action, the reviewing court will consider all of the facts set out in the petition and in the attached exhibits. *Moffett v. Commerce Trust Company*, 283 S.W. 2d 591 (Mo. 1955).

consider only the facts properly pleaded and would disregard conclusions.¹⁷⁰

On the other hand, it has been said that an appellate court should, in determining the sufficiency of a petition, treat mere conclusions as good, unless the pleading containing them wholly fails to state any claim whatever.¹⁷¹

What is meant by this holding is not clear, for usually in Missouri conclusions are not properly included in a pleading. It may mean that one may use the conclusions to clarify and amplify the factual statements in a pleading which states a cause of action in a sketchy manner.

5. As to Matters Involving Discretion of Court or Jury

Appellate courts will not reverse decisions of trial courts on matters within the latter's discretion unless the trial courts manifestly abuse their discretion. During the year, this doctrine has been applied to rulings on the voir dire, relating to the failure of prospective jurors to disclose facts,¹⁷² and to the asking of a question relating to insurance,¹⁷³ to the granting of a continuance,¹⁷⁴ to the order in which evidence may be introduced,¹⁷⁵ to the content of cross-examination,¹⁷⁶ to the refusal to grant a new trial because counsel reminded the witness that he, the witness, was under oath,¹⁷⁷ to the content of argument,¹⁷⁸ to a failure to reprimand counsel for a retaliatory argument,¹⁷⁹ to the length of an argument,¹⁸⁰ to instructions,¹⁸¹ to the dismissal of a case for want of prosecution thereof,¹⁸² to the setting aside of a default judgment,¹⁸³ to the granting of new trials because of

170. *Hudson v. Jones*, *supra* 169; *Smith v. Taylor*, 289 S.W. 2d 134 (Mo. App. 1956).

171. *Judge v. Durham*, *supra* note 169.

172. *Barb v. Farmers Insurance Exchange*, *supra* note 31.

173. *Gray v. Williams*, 289 S.W. 2d 463 (Mo. App. 1956).

174. *Savings Finance Corporation v. Blair*, *supra* note 36.

175. *Bedenk v. St. Louis Public Service Company*, *supra* note 159.

176. *State of Missouri ex rel. Rueseler Motor Co. v. Klaus*, *supra* note 147.

177. *Willis v. Wabash Railroad Company*, 284 S. W. 2d 503 (Mo. 1955).

178. *Collins v. Cowger*, 283 S.W. 2d 554 (Mo. 1955); *Shelley v. St. Louis Public Service Company*, 279 S.W. 2d 182 (Mo. App. 1955); *Yankoff v. Allied Mutual Insurance Company*, 289 S.W. 2d 471 (Mo. App. 1956).

179. *Bedenk v. St. Louis Public Service Company*, *supra* note 159.

180. *Osborne v. Goodman*, 289 S.W. 2d 68 (Mo. 1956).

181. *Osborne v. Goodman*, *supra* note 180.

182. *City of Jefferson v. Capital City Oil Company*, 286 S.W. 2d 65 (Mo. App. 1956). Compare *Levee District No. 4 of Dunklin County v. Small*, *supra* note 45, in which case the appellate court set aside the trial court's dismissal of a case for failure to prosecute.

183. *Levee District No. 4 of Dunklin County v. Small*, *supra* note 45.

perjury by a witness,¹⁸⁴ because verdicts were against the weight of the evidence,¹⁸⁵ because of the excessiveness of verdicts,¹⁸⁶ and because of the inadequacy thereof.¹⁸⁷ But, in a case of dismissal for failure to prosecute, the appellate court reversed the trial court where there was a written agreement containing a provision for a continuance and a provision that, upon failure of the defendant to carry out the agreement, the plaintiff could take judgment.¹⁸⁸

6. Assumptions

On appeal from a judgment confirming a jury's verdict assessing compensation for the taking of land condemned by a city and vesting title thereto in that city, an appellate court must assume that all of the land condemned is necessary in the legal sense for the public use for which the city has a right of eminent domain, in the absence of proper contrary allegations and proof or offer of proof.¹⁸⁹

Where the plaintiff's counsel on the voir dire examinations of the jury panel injected a question of insurance into the case, in determining whether the juror was biased, the appellate court must indulge the presumption, where plaintiff recovered below, that the counsel acted in good faith.¹⁹⁰

7. Weighing Evidence

An appellate court does not weigh the evidence in a jury tried case.¹⁹¹

184. *Chiodini v. Terminal Railroad Ass'n of St. Louis*, 287 S.W. 2d 357 (Mo. App. 1956).

185. *Dawson v. Scherff*, *supra* note 99; *Liddle v. Collins Construction Company*, *supra* note 140.

The test as to whether there has been an arbitrary exercise of the trial court's inherent discretion to grant a new trial because the verdict was against the weight of the evidence is whether there was substantial evidence to have supported a verdict for the party to whom the new trial was granted. If there was, the appellate court will not interfere. *Lomax v. Sawtell*, *supra* note 142.

186. *Jenkins v. Terminal Railroad Association of St. Louis*, 285 S.W. 2d 12 (Mo. App. 1955); *Fullerton v. Atchison, Topeka & Santa Fe Ry. Co.*, 285 S.W. 2d 572 (Mo. 1956).

187. *Sapp v. Key*, *supra* note 87.

188. *Levee District No. 4 of Dunklin County v. Small*, *supra* note 45.

189. *In re Armory Site in Kansas City*, 282 S.W. 2d 464 (Mo. 1955).

190. *Gray v. Williams*, *supra* note 173.

191. *Siegel v. Ellis*, 288 S.W. 2d 932 (Mo. 1956).

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

1. Probative Facts—Substantial Evidence

It has been held that a jury's verdict to the effect that a submissible case has been made will be interfered with on appeal only when there is a complete absence of probative facts to support the verdict.¹⁹²

Thus, it has been said that, in an automobile accident case, it is not the province of the appellate court to determine who was negligent but whether there was any probative evidence by which the jury could have reached its conclusion, and, if so, the verdict must be upheld.¹⁹³

Much the same idea has been expressed in a statement that an appellate court's duty is to determine as a matter of law whether there is any substantial evidence to sustain the verdict.¹⁹⁴

2. Evidence Considered and View Taken of It

In determining whether a submissible case or defense has been presented by the party in whose favor a judgment has been given, that is, whether substantial evidence in his favor has been introduced, it has been decided that the appellate court should view the evidence in the light most favorable to the winning party.¹⁹⁵ Again it has been said that all of the evidence favorable to the successful party, including his evidence and that of his opponent,¹⁹⁶ but not evidence of his adversary which is unfavorable to him,¹⁹⁷ must be considered by an appellate court in deciding whether a submissible case as defense has been presented by the winning party. It has also been declared that, in such a case, *all* evidence favorable

192. *Ibid.*

193. Fuzzell v. Williams, *supra* note 102.

194. Dugan v. Rippee, 278 S.W. 2d 812 (Mo. App. 1955).

195. The following are cases representing this view: Floyd v. St. Louis Public Service Company, 280 S.W. 2d 74 (Mo. 1955); Beckwith v. Standard Oil Company, 281 S.W. 2d 852 (Mo. 1955); Bunch v. Mueller, 284 S.W. 2d 440 (Mo. 1955); Dotson v. International Harvester Company, 285 S.W. 2d 585 (Mo. 1955.); Wabash Railroad Company v. Dannen Mills, Inc., 288 S.W. 2d 926 (Mo. 1956); Cathey v. De Weese, 289 S.W. 2d 51 (Mo. 1956).

196. Siegel v. Ellis, *supra* note 191; Fuller v. Baxter, 284 S.W. 2d 66 (Mo. App. 1955); Stout v. St. Louis County Transit Company, 285 S.W. 2d 1 (Mo. App. 1955); Dennison v. Whaley, 285 S.W. 2d 73 (Mo. App. 1955); Leathers v. Sikeston Coca-Cola Bottling Company, 286 S.W. 2d 393 (Mo. App. 1956).

197. Examples of this holding are Ashley v. Williams, 281 S.W. 2d 875 (Mo. 1955); Rhyne v. Thompson, 284 S.W. 2d 553 (Mo. 1955); Siegel v. Ellis, *supra* note 191; Willis v. Wabash Railroad Company, *supra* note 177.

to the party succeeding must be accepted by the appellate court as true.¹⁹⁸ Finally, it is said that an appellate court, under such a circumstance, must give the party obtaining a judgment the benefit of every favorable inference which can reasonably be drawn from the evidence.¹⁹⁹

p. *Tests Applied in Determining Propriety of Instructions*

It has been decided recently that, in determining the propriety of a trial court's instruction to a jury, an appellate court, on an appeal from a judgment on a jury's verdict must consider the evidence with all reasonable inferences therefrom, in the light most favorable to the successful party, and must disregard evidence unfavorable to him.²⁰⁰

q. *Tests Applied on Appeal from an Administrative Agency*

In reviewing a decision of an administrative agency, an appellate court has the duty to determine whether the agency's award is supported by competent and substantial evidence upon the whole record. This does not mean that the reviewing court may substitute its own judgment on the evidence for that of the administrative tribunal. But it does authorize it to decide whether the agency could have reasonably made its findings, and reached its result, upon consideration of all of the evidence before it; and to set aside decisions clearly contrary to the overwhelming weight of the evidence. The reviewing court should adhere to the rule of deference to findings, involving credibility of witnesses, made by those before whom the witnesses gave oral testimony.

In determining whether the agency could have reasonably made its findings, and reached the conclusion it did reach, upon consideration of all of the evidence before it, the appellate court should view the record before it in a light most favorable to the findings of the agency, should consider the favorable inferences which the agency had a right to draw from

198. *Dugan v. Rippee*, *supra* note 194; *Ashley v. Williams*, *supra* note 197; *Heuer v. Ulmer*, 281 S.W. 2d 320 (Mo. App. 1955); *Fuzzell v. Williams*, *supra* note 102.

199. The following decisions exemplify cases containing this view: *Willis v. Wabash Railroad Company*, *supra* note 177; *Cathey v. De Weese*, *supra* note 195; *Heuer v. Ulmer*, *supra* note 198; *O'Leary v. Illinois Terminal Railroad Company*, 288 S.W. 2d 393 (Mo. App. 1956).

200. *Palmer v. Lasswell*, *supra* note 30; *Shelley v. St. Louis Public Service Company*, *supra* note 178.

the evidence before it, and should then determine whether the agency's findings, even if supported by competent and substantial evidence, were contrary to the overwhelming weight of the evidence in the whole record.²⁰¹

It has been said that in determining whether there is substantial evidence to support the findings of such an agency, each case must be determined upon its own particular facts.²⁰²

It has been stated, further, that, in reviewing such proceedings, the appellate tribunal does not try the cases *de novo*.²⁰³

It has also been decided that in a workmen's compensation proceeding, it is the award of the Industrial Commission and not the award of the referee that is before the court for review, and that the referee's award is not a factor to be considered in determining whether the award of the Commission is supported by the evidence.²⁰⁴ But compare the holding that, in such a proceeding, the findings of the referee carry considerable weight, especially where there is a question as to the credibility of witnesses, though they are by no means conclusive.²⁰⁵

r. *Appeals on the Ground of Excessive or Inadequate Verdicts or Judgments*

1. Authority of Court

Although the amount of damages is primarily for the jury, an appellate court properly may determine, as a matter of law, the maximum amount which the evidence supports. Obviously, such a question is not susceptible of determination by a precise formula or with mathematical nicety, and each case must be ruled on its own particular facts.

Thus, in an action to recover for personal injuries, consideration is given to the nature and extent of the injuries and disabilities, diminished

201. *Francis v. Sam Miller Motors*, 282 S.W. 2d 5 (Mo. 1955). The following are further examples of decisions supporting the views of this case: *Ruedlinger v. Long*, 283 S.W. 2d 889 (Mo. App. 1955); *Culberson v. Daniel Hamm Drayage Company*, 286 S.W. 2d 813 (Mo. 1956); *Arnold v. Wigdor Furniture Company*, 281 S.W. 2d 789 (Mo. 1955).

202. *Alexander v. Saunders Mills, Inc.*, 289 S.W. 2d 483 (Mo. App. 1956).

203. *Norman v. State Department of Public Health & Welfare*, 283 S.W. 2d 143 (Mo. App. 1955).

204. *Coleman v. Hercules Powder Company*, *supra* note 147.

205. *Banks v. City of Hannibal*, 283 S.W. 2d 909 (Mo. App. 1955).

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 excessiveness or of the inadequacy of an award is what will fairly and reasonably compensate the plaintiff for his injuries.²⁰⁶

2. Excessiveness or Inadequacy Must Be Gross

An appellate court should not disturb a verdict as excessive unless it appears that it is so grossly excessive as to indicate an arbitrary exercise and abuse of discretion.²⁰⁷

3. View Taken of Evidence

In determining whether the amount of an award is grossly inadequate in a case wherein the jury's verdict has been approved by the trial court, an appellate court will consider the evidence in the light most favorable to the verdict returned, because it was the peculiar province of the jury on the trial, and of the trial judge on the motion for new trial, to pass upon the weight of the evidence and the credibility of the witnesses.²⁰⁸

Further, in passing upon a contention that the verdict is excessive, the appellate court must take as true all evidence which tends to support the verdict.²⁰⁹

4. Reducing, or Adding to, Judgment

In sustaining a judgment on the condition of a remittitur, the appellate court does not award or fix the damages but only says that if the jury had given such a maximum amount, its verdict could have properly been permitted to stand. In ordering a remittitur the court allows the judgment to stand for a part of the amount found by the jury but if a court increases an inadequate recovery, it adds something not within the terms of the verdict.²¹⁰

206. *Fann v. Farmer*, 289 S.W. 2d 144 (Mo. App. 1956).

207. *Sandifer v. Thompson*, 280 S.W. 2d 412 (Mo. 1955); *Long v. St. Louis Public Service Company*, 288 S.W. 2d 417 (Mo. App. 1956).

208. *Sandifer v. Thompson*, *supra* note 207; *Bedenk v. St. Louis Public Service Company*, *supra* note 159; *Thompson v. Healzer Cartage Company*, 287 S.W. 2d 791 (Mo. 1956); *Fann v. Farmer*, *supra*, note 206.

209. *Long v. St. Louis Public Service Company*, *supra* note 207.

210. *Combs v. Combs*, 284 S.W. 2d 423 (Mo. 1955).

s. *Judgments of Appellate Court*

1. Dismissal for Noncompliance with Rules of Court

Although appeals are not lightly dismissed for noncompliance with rules of court,²¹¹ they may be dismissed for that reason.

Thus, dismissals have resulted during the past year for the omission of the judgment from the transcript,²¹² for the lack of consent of the parties to, or the court's approval of an abridged transcript,²¹³ for improper and inadequate statements of facts containing only the résumé of the testimony of named witnesses,²¹⁴ or only the facts favorable to the appellant,²¹⁵ or merely a résumé of the allegations of the pleadings,²¹⁶ and because the points in a brief contained only abstract statements of law.²¹⁷

On the other hand, a dismissal for failure to file a transcript on time was, under the following circumstances, reversed. The notice of appeal was filed February 13, 1954, and the transcript was filed on May 28, 1954, fourteen days beyond the expiration of ninety days from the filing of the notice of appeal. The transcript contained this entry under date of May 25, 1954: "Upon motion of plaintiff's attorney, John Hosmer, the court this day enlarges and extends period of time for filing transcript on appeal a period of twenty days on account of failure to file within 90 day period being due to excusable neglect." It appears from the counsels' affidavits and counter-affidavits that the plaintiff's motion to extend the time for filing the transcript was not in writing and that no notice was given by the plaintiff to opposing counsel that the plaintiff intended to apply for the extension. However, the trial court, prior to making the order of dismissal, advised one of the defendants' counsel that the motion had been made and that the court intended to sustain it and to make the order extending the time. The defendants' counsel, then present in court, objected on the sole ground that, inasmuch as he was not the chief defense attorney in the case, he did not know whether such chief attorney would

211. *Ellis v. Farmer*, 287 S.W. 2d 840 (Mo. 1956).

212. *White v. Nelson*, *supra* note 134.

213. *St. Louis Housing Authority v. Evans*, *supra* note 136; *Jones v. Stubblefield*, 284 S.W. 2d 886 (Mo. App. 1955).

214. *Repple v. East Texas Motor Freight Lines*, 289 S.W. 2d 109 (Mo. 1956).

215. *Peterson Co. v. Landes*, 280 S.W. 2d 857 (Mo. App. 1955).

216. *Peterson Company v. Landes*, *supra* note 215.

217. *Arnold v. Reorganized School District No. 3*, 289 S.W. 2d 90 (Mo. 1956); *Repple v. East Texas Motor Freight Lines*, *supra* note 139.

consent to the extension. No objection was made that the failure of the plaintiff to file the transcript within 90 days was not the result of excusable neglect.²¹⁸

Further, it has been decided that, where the essence of the appellant's statements, points, and arguments was that the proof offered by the respondent having the burden of proof was not sufficient to overcome the evidence favorable to the appellant and the respondent was not entitled to the judgment, the brief was sufficient to preclude dismissal of the appeal for failure to comply with the rules of court.²¹⁹

In addition, it has been ruled that conclusions or arguments in a statement of facts do not justify a dismissal of an appeal, where the essential facts determinative of the issue presented may be ascertained from the statement.²²⁰

2. Judgments Affirmed and Reversed

Where there is no point in the appellant's brief attacking the judgment on a particular account, the judgment on such an account will be affirmed.²²¹

The decree of a court in an action in equity to cancel realty deeds for want of consideration and on the further ground that the plaintiff's signature was obtained by fraud, which reformed and corrected the deed so as to preserve to the plaintiff certain rights with respect to the occupancy and collection of rents, but which did not cancel the deeds, was not reversible, on an appeal by the plaintiff, since it was not adverse or prejudicial to the plaintiff, where, under the findings as to her theory of the case, she was entitled to no relief whatsoever. This is so, though the plaintiff did not request any reformation of the deed and though such reformation was not within the issues presented to the court by the pleadings.²²²

An error of a trial court as to a matter which is immaterial or moot is not a ground for the reversal of its judgment.²²³

218. *Coots v. Payton*, 280 S.W. 2d 47 (Mo. 1955).

219. *Ellis v. Farmer*, *supra* note 211.

220. *Ibid.*

221. *Ibid.*

222. *Kenner v. Aubuchon*, 280 S.W. 2d 820 (Mo. 1955).

223. *Floyd v. St. Louis Public Service Company*, *supra* note 195; *Bunch v. Mueller*, *supra* note 195.

This rule is enunciated in Section 512.160(2) of our Revised Statutes, which states that an appellate court shall not reverse a judgment unless it believes that an error was committed by the trial court against the appellant which materially affected the merits of the action.

Generally, trial errors are immaterial and are not a ground for the reversal of a judgment, if no case was made for the jury.²²⁴

Also, trial errors are immaterial if there was substantial evidence supporting the verdict in the amount awarded by the jury.²²⁵

Further, even though instructions improperly submitted several charges of contributory negligence in the conjunctive, and conditioned a verdict for the defendant (on the ground that the plaintiff was guilty of contributory negligence), upon an affirmative finding against the plaintiff on all of the issues of contributory negligence submitted in the instruction, there was no reversible error in giving such an instruction, where there was substantial evidence establishing all but one of the charges of contributory negligence.²²⁶

Though an inconsistent verdict may call for reversal, in an action upon a note and mortgage given for the balance of the purchase price of personalty, wherein the buyer defended and counterclaimed on the ground of a breach of warranty of the fitness for the purpose for which it was sold, a verdict for the buyer in the action and for the sellers on the counterclaim was not so necessarily inconsistent as to require reversal.²²⁷

Again, it has been decided that the trial court's error in accepting a verdict in which the interest was awarded without the jury's having computed the amount thereof was not reversible, and the reviewing court modified the judgment to show the amount of interest due.²²⁸

Moreover, there will not be a reversal of a judgment though the verdict for the defendant, on which the judgment was based, was not supported by evidence, if the jury found the plaintiff's evidence incredible and

224. *Thompson v. Healzer Cartage Company*, *supra* note 208.

225. *Palmer v. Lasswell*, *supra* note 30. Also see *Sapp v. Garrett*, *supra* note 119.

226. *Heuer v. Ulmer*, *supra* note 198.

227. *Doerflinger Realty Company v. Fields*, 281 S.W. 2d 609 (Mo. App. 1955).

228. *Barker v. Crown Drug Company*, 284 S.W. 2d 559 (Mo. 1955).

unbelievable and the trial court approved that finding by overruling a motion for a new trial.²²⁹

Also, it has been said that an appellate court is less likely to interfere when the trial court has set aside a default judgment than when it has not.²³⁰

During the year, in applying this rule, many other errors have been found to be harmless and not grounds for reversal.

For instance, it has been determined that where there was no evidence to support the plaintiff's allegations of fraud, striking of the fraud alleging paragraph of the petition after the case had gone to trial was not prejudicial to the plaintiff.²³¹

Again, in an action against an automobile casualty insurer for fire loss of an automobile, wherein the automobile dealer testified to the cash value of the automobile at the time of the loss and there was other evidence of the value, admission of the dealer's testimony as to the amount he had offered for the automobile on a trade-in on a new automobile was, if error, harmless.²³²

Error in the exclusion of cumulative evidence has been held to be free from harm.²³³

Permitting an unsworn counsel to read mortality tables contained in Corpus Juris Secundum to the jury in a personal injury action was held not to be prejudicial in view of the fact that no contention was made at the trial or in the brief on appeal that the statement read to the jury was not as it appeared in Corpus Juris Secundum.²³⁴

There have been several holdings that instructions were harmless.

For instance, it was held, in an action against an estate to recover the claimant's share of the profits from a business venture with the decedent,

229. Producers Produce Company v. Industrial Commission of Missouri, 281 S.W. 2d 614 (Mo. App. 1955).

230. Spink v. Kemp, 283 S.W. 2d 502 (Mo. 1955).

231. State *ex rel.* State Highway Commission v. Jacobs, 281 S.W. 2d 597 (Mo. App. 1955).

232. Jones v. Farm Bureau Mutual Insurance Company, *supra* note 144.

233. State *ex rel.* State Highway Commission v. Jacobs, *supra* note 231; Spivack v. Spivack, *supra* note 69.

234. Sandifer v. Thompson, *supra* note 207.

that an instruction that the decedent was indebted to the claimant in the amount of one-half of the claimant's share of the profits, an inadvertent statement of the true proposition that the claimant was entitled to one-half of the share of profits of the venture, was not prejudicial to the estate.²³⁵

Too, it was decided that, in an action for personal injuries suffered in an automobile collision, a verdict-directing instruction two pages and seven lines long, and covering the entire fact submission on several different assignments of negligence, while unduly lengthy, was not prejudicial to the defendants.²³⁶

Again, the question of repetition or elaboration of the same proposition in instructions is said to be a matter of discretion on the part of the trial court, and is generally not held to be reversible error where it is approved by the trial judge.²³⁷

Further, the giving of instructions on contributory negligence in cases where that defense is not pleaded is harmless error of which the *defendant* had no right to complain, because it is made in his favor.²³⁸

Also, it is not reversible error for an instruction to assume or to omit a conceded fact.²³⁹

And, in addition, it has been ruled that in an action for injuries sustained by the plaintiff, when the automobile, which he was driving on a through street, collided with the defendant's truck, which had entered an intersection from the plaintiff's right and was attempting to make a left turn onto the through street in front of the automobile, an instruction submitting alternative grounds of alleged contributory negligence of the plaintiff, though the required findings were not as complete and specific as they should have been, was not prejudicially erroneous, in view of the reasonable construction and of the effect of all of the instructions read and considered together.²⁴⁰

235. Siegel v. Ellis, *supra* note 191.

236. Kieffer v. Bragdon, 278 S.W. 2d 10 (Mo. App. 1955).

237. *Ibid.*

238. Karnes v. Ace Cab Company, 287 S.W. 2d 378 (Mo. App. 1956).

239. Ferguson v. Union Electric Company of Missouri, 282 S.W. 2d 505 (Mo. 1955).

240. Taylor v. Alexander, 283 S.W. 2d 588 (Mo. 1955).

On the other hand, on several occasions it has been decided that the trial courts' errors were prejudicial to the losing parties and there have been reversals of their judgments.

For instance, it has been ruled that the entry of a judgment against a minor defendant without a suggestion of infancy and the appointment of a guardian ad litem and without representation of the minor defendant by a legal guardian or curator constituted reversible error.²⁴¹

Further, the improper injection into a case of the information that the defendant is covered by liability insurance constitutes reversible error, especially so if it is thrown in purposefully or in bad faith.²⁴²

Moreover, in an action to recover for the value of merchandise sold a store, admitting improper hearsay testimony concerning the general reputation in the community that another than the plaintiff owned the business was reversible error where the question of whether the plaintiff relied upon the representations when it extended credit to the business and was injured by the defendant's conduct therein was a question for the jury.²⁴³

An appealing defendant can avail himself of an error in a codefendant's instruction which affects the question of the appealing defendant's liability to the plaintiff and prejudices such defendant's interest.²⁴⁴

Again, it has been decided that, in an architect's action for reasonable value of services in drawing plans, wherein there was a controversy as to whether the plans conformed to the defendant's directions, it was harmful error to refuse a requested instruction presenting the defendant's theory which was converse to the theory of the plaintiff's verdict-directing instruction that the architect's plans were in conformity with the defendant's instructions.²⁴⁵

Also, conflicting instructions may be a ground for a reversal.²⁴⁶

And, finally, it has been stated that, where, during lengthy colloquies between attorneys and the trial court within the hearing of the jury, it

241. *Morgan v. Morgan*, 289 S.W. 2d 151 (Mo. App. 1956).

242. *Gray v. Williams*, *supra* note 173.

243. *Moon Distributing Company v. Marable*, *supra* note 88.

244. *Ciardullo v. Terminal Railroad Ass'n of St. Louis*, 289 S.W. 2d 96 (Mo. 1956).

245. *Campbell v. Evens & Howard Sewer Pipe Company*, 286 S.W. 2d 399 (Mo. App. 1956).

246. *Wabash Railroad Co. v. Dannen Mills*, 279 S.W. 2d 50 (Mo. App. 1955).

was suggested that the defendant's counsel was using unethical tactics to get the jury to believe in his view of the facts, whereas there was no evidence to support this claim, there was reversible error.²⁴⁷

3. Cause Remanded

A case should not be reversed for failure of proof without remanding unless the record indicates that the available essential evidence has been fully presented and that no recovery could be had in any event.²⁴⁸

The furtherance of justice requires that a case should not be reversed without remanding it, 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, if so advised, so as to state a case upon the theory which his evidence discloses.

However, the rule has its restrictions. For example, where a plaintiff abandoned his assignments of primary negligence and requested a humanitarian submission only, and thus secured a strategic advantage in avoiding the defense of contributory negligence, the case will not be remanded if, on appeal, it is determined that he failed to make a submissible humanitarian case.²⁴⁹

Where an improper element of damage has been submitted to a jury, this error cannot be cured by a remittitur and an appellate court will reverse the judgment entered on the verdict and will remand the case for a new trial.²⁵⁰

247. *Dunn v. Terminal Railroad Association of St. Louis*, 285 S.W. 2d 701 (Mo. 1956).

248. *Truck Insurance Exchange v. Great Northern Electric Company*, 284 S.W. 2d 60 (Mo. App. 1955); *Williams v. Coca-Cola Bottling Company*, 285 S.W. 2d 53 (Mo. App. 1955); *Local Finance Company v. Charlton*, 289 S.W. 2d 157 (Mo. App. 1956).

249. *Houfburg v. Kansas City Stock Yards Company of Maine*, 283 S.W. 2d 539 (Mo. 1955). Also, see *Concrete, Inc. v. Curry*, 278 S.W. 2d 6 (Mo. App. 1955); *Snyder v. Jensen*, *supra* note 23.

250. *Briley v. Thompson*, 285 S.W. 2d 27 (Mo. App. 1955); *Willis v. American National Life Insurance Co.*, 287 S.W. 2d 98 (Mo. App. 1956).

Where the appellate court could not tell whether the Industrial Commission failed to consider certain evidence, or whether it considered such evidence and found it not credible, or whether it concluded that such evidence was credible but legally insufficient, and the court was of the opinion that such evidence, if credible, together with the other evidence, was legally sufficient to require a compensation award, the court reversed the judgment affirming a denial of compensation and remanded the cause to the circuit court with directions to remand to the commission to decide the case in accordance with the appellate court's decision.²⁵¹

A case need not be remanded as to the issues of liability²⁵² and of damages,²⁵³ but may be remanded as to either issue.

In a declaratory judgment action to determine the validity of the 1952 division of the City of St. Louis into seven senatorial districts, where the appellate court held that the division was invalid, since elections of senators would soon take place, that court, instead of remanding the case to the circuit court with directions to enter declaratory judgments in accordance with the appellate court's rulings, gave such judgment as the circuit court ought to have given.²⁵⁴

An appellate court has no discretion to grant a new trial except upon reversible error properly assigned and presented, hence, where no such error exists in the record, the court must affirm the judgment.²⁵⁵

Therefore, in an action by a pedestrian for personal injuries sustained when he was struck by an approaching motorist while attempting to cross a highway, a statement by counsel for the motorist that the defendant was a working man with a wife and family and that "they want you to inflict financial ruin upon" the motorist, while improper, was not so patently inflammatory and unfairly prejudicial as to require the appellate court to grant a new trial.²⁵⁶

251. *Arnold v. Wigdor Furniture Company*, 281 S.W. 2d 789 (Mo. 1955).

252. *Beckwith v. Standard Oil Company*, *supra* note 195.

253. *McClard v. Morrison*, *supra* note 162.

254. *Preisler v. Doherty*, *supra* note 51.

255. *Blackman v. Botsch*, 281 S.W. 2d 532 (Mo. App. 1955).

256. *Parmley v. Henks*, *supra* note 163.

t. *Rehearing*

A reviewing court, in determining a motion for a rehearing, disregards statements in the verified motion of alleged facts in the nature of newly discovered evidence.²⁵⁷

u. *Transfer*

Under article 5, section 10, of our constitution, where there was an irreconcilable conflict in the opinions of the supreme court on the question of the submission of the defense of contributory negligence, the question was held to be one of general interest and importance and the cause was transferred to the supreme court for decision.²⁵⁸

When a case is transferred to the state supreme court, it is treated as though it was there on an original appeal.²⁵⁹

257. *Houfburg v. Kansas City Stock Yards Company of Maine*, *supra* note 3.

258. *O'Leary v. Illinois Terminal Railroad Company*, *supra* note 199.

259. *Bunch v. Mueller*, *supra* note 195; *Dickerson v. St. Louis Public Service Company*, 286 S.W. 2d 820 (Mo. 1956).