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Trial Practice in Missouri-1957

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TRIAL PRACTICE IN MISSOURI–1957*

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I. PARTIES

A. *Real Parties in Interest*

Usually, a mere general or simple creditor cannot maintain a suit in equity to set aside a fradulent conveyance, and only judgment creditors and those who have a legal or equitable lien on property, or who have commenced attachment suits against property, can maintain such a suit; but, if the amount of indebtedness is admitted, or if it appears that the ordinary process of law cannot be served upon a debtor, the requirement that a claim be reduced to judgment is inapplicable.[1]

An action for the death of parents survives to their minor children and they through their guardians and curators are proper parties to institute and prosecute it.[2]

B. *Necessary Parties*

Where the legal title to lands claimed by the defendants, at the time a drainage district was established, was in the United States, if an easement was to be established over such lands, by the creation of the drainage district, the United States was a necessary party, and no easement could be acquired if the United States was not made a party.[3]

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*This Article contains a discussion of selected 1957 and 1958 Missouri court decisions.

The new general code for civil procedure (hereafter referred to as "code for civil procedure," "new code" or "code") was enacted in 1943. Mo. Laws 1943, pp. 353-97, §§ 1-145. In the main it has been codified in chapters 506, 507, 509, 510 and 512, Missouri Revised Statutes (1949). The code has been amended in some respects since its enactment. Supreme court rules 1, 2 and 3 appear at pages 4098 to 4113 of volume 2, Missouri Revised Statutes (1949). The following interpretations of the code and of these rules are based on Missouri cases appearing in volumes 302 through 312 of the Southwestern Reporter, Second Series. Beginning with this Article the writer will no longer cover material on appellate procedure, nor attempt to present all of the decisions on the code and rules, but will merely present new interpretation thereof, or interesting cases involving earlier interpretations.

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1. Johnson v. Fotie, 308 S.W.2d 662 (Mo. 1958); Jones v. Davis, 306 S.W.2d 479 (Mo. 1957).

2. Tice v. Miller, 308 S.W.2d 697 (Mo. 1957).

3. Drainage Dist. No. 48 of Dunklin County v. Small, 311 S.W.2d 29 (Spr. Ct.

C. *Interpleader*

While the general rule is that, where interpleader is properly brought, the stakeholder is entitled to costs which may be allowed out of the fund deposited in court, it is also the general rule that the action of interpleader must be a proper one. Hence, the stakeholder can not get costs out of a fund, where the facts do not show that there is more than one claimant to the fund in existence and capable of interpleading.[4]

D. *Intervention*

An intervenor may not by a purported intervention bring in a different and extraneous cause of action than that which is the subject of the original action.[5]

In an action by a city for a declaratory judgment authorizing it to proceed in the annexation of described territory, an intervenor who owned real estate in and resided in the area proposed to be annexed was entitled to raise any legitimate defense coming within the scope of the original suit which the original defendants might have raised.[6]

When a suit is brought by a third person against a purchaser, the seller may intervene and defend the title, and, if he is duly notified of the bringing of the action against the purchaser, he is bound to do so, and, if he fails to defend, he is bound by the results of such litigation.[7]

II. Pleadings

An interesting case relating to the liberal allowance of amendments has been decided recently.

Where a railroad employee suing for injuries sought to amend a petition by striking allegations of negligence under the Employers' Liability Act and to rely upon the Boiler Inspection Act, and on trial it appeared that the remedy had been misconceived and the plaintiff sought to reinstate allegations of negligence and to offer evidence thereunder, since the defendant was not prejudiced, but serious prejudice to the plaintiff would result if the request were not granted, the petition to reinstate the allegations of negligence was properly granted.[8]

App. 1958).

4. Badeau v. National Life & Acc. Ins. Co., 305 S.W.2d 876 (K.C. Ct. App. 1957).
5. St. Joseph v. Hankinson, 312 S.W.2d 4 (Mo. 1958).
6. *Ibid.*
7. Ivester v. E. B. Jones Motor Co., 311 S.W.2d 109 (St. L. Ct. App. 1958).
8. Simpson v. Kansas City Connecting R.R., 312 S.W.2d 113 (Mo. 1958) (en banc).

III. Cases Tried Without a Jury

Retaxation of allowances to commissioners for appraising damages to property condemned in a proceeding without a jury is properly accomplished, not by a motion to retax costs, but by a motion to amend the judgment or by a motion for a new trial, or by both of these motions, as provided by subdivision three of section 510.310, Missouri Revised Statutes (1949).[9]

There is an instructive case relating to authority to grant a new trial. Judgment for the defendant was entered on February 21, 1956, and the plaintiff's timely motion for a new trial was sustained on April 17. Though, at the time the motion for a new trial was ruled on, the thirty-day period after entry of judgment, during which time supreme court rule 3.25 gives the trial court control over the judgment, had elapsed, it was held that the trial court still retained jurisdiction to rule on the motion on the discretionary grounds stated therein, for the judgment was not final until the motion was passed on within ninety days after it was filed.[10]

Damages to the plaintiff's automobile were sustained when his stopped automobile was struck by a truck. Judgment for the plaintiff was set aside by the granting of the defendant's motion for a new trial and the plaintiff appealed. It was held that the trial court erred in instructing that, on a finding for the plaintiff, the jury could allow the plaintiff such sum as would reasonably and fairly compensate the plaintiff for all damages directly resulting by reason of the negligence of the defendant. This error was held to be prejudicial to the defendant in the absence of evidence establishing the value and condition of the plaintiff's automobile prior to the accident, as there was not adequate evidence from which the jury could determine what amount would fairly compensate the plaintiff for damages resulting from the defendant's negligence. Hence, the trial court's grant of a new trail to the defendant was proper.[11]

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9. State *ex rel.* State Highway Comm'n v. Graeler, 303 S.W.2d 944 (St. L. Ct. App. 1957).
10. Simpson v. Kansas City Correcting R.R., *supra* note 8.
11. Thomson v. Bast, 309 S.W.2d 667 (St. L. Ct. App. 1958).