1945

Missouri Supreme Court for the Year 1944, The

Harold J. Fisher

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THE MISSOURI SUPREME COURT FOR THE YEAR 1944
STATISTICAL SURVEY

HAROLD J. FISHER*

In 1944 the Missouri Supreme Court handed down 251 opinions, nine of these opinions representing two separate cases each, and two opinions representing three separate cases each, thus making a total of 264 cases disposed of by opinion.¹

There were no changes in the personnel of the court during the year 1944.

Table I shows the number of opinions written by individual judges and commissioners in 1944.

**TABLE I**
NUMBER OF OPINIONS WRITTEN

**Judges**

<table>
<thead>
<tr>
<th>Judge</th>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clark</td>
<td>16</td>
</tr>
<tr>
<td>Douglas</td>
<td>14</td>
</tr>
<tr>
<td>Ellison</td>
<td>21</td>
</tr>
<tr>
<td>Gantt</td>
<td>11</td>
</tr>
<tr>
<td>Hyde</td>
<td>17</td>
</tr>
<tr>
<td>Leedy</td>
<td>8</td>
</tr>
<tr>
<td>Tipton</td>
<td>21</td>
</tr>
</tbody>
</table>

**Commissioners**

<table>
<thead>
<tr>
<th>Commissioner</th>
<th>Number of Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barrett</td>
<td>24</td>
</tr>
<tr>
<td>Bohling</td>
<td>25</td>
</tr>
<tr>
<td>Bradley</td>
<td>22</td>
</tr>
<tr>
<td>Dalton</td>
<td>24</td>
</tr>
<tr>
<td>Van Osdol</td>
<td>24</td>
</tr>
<tr>
<td>Westhues</td>
<td>24</td>
</tr>
</tbody>
</table>

Table II shows the classification of the cases in the various fields of law. Many of the cases involved several issues, so for the purposes of this table, it has been necessary to place each case arbitrarily in one category only.

¹Student Editor, Missouri Law Review.

1. The trend of litigation has remained relatively constant over the past ten years: 1935, 331; 1936, 369; 1937, 277; 1938, 303; 1939, 290; 1940, 282; 1941, 336; 1942, 293; 1943, 306.
## TABLE II

**Topical Analysis of Decisions**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeal and Error</td>
<td>10</td>
</tr>
<tr>
<td>Attorney and Client</td>
<td>3</td>
</tr>
<tr>
<td>Banks and Banking</td>
<td>1</td>
</tr>
<tr>
<td>Bills and Notes</td>
<td>1</td>
</tr>
<tr>
<td>Certiorari</td>
<td>2</td>
</tr>
<tr>
<td>Constitutional Law</td>
<td>4</td>
</tr>
<tr>
<td>Contracts</td>
<td>9</td>
</tr>
<tr>
<td>Corporations</td>
<td>3</td>
</tr>
<tr>
<td>Courts</td>
<td>7</td>
</tr>
<tr>
<td>Creditors Rights</td>
<td>2</td>
</tr>
<tr>
<td>Criminal Law</td>
<td>40</td>
</tr>
<tr>
<td>Damages</td>
<td>7</td>
</tr>
<tr>
<td>Divorce</td>
<td>1</td>
</tr>
<tr>
<td>Elections</td>
<td>6</td>
</tr>
<tr>
<td>Equity</td>
<td>4</td>
</tr>
<tr>
<td>Evidence</td>
<td>4</td>
</tr>
<tr>
<td>Habeas Corpus</td>
<td>6</td>
</tr>
<tr>
<td>Insane Persons</td>
<td>1</td>
</tr>
<tr>
<td>Insurance</td>
<td>4</td>
</tr>
<tr>
<td>Mandamus</td>
<td>1</td>
</tr>
<tr>
<td>Master and Servant</td>
<td>5</td>
</tr>
<tr>
<td>Mortgages</td>
<td>5</td>
</tr>
<tr>
<td>Municipal Corporations</td>
<td>10</td>
</tr>
<tr>
<td>Negligence (Automobiles)</td>
<td>14</td>
</tr>
<tr>
<td>Other Negligence</td>
<td>23</td>
</tr>
<tr>
<td>Physicians and Surgeons</td>
<td>2</td>
</tr>
<tr>
<td>Pleading</td>
<td>5</td>
</tr>
<tr>
<td>Practice and Procedure</td>
<td>2</td>
</tr>
<tr>
<td>Prohibition</td>
<td>1</td>
</tr>
<tr>
<td>Quo Warrant</td>
<td>1</td>
</tr>
<tr>
<td>Real Property</td>
<td>23</td>
</tr>
<tr>
<td>Statutes</td>
<td>10</td>
</tr>
<tr>
<td>Taxation</td>
<td>11</td>
</tr>
<tr>
<td>Torts (Other Than Negligence)</td>
<td>4</td>
</tr>
<tr>
<td>Trusts</td>
<td>8</td>
</tr>
<tr>
<td>Unemployment Compensation</td>
<td>4</td>
</tr>
<tr>
<td>Wills and Administration</td>
<td>15</td>
</tr>
<tr>
<td>Workmen's Compensation</td>
<td>5</td>
</tr>
</tbody>
</table>

Table III shows the disposition of the cases. It is of importance to note that even though the trial court was affirmed in some manner in more
instances than it was reversed, in a large percentage of the cases the appeal was successful to some extent.

### TABLE III
**Disposition of Litigation**

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeal dismissed</td>
<td>4</td>
</tr>
<tr>
<td>Application denied</td>
<td>1</td>
</tr>
<tr>
<td>Cause remanded with directions</td>
<td>1</td>
</tr>
<tr>
<td>Decree Affirmed</td>
<td>7</td>
</tr>
<tr>
<td>Decree affirmed as modified</td>
<td>1</td>
</tr>
<tr>
<td>Decree affirmed in part and in part remanded with directions</td>
<td>1</td>
</tr>
<tr>
<td>Decree reversed and remanded with directions</td>
<td>2</td>
</tr>
<tr>
<td>Decree reversed in part and remanded with directions</td>
<td>1</td>
</tr>
<tr>
<td>Decree and judgment reversed and cause remanded with directions</td>
<td>1</td>
</tr>
<tr>
<td>Information dismissed</td>
<td>1</td>
</tr>
<tr>
<td>Judgment affirmed</td>
<td>131</td>
</tr>
<tr>
<td>Judgment affirmed, cause remanded</td>
<td>2</td>
</tr>
<tr>
<td>Judgment affirmed, on condition of remittur</td>
<td>6</td>
</tr>
<tr>
<td>Judgment affirmed in part, reversed in part</td>
<td>1</td>
</tr>
<tr>
<td>Judgment affirmed and appeal from supplemental orders dismissed</td>
<td>3</td>
</tr>
<tr>
<td>Judgment reversed</td>
<td>8</td>
</tr>
<tr>
<td>Judgment reversed with directions</td>
<td>1</td>
</tr>
<tr>
<td>Judgment reversed and remanded</td>
<td>31</td>
</tr>
<tr>
<td>Judgment reversed and remanded with directions</td>
<td>21</td>
</tr>
<tr>
<td>Opinion quashed</td>
<td>4</td>
</tr>
<tr>
<td>Order affirmed</td>
<td>4</td>
</tr>
<tr>
<td>Order affirmed and cause remanded</td>
<td>1</td>
</tr>
<tr>
<td>Order granting new trial affirmed</td>
<td>1</td>
</tr>
<tr>
<td>Order set aside and cause remanded with directions</td>
<td>1</td>
</tr>
<tr>
<td>Order reversed and cause remanded with directions</td>
<td>4</td>
</tr>
<tr>
<td>Permanent writ granted</td>
<td>2</td>
</tr>
<tr>
<td>Peremptory writ issued</td>
<td>3</td>
</tr>
<tr>
<td>Peremptory writ denied</td>
<td>1</td>
</tr>
<tr>
<td>Peremptory writ of mandamus issued</td>
<td>1</td>
</tr>
<tr>
<td>Petition dismissed</td>
<td>1</td>
</tr>
<tr>
<td>Petitioner discharged</td>
<td>1</td>
</tr>
<tr>
<td>Petitioner remanded to custody</td>
<td>4</td>
</tr>
<tr>
<td>Provisional rule in prohibition made absolute</td>
<td>1</td>
</tr>
<tr>
<td>Record and opinion quashed in part</td>
<td>1</td>
</tr>
<tr>
<td>Respondent disbarred</td>
<td>1</td>
</tr>
<tr>
<td>Respondents records quashed</td>
<td>1</td>
</tr>
</tbody>
</table>
Transferred to court of appeals ...................................................... 4
Writ quashed ................................................................................ 3
Writ quashed and petitioner remanded ......................................... 1

Table IV shows the disposition of motions subsequent to decision. In many of the cases rehearings were granted, or the case was transferred to the court en banc, but as these records are not available, such motions are not included in this study.

TABLE IV
MISCELLANEOUS

Rehearing denied ............................................................................. 121
Motion to transfer to court en banc denied ................................. 33
Motion to modify denied ............................................................... 4
Motion to modify sustained ........................................................... 1
Mandate conformed to ................................................................. 1

APPELLATE PRACTICE
CHARLES V. GARNETT

THE JURISDICTION OF THE SUPREME COURT

It is worthy of note that, during the year under review, the supreme court has found it necessary to discuss the question of its jurisdiction in only nine cases; and that, of these, only four were transferred to the courts of appeals.

In one case, City of St. Louis v. Fitch, the appeal was from a conviction upon a charge of misdemeanor in violating a city ordinance, but reached the appellate court upon the record proper, no bill of exceptions having been preserved. Hence there was no affirmative showing in the record that any constitutional question was raised or preserved, and the supreme court declined to entertain jurisdiction upon the mere claim, in the briefs, not supported by the record, that a constitutional question was involved; and transferred the case to the court of appeals. The court again declared: "This is a court of limited appellate jurisdiction. The record must affirmatively disclose jurisdiction for an appeal to lodge here. . . . Raising a constitutional question is not a mere matter of form. The question must really exist, and, if it does not exist, it is not raised."

*Attorney, Kansas City, LL.B., Kansas City School of Law, 1912.
1. 183 S. W. (2d) 828 (Mo. 1944).
In Badger Lumber Co. v. Goodrick, the appeal was from an order denying a motion, in the nature of a writ of error coram nobis to vacate a judgment in a mechanic's lien action. Although there was no affirmative showing of requisite jurisdictional amount, the supreme court retained jurisdiction of the appeal because one of the grounds of the motion to vacate was that the manner of obtaining the judgment sought to be vacated amounted to a denial of due process of law.

In National Surety Corporation v. Burger's Estate, the Surety Company instituted a statutory proceeding in the probate court by which it sought to be relieved of any future liability under a $30,000 bond executed on behalf of the curator of the estate of a minor. The relief sought was denied both in the probate court, and, on appeal, in the circuit court, following which the appeal to the supreme court was taken. But because the relief sought was from an indefinite and contingent future liability, and the money value of such relief was not affirmatively shown, the supreme court held that it had no jurisdiction of the appeal, and transferred the cause to the court of appeals.

In two cases, Miller v. Heisler, a suit to have a judgment declared a special lien against real estate, and Adams v. Adams, a suit in partition where the issue was whether a co-parcener was entitled to a lien for taxes and improvements, the court again applied the rule that adjudication of liens on real estate does not involve title to real estate, and transferred both cases to the Court of Appeals.

By a divided vote, the court retained jurisdiction in Herriman v. Creason, a suit to set aside a conveyance of real estate in fraud of creditors. The trial court had sustained a demurrer to the petition, and the appeal was from the order of dismissal which followed that ruling. The prayer of the petition was that the transfer be declared void as to the plaintiff, and cancelled, and that the real estate be sold to pay plaintiff's judgment. The majority opinion is based on the statutory provision that conveyances in fraud of creditors shall, as against creditors, be utterly void. The opinion reasons: "Now, if the deed is void, even in part, it fails to convey the whole

2. 184 S. W. (2d) 435 (Mo. 1944).
3. 183 S. W. (2d) 93 (Mo. 1944).
4. 180 S. W. (2d) 54 (Mo. 1944).
5. 177 S. W. (2d) 483 (Mo. 1944).
title. So far as the creditor is concerned, the title is still left in the fraudulent grantor and a suit to cancel the deed directly involves the apparent legal title of the fraudulent grantee... Such a recording differs from one to establish a lien on land as the property of the record owner for that would not attack, but recognize, the title.” Tipton, J., in a strong dissenting opinion, reminds the majority that the test of whether or not title to real estate is involved in a jurisdictional sense is, as announced in Nettleton Bank v. Mcgaughey’s Estate⁸ “The judgment sought or rendered must be such as will directly determine title in some measure or degree adversely to one litigant and in favor of another; or as some of the cases say, must take title from one litigant and give it to another.” Judge Tipton points to the fact that the rule announced in the Nettleton Bank case has been consistently followed since its adoption⁹, and continues:

“Where is title directly taken from one litigant and given to the other litigant in this case?

“I am unable to see where title to real property is directly involved, but the real question is whether this plaintiff is entitled to a lien upon this real estate, which later may be foreclosed.”

The majority opinion undertakes to distinguish the opinion in the case of Salia v. Pillman¹⁰ viewing that opinion as being contrary to State ex rel Brown v. Hughes¹¹, and refers to numerous other fraudulent conveyance cases, in some of which, however, the supreme court had assumed jurisdiction without discussion. The Salia case did not go off on demurrer in the court below, but was decided on the merits, the decree declaring the amount due plaintiffs to be an equitable lien, to be satisfied by sale of the land if not paid within the time prescribed in the decree; and the court had held that this decree merely established a lien and provided for its enforcement.

Thus the final effect of the opinion now under review is to overrule (at least by implication) the Salia opinion, and, following the decision in Balz v. Nelson¹², written over forty years ago, to establish the rule that a creditor’s suit to set aside a fraudulent conveyance involves title to real estate and that appellate jurisdiction in such cases is in the supreme court.

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8. 381 M. 948, 953, 2 S. W. (2d) 771, 774 (1929). (Italics added.)
10. 328 Mo. 1212, 43 S. W. (2d) 1038 (1931).
11. 345 Mo. 958, 137 S. W. (2d) 544 (1940).
12. 171 Mo. 682, 72 S. W. 527 (1903).
That rule is again followed in the later case of Belleville Casket Co. v. Brueggeman.

In State ex rel Place v. Bland, the writ of certiorari was employed to question the jurisdiction of the court of appeals, in a suit where the trial court had entered a decree providing for specific performance of a contract for the sale of realty, or, in the alternative, for cancellation of certain notes. In other words, the decree left the defeated party with the option of conveying real estate or submitting to the cancellation of the notes. The court, although finding no precedent exactly in point, ruled that the optional feature of the decree appealed from did not deprive the supreme court of jurisdiction, and called attention to Herriman v. Creason (considered supra) in holding: "We think these decisions and sound reason show that title is involved where it is taken from one and vested in another even subject to a contingency." The Court is careful to say, however, that "... this does not apply to the mere foreclosure of liens on land where the defendant's title thereto is undisputed and the question is merely one of enforcing the lien."

In Cannon v. Blake, a suit to cancel a note and deed of trust and restrain foreclosure, the court retained jurisdiction because legal title of the trustee under the deed of trust was in issue.

The Right of Appeal

It is, of course, well settled that an appeal will lie only from a final judgment (or from an order sustaining a motion for new trial) and, ordinarily, an appeal after an order sustaining a demurrer to the petition is premature unless the record further shows refusal to plead further and entry of judgment. But, in Keller v. Keller the order of the trial court not only sustained the demurrer, but also dismissed the petition and authorized execution for costs. Consequently, because the order appealed from was a final judgment even though plaintiff had not declined to plead further, and terminated the suit, the supreme court held that the appeal was not premature.

However, in Adair County v. Bennett, where the order of the trial court, at the close of the evidence, in recording plaintiff's involuntary non-
suit, awarded costs to defendant, but the order overruling plaintiff's motion to set the nonsuit aside was not followed by a judgment of dismissal or discharge of defendants, the court held that the assessment of costs did not dispose of the case, and dismissed the appeal as premature. And in *Evans v. Barham*\(^{18}\) an order overruling a motion to quash the proceedings of a police judge in a misdemeanor action was not a final appealable judgment and the appeal therefrom was dismissed.

In *State ex rel Consumers Public Service Company v. Public Service Commission*\(^{19}\) it was held that the general rule that only those who are "aggrieved" by a final decision may appeal therefrom, is not wholly applicable to appeals prosecuted for the purpose of reviewing decisions of the Public Service Commission. In appeals of that class any person "interested" has the right of appeal; and that is true because of the special statutory provisions creating the Commission and regulating proceedings before it. The court reasons: "These provisions make it plain that the Public Service Commission Act provides its own Code for proceedings for judicial review of its orders and that the reference to the general code is only to make appeals subject to the usual rules of appellate procedure where procedure is not otherwise specified in the act. . . . We think 'interested' is the key provision . . . and that it is a broader term than 'aggrieved' . . ." Any interest that would justify either a complaint or an intervention before the Commission is sufficient to create the right of appeal whether that interest is an actual pecuniary interest or not. A prior decision of the court of appeals to the contrary in *American Petroleum Exchange v. Public Service Commission*\(^{20}\) is overruled.

**Abstracts and Briefs**

With the adoption of the new Code of Civil Procedure, effective January 1, 1945, new rules governing appellate practice, promulgated by the supreme court, also went into effect. For that reason, the opinions written in 1944 and prior years on questions relating to rules of court governing appellate practice are of importance in future litigation only in so far as the rules there construed have been re-adopted in the new rules.

In *Padgett v. Missouri Motor Distributing Corporation*\(^{21}\), the court

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18. 184 S. W. (2d) 424 (Mo. 1944).
19. 352 Mo. 905, 180 S. W. (2d) 40, 43, 45 (1944).
20. 176 S. W. (2d) 533 (Mo. 1943).
21. 177 S. W. (2d) 490 (Mo. 1944).
again held that the failure to include in the abstract the testimony of witnesses which is not material to the appellate issues does not render the abstract defective under old Rule 13 which required that the abstract "shall set forth so much of the record as is necessary to a complete understanding" of the questions to be presented on appeal. Under the new code and new appellate rules, a different result might have been reached because, by rules 1.04 and 1.06 of the new rules, the entire evidence must be included unless the respondent expressly (or presumptively, under Rule 1.06) consents that immaterial evidence be omitted.

In Ford v. Louisville & N. R. R., the appellant, by way of setting out assignments of error as required by Rule 15 of the old rules of the supreme court, merely quoted the motion for new trial. Respondent, relying on the holding in Aulgur v. Strodtman, that adoption of the motion for new trial is insufficient, moved to dismiss the appeal. The court, however, distinguished the case under review from the Aulgur case upon the ground that, while the motion for new trial in the Aulgur case contained only general assignments, the motion in the case under review distinctly and specifically assigned error to the admission of certain specific evidence, and the court held that the error relied upon had been distinctly pointed out. Accordingly the motion to dismiss the appeal for failure to comply with the rule was overruled, and the judgment was reversed because of the error thus pointed out.

In Rockwood v. Crown Laundry Co., the appeal was from a judgment for defendant rendered upon refusal of plaintiff to plead further after demurrer to the petition had been sustained. Respondent moved to dismiss the appeal on the ground that the abstract did not contain the judgment appealed from, nor the affidavit for appeal. However, the abstract did contain, in narrative form, recitals showing the entry of judgment and the fact that the affidavit had been filed and the appeal taken, and the motion to dismiss was overruled.

The decisions in the year under review do not include any cases in which the right of review has been denied for failure to comply with court rules. As before stated, the new code and the new rules should go far in eliminating both delay and the loss of the right of appellate review through

22. 183 S. W. (2d) 137 (Mo. 1944).
23. 329 Mo. 738, 46 S. W. (2d) 172, 174 (1932).
infractions of court rules. But the period now being entered will undoubtedly be one calling for careful consideration of many questions of appellate practice in the light of new statutes and rules, and the precedents of preceding years will yield to the impact of the new legislation. The guiding principle of construction is, as declared by the code25 "the just, speedy and inexpensive determination of every action."

EVIDENCE
EDITH DAILEY WRIGHT

The decisions of the supreme court of Missouri during 1944 on evidence law were, for the most part, based on well established rules and laws of evidence set forth in previous years.

JUDICIAL NOTICE

In Benton v. St. Louis-San Francisco Ry.1 the court said it is common knowledge that the flange on the wheel of a railroad engine or car is to the inside and against the inside edge of the rails.

RELEVANCY, MATERIALITY AND COMPETENCY

Wienen v. Mutual Life Insurance Co.2 was an action by a physician against an insurance company for disability benefits. The court held evidence showing that plaintiff had sold his practice and the amounts received in such sale were irrelevant. In addition, the testimony as to the amounts he was receiving from other insurance companies as disability benefits were irrelevant.

Menke v. Rovin3 was an action for damages by plaintiff buyer against defendant seller for fraud in the sale of real estate. Defendant had represented the three pieces of property as leased to three parties for varying terms with privileges of renewals in two of the leases. Actually only one piece was leased and the other two apparent lessees were "stooges" placed in the buildings by the seller. After the sale these apparent lessees left. The jury awarded actual and punitive damages. One assignment of error was that plaintiff's counsel had been permitted to inquire as to the value of


*Attorney, Mexico. A.B. 1942, LL.B. 1944, University of Missouri.
1. 182 S. W. (2d) 61 (Mo. 1944).
2. 352 Mo. 673, 179 S. W. (2d) 39 (1944).
3. 352 Mo. 826, 180 S. W. (2d) 24 (1944).
another piece of property held in the name of a straw party and actually belonging to defendant's mother. Defendant used the same straw party for holding his own property. The supreme court held that the financial condition of the defendant is a proper element for consideration in determining punitive damages. While the financial status of his mother was not, and defendant says the admission of such evidence was prejudicial, the scope of cross-examination is largely in the discretion of the trial court and under the circumstances surrounding the testimony, its admission did not constitute an abuse of such discretion.

In *Ford v. Louisville & Nashville R. R.*, an action for wrongful death of plaintiff's husband, W's deposition had been taken prior to his own death. The deposition showed that W did not remember with much clarity the events leading to the husband's death. In the course of taking the deposition, plaintiff's attorney produced W's earlier statement reciting in detail the events leading to the death. W then said this was correct. The supreme court refused to support the admission of the statement by the lower court saying it could be used to refresh W's memory but was not admissible in itself to support plaintiff's case. Neither was it admissible as a prior consistent statement inasmuch as W had not been impeached.

**Witnesses**

**A. Competency**

*Kleinschmidt v. Bell* was a suit for libel. Plaintiff had been a candidate for circuit judge against X. Y, brother of X, caused defendant to print handbills copying an article charging plaintiff with knowingly permitting gambling when he was prosecuting attorney. The supreme court said it was within the lower court's discretion (1) to refuse to permit W to testify as to plaintiff's reputation as prosecuting attorney, W having been only ten years old at the time of plaintiff's term as prosecutor (2) to refuse to permit a lay witness who had not qualified to testify concerning plaintiff's loss of law practice.

In the field of qualification of expert witnesses, *Baker v. Kansas City Public Service Co.* was handed down. This was an action for damages for personal injuries sustained in a collision with defendant's street car: X, a

4. 183 S. W. (2d) 137 (Mo. 1944).
5. 183 S. W. (2d) 87 (Mo. 1944).
6. 183 S. W. (2d) 873 (Mo. 1944).
former street car operator for defendant, was plaintiff's expert witness. Defendant claimed he was not qualified since he was employed by the company when the old-type cars were in use and had never operated the new type. X claimed he had ridden in the new cars, had observed their operation under normal circumstances and in emergencies. The supreme court said the qualification of experts rests largely in the discretion of the lower court and their action in allowing him to qualify as an expert shows no abuse of that power.

B. Privilege

_Denny v. Robertson_7 was an action by a widow under the wrongful death statutes against Doctor A. Widow alleged that defendant broke her husband's jaw in attempting to extract a tooth which injury had caused his death. Plaintiff, at the trial, called the attending physician at deceased's death to prove death as required in such actions. Defendant also called several doctors who had treated deceased to prove that his treatment was not the cause of death. Plaintiff objected on the ground that under Section 18958 a doctor is prohibited from testifying to information acquired in treatment of a patient and that privilege may not be waived by those suing under the wrongful death statutes. The court held that it is a privilege that may be waived (1) by the patient (2) by his representatives after death or (3) by those suing under the wrongful death statutes despite a holding that such statutes create a new cause of action,9 basing the holding on the fact that the beneficiary could not recover absent testimony by the attending physician. Plaintiff, by introducing testimony of the attending physician to prove death, waived the privilege as to the other physicians' testimony.10

C. Impeachment

_Walsh v. Terminal R. R. Ass'n of St. Louis_11 and _State v. Graves_12 both deal with whether or not, in impeaching a witness, the whole prior statement

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7. 352 Mo. 609, 179 S. W. (2d) 5 (1944).
8. Mo. Rev. Stat. (1939). "Persons incompetent to testify—... a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon."
11. 182 S. W. (2d) 607 (Mo. 1944).
or only the portion thereof which tends to impeach must be read. In both cases the supreme court said that only the portion which is intended to impeach the witness need be read, leaving it to the opposing party to read the remainder insofar as it may tend to rehabilitate the witness.

The *Graves* case sets forth another point. The defendant had elected to testify in his own behalf. When the prosecutor asked questions directed to his impeachment, attempting to prove prior convictions as allowed under Sections 4081 and 1916 of the Missouri Revised Statutes, 1939, defendant objected. Defendant contended these statutes are unconstitutional insofar as they provide that the defendant may be impeached like any other witness. The supreme court held that Section 4081 was an enabling Act making it possible for accused to be a witness when he would have been disqualified under the common law. When the defendant becomes a witness as allowed by the statute, it is a voluntary act by which he waives the constitutional protection subjecting himself to cross-examination and impeachment. The court said that *State v. Larkin* has been exploded entirely insofar as it held that cross-examination of the accused is limited by constitutional rule against self-incrimination. When defendant testifies, it is at his own election and he can look for protection only to the statutes giving him the election.

**ADMISSIONS**

In *Gosney v. May Lumber & Coal Co.* X, driver of defendant's truck which collided with plaintiff's car, stated upon examination in his deposition that he could stop his truck in 10 or 15 feet, but before signing it, changed his estimate to 80 or 90 feet. The court said he had a right to correct his answer in the deposition before signing it, but that these answers were not admissible, in any event, as admissions against defendant since X was not a party to the suit and apparently not in defendant's employ at the time of


14. "No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination... Provided, that no person on trial or examination... shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf... and shall be liable to cross-examination... and may be contradicted and impeached as any other witness in the case."

15. "Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility..."

16. 250 Mo. 218, 157 S. W. 600 (1913).

17. 352 Mo. 693, 179 S. W. (2d) 51 (1944).
the deposition. Neither were they admissable to affect X's credibility when offered by the defendant because X was defendant's witness.

**HEARSAY**

*Ross v. Pendergast*\(^{18}\) involved a plaintiff whose father died leaving envelopes in his safe deposit box containing money. On one of these was plaintiff's name. Defendants, executrices of the estate, took possession of the envelope and plaintiff brings this action in replevin. Plaintiff's father had made statements during his lifetime that the money belonged to plaintiff. The supreme court held these statements admissible as admissions against interest, and held erroneous an instruction that plaintiff cannot establish ownership by such statements alone. Although weak evidence, it is not impossible to support a verdict based thereon.

*St. Joseph Lead Co. v. Fuhrmeister*\(^{19}\) was an action to quiet title. After conveyance to defendant, X company, grantor, gave notice of forfeiture based upon a clause in the deed for forfeiture if grantee sold liquor on the premises. After re-entry X sold the land to plaintiff. Following the re-entry and sale, defendant wrote X's president asking for permission to sell liquor on the premises. X's president did not reply to the letter and defendant sought to have it admitted in evidence to show that defendant had consulted with X's officers and had interpreted no reply as acquiescence. The court sustained an objection and the supreme court affirmed, branding the evidence as hearsay. Furthermore there was no duty on the president to reply—especially since X had already sold the land to plaintiff.

*Hammond v. Schuermann Building & Realty Co.*\(^{20}\) was an action for wrongful death of plaintiff's husband. X was taken into custody in connection with the death and gave a signed statement of the occurrence. After his testimony at the trial this statement was introduced by plaintiff to impeach X. There was an instruction that the written statement must not be considered by the jury as substantive evidence against defendants. The supreme court upheld this instruction on appeal saying that hearsay evidence, while incompetent to prove the truth of the facts stated therein, may be introduced for the purposes of impeachment only, applying the doctrine of multiple admissibility. This case seems to the writer to make a needless

\(^{18}\) 182 S. W. (2d) 307 (Mo. 1944).
\(^{19}\) 182 S. W. (2d) 273 (Mo. 1944).
\(^{20}\) 352 Mo. 418, 177 S. W. (2d) 618 (1944).
distinction. This evidence would admittedly have been hearsay if there had been no right to cross-examine X. However defendants had the right because he was present at the trial. It is submitted that the evidence was competent as substantive evidence as well as for impeachment purposes. In Pulitzer v. Chapman the court said that prior inconsistent statements made in a deposition by a witness who testifies at the trial may be used not only to impeach but as substantive evidence of the facts stated therein. A deposition differs from a mere signed statement in that the opposing counsel's opportunity to cross-examine comes at the time of the statement in the former, not so in the latter. However the time of cross-examination has never been held material in determining whether or not evidence is hearsay. Until the time element becomes material in the determination, declarations in signed statements, as well as those in depositions, should be admissible to prove the truth of the facts stated therein when the witness is present at the trial to be cross-examined.

INSURANCE
Orrin B. Evans

Misrepresentation

In State ex rel Dyer v. Blair, the Missouri Supreme Court rendered a decision of considerable concern to insurance companies doing business in Missouri. The material parts of the application for the insurance policy in suit were not set forth in the opinion but from the defendant insurer's pleadings it appears that the insured, in his application, "had represented that his health was good and free from every disease and infirmity; that he had never suffered from any ailment or disease of the nervous system, heart or lungs ...; that he had never had rheumatism, gout, syphilis, goiter or diabetes, and that he had never consulted or been treated by, or been in the care of any physician, healer, or any practitioner...." (italics added). The policy was issued April 22, 1940, and the insured died May 26, 1940. The opinion does not set forth the plaintiff's pleadings nor the exact evidence offered by the plaintiff (who was the beneficiary under the policy). "It was

*Professor of Law, University of Missouri; A.B. University of Wisconsin, 1931; LL.B. 1935; J.S.D. Yale University, 1940.
1. 178 S. W. (2d) 1020, 1021, 1024 (Mo. 1944).
admitted by plaintiff that insured had nervous trouble; that he suffered from what he called a nervous breakdown; that he had this nervous trouble as far back as 1937, continuing through 1939; that he had been treated in Springfield, Missouri, the latter part of 1939." The proof of death stated that death resulted from coronary thrombosis, and the accuracy of this statement does not seem to have been seriously controverted.

The insurer defended on the ground of fraud in the procurement of the policy and breach of the sound health provision thereof. It offered the testimony of physicians who had treated the insured for several years prior to the application for the policy, one of whom was treating him at the time of the application and who continued to treat him to the day of his death. The evidence established that the insured was suffering from syphilis of many years duration. It appeared that the insured's blood pressure was abnormal and that the aorta of the heart was enlarged. It was conceded that coronary thrombosis need not have resulted necessarily from the syphilis. The physicians disagreed as to the likelihood of the syphilis having been the cause of the thrombosis.

The trial judge let the case go to the jury, which found for the plaintiff. The court of appeals reversed, because "the evidence (wholly uncontra-dicted) so conclusively disclosed deception, fraud and intentional concealment of a serious diseased condition and treatment thereof on the part of the insured, which existed at the time of the application for insurance and for a long time prior thereto, and which contributed to or caused his death (the event on which the policy is to become payable), we are driven un-alterably to the conclusion that the court was not authorized under the evidence, to submit the case to the jury. In this conclusion we feel there is no room for reasonable minds to differ."

The supreme court granted certiorari, and finally quashed the opinion of the court of appeals, because of alleged conflict with prior decisions of the supreme court to the effect that where plaintiff has made a prima facie case, and an affirmative defense has been tendered, the plaintiff's case cannot be taken from the jury, for he has the right to have the jury pass on the credibility of the defendant's witnesses and the weight of their testimony, though uncontroverted. In view of the provisions of the 1945 Constitution, broadening the jurisdiction of the supreme court, there is little point in detailed discussion of the jurisdictional aspect of this case. It might be noted, in passing, however, that the two cases cited by the court as laying
down the violated rule were hardly in point. While both paid lip service to
the general rule, the first case actually held that the issue was properly taken
from the jury under an exception to the general rule, and the second case was
not an insurance case at all.

The court does not elaborate on what constitutes a *prima facie* case but
it is understood that in insurance litigation, a *prima facie* case is made out
by proof of the execution of the policy, payment of the first premium and
proof of loss. In this, the plaintiff is aided by the presumption that posse-
sion of a policy indicates its proper execution and continuing validity. It
must be apparent that there are many kinds of *prima facie* cases. The doc-
trine which the supreme court here applied to an insurance case was first
enunciated in *Gannon v. Laclede Gas Light Co.*, a *res ipsa loquitur* case
although not so designated. The Missouri treatment of *res ipsa* cases is
out of line with the jurisprudence of the rest of the country, the great
majority in such cases holding that when the plaintiff establishes a *res ipsa
loquitur* case, the burden is shifted to the defendant of coming forward with
the evidence, but that when the defendant introduces evidence exculpating
himself from negligence, the presumption drops out of the case, and that if
the defendant's explanation is uncontradicted, the judge may take the case
from the jury. It may be observed that the application of the Missouri rule
in *res ipsa* cases to an insurance case is even more drastic, for in the *res ipsa*
case the court retains a measure of control in that it must decide whether
the "thing speaks for itself". A *prima facie* insurance case is made out by
the mechanical presentation of the elements mentioned above. There should
be no magic in the word "*prima facie.*" It is one thing to say that the
plaintiff has introduced evidence which should require the defendant to come
forward with a defense and which, in the absence of such defense, justifies
or even requires a verdict for the plaintiff. It is another thing to say that
because the defendant's defense is labeled "affirmative" the jury is entitled
to disbelieve all the defendant's uncontradicted testimony, no matter how
impressive. An affirmative defense deals with matter not necessarily neg-
atived by the plaintiff's pleadings and proof but injected for the first time
by the defendant. Just why the jury is bound to believe the uncontradicted
evidence of the plaintiff as to the essential matters which he establishes, but

2. 145 Mo. 502 (1898).
3. A more recent case applying the Missouri rule of *res ipsa loquitur* is
need not believe the uncontradicted evidence of the defendant on altogether new points—new, yet equally pertinent to the issue of liability—is not plain.

Two exceptions to the general doctrine are recognized. "When the proof is documentary, or the defendant relies on the plaintiff's own evidential showing (or evidence which the plaintiff admits to be true), and the reasonable inferences therefrom all point one way, there is no issue of fact to be submitted to the jury." As a practical matter, then, the effect of the instant's decision is to put a premium on the plaintiff's silence. The less testimony he introduces, the better off he will be, at least so far as his prima facie case is concerned.

In the instant case the evidence was clear and overwhelming that the insured was engaged in defrauding the defendant insurer. However, in Missouri fraudulent misrepresentation in obtaining a policy will not void the policy unless the facts misrepresented contributed to the death, no matter how material the misrepresentation might have been in inducing the company to enter into the contract. It was admitted by the plaintiff that the insured had consulted a physician, in contradiction to the terms of his application. Can it be said that such a misrepresentation concerns a fact which ever contributes to death? The holding of the instant case comes very close to rendering such a statement in an application to an insurance policy of no protection to the insurer. From the evidence recited in the opinion, it appears that the testimony as to whether insured's syphilis and heart condition contributed to the coronary thrombosis was not altogether conclusive. The court was therefore perhaps justified in holding that the statute which requires the materiality of a misrepresentation to be submitted to the jury was applicable, but in view of the decision in Kirk v. Metropolitan Life Insurance Co., the opinion goes too far in implying that the question is always for the jury no matter how clear the testimony.

INSOLVENCY

In State v. Fidelity Assurance Ass'n, the Missouri Superintendent of Insurance sought to acquire possession of and control over certain securities which, as the property of Fidelity—a West Virginia corporation—had at the instance of the Commissioner of Securities of Missouri been placed in

5. Ibid.
7. 179 S. W. (2d) 67 (Mo. 1944).
escrow to secure the Missouri policy holders of Fidelity. Fidelity had failed and its assets had been taken over by the Commissioner of Insurance of West Virginia, pursuant to a receivership in that state. The Missouri Commissioner of Securities instituted a suit in Missouri in consequence whereof he was appointed ancillary receiver of the affairs of Fidelity and said ancillary receivership apparently having been recognized in West Virginia, the securities previously held in escrow were turned over to the Commissioner. The court held that Section 6023, Missouri Revised Statutes, 1939, providing that "no action shall be brought or maintained by any person other than the superintendent of the insurance department of this state for the winding up or dissolution of any insurance company, or the distribution of its assets among its creditors . . ." applied only to the insolvency of a Missouri company. The court stated that the Missouri statute made no attempt to provide for the dissolution of a foreign insurance company and that the Superintendent of Insurance had no statutory standing entitling him to priority in claiming these funds. The Missouri circuit court could properly appoint the Commissioner of Securities as ancillary receiver and as he was working in harmony with the West Virginia receiver and had possession of the securities, his possession should not be disturbed. The Court intimated that a different result might follow if the Superintendent of Insurance had first obtained the possession of the securities.

**Insanity**

Two cases decided in 1944 involved the issue of the insanity of the insured. Both cases were actions upon provisions in insurance policies which provided double indemnity in case of accidental death. Britton v. Guardian Life Insurance Company of America\(^8\) followed Lemmon v. The Continental Casualty Company\(^9\) in holding that manic-depressive psychosis was a form of insanity within the rule that suicide while insane constitutes accidental death for insurance purposes. In State ex rel. Kansas City Life Insurance Co. v. Bland\(^10\) the court of appeals had construed the policy in suit purporting to except liability for death resulting "directly or indirectly, wholly or in part, from poisoning, infection or any kind of illness, disease or infirmity . . ." not to except liability for death from suicide while insane. The supreme court quite properly held that this ruling did not conflict

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8. 177 S. W. (2d) 443 (Mo. 1944).
10. 184 S. W. (2d) 425, 426 (Mo. 1944).
with any prior decision of its own. It would seem that insanity was a mental disease or infirmity. Under the Missouri law, an insurer may not except liability for suicide, sane or insane, but he may except liability for death from any particular cause, so long as the exclusion covers non-suicidal as well as suicidal activation of that cause. Presumably, therefore, if the insured had died as a direct result of his mental illness, there could have been no recovery. The policy purported to exclude liability for death resulting indirectly from disease or infirmity and this exclusion would not necessarily be limited to suicide. Thus, there was theoretically posed a nice question as to whether the case should be governed by the statute or by the doctrine of the Fields case. The decision of the court of appeals seems to have been the common sense solution.

Construction of Policies

In Wiener v. Mutual Life Insurance Company of New York the policy sued upon insured the plaintiff against "total and permanent disability from bodily injury or disease, which would permanently, continuously and wholly prevent him from performing any work for compensation, gain or profit, or from following any gainful occupation." The plaintiff, an eminent physician, suffered a heart attack. He recovered from the more acute symptoms of his disease and engaged in some professional activities, but sold his general practice and has not been engaged in active practice. He had been advised by a number of physicians not to resume practice because of the organic condition of his heart. The court held that "a person is totally disabled when he cannot perform in the usual manner enough of the substantial and material duties of his occupation to be able successfully to continue his occupation or, in such a case as this, any gainful occupation for which he would be fitted." "An insured is disabled if he is not able to work without running the risk of increasing his disability or of shortening his life." The court further held that it was error to admit testimony as to the extent of plaintiff's income from sources other than the practice of his profession and from other disability policies, but stated that since the burden of proof was upon the plaintiff to establish his disability, it was not error to refuse to instruct the jury in his favor simply because there was no contradictory testimony as to the state of his disability.

13. 179 S. W. (2d) 39, 40 (Mo. 1944).
In *Schmidt v. Utilities Insurance Co.*, the defendant had insured a coal company against liability imposed upon it for damages sustained by any person "arising out of the ownership, maintenance, or use of the automobile" of the coal company to which the policy applied. The coal company's truck driver had placed large wooden blocks in the gutter as ramps so that it might back its truck from the street to a coal hole where a delivery was to be made. Having completed the delivery, the truck driver negligently left the blocks of wood on the sidewalk where the plaintiff tripped over them and fell, injuring himself. The court held that the plaintiff's injury resulted from an accident which "arose out of the use of" the automobile, saying that the words of the policy were much broader than the phrase "caused by," sometimes employed. The policy did not require that the injury be the direct and proximate result, in a strict legal sense, of the use of the automobile.

*Schoen v. The American National Insurance Company* was a suit for disability benefits. The defendant contended that there was no liability because the insured had not furnished the proof of disability required by the policy. It appears that the disability for which compensation was claimed was insanity, and that same disability made it impossible for the insured to comply with the requirement of proof of disability. The court pointed out that the policy, literally construed, would require an impossibility and therefore would not cover such a disability at all, although in its terms it purported to do so. The court therefore held that performance of the conditions of furnishing proof was excused under such circumstances.

**Insurance Policies Distinguished**

Herbert Hall, age 72, purchased from the Kansas City Life Insurance Company an "investment annuity policy," for which he paid the single premium of $50,000. The policy provided that it should pay to Hall a quarterly annuity equal to 4% upon the $50,000 during his life and upon his death it should pay $50,000 to the named beneficiary. The right to change the beneficiary was reserved. On the death of Hall, his executor claimed the proceeds of the policy as against the named beneficiary, on the theory that the policy was an invalid testamentary disposition of his estate. The supreme court held that whether or not this was a true insurance policy,
because it contained no element of indemnity, it was a third party benefici ary contract completely executed and that it did not have to conform to the Statute of Wills. Judgment for the beneficiaries was affirmed.

The case may be the subject of interesting speculation. It would appear that such a contract could not be considered as insurance within the provisions of the Federal Revenue Act exempting a limited amount of insurance from inheritance taxes.17 Would a company engaged exclusively in issuing policies of this character be doing insurance business and subject to the regulations of the insurance code?

PROPERTY
G. V. Head* 

Connell v. Jersey Realty & Investment Co.1 involves the sufficiency of an alleged common law dedication of certain roads and sidewalks adjacent to a business building in a suburban residential development in Kansas City. A representative of the investment company which owned and platted the area and sold the individual lots and tracts testified that the roadways in question were primarily for the benefit of the tracts in the neighborhood of the business building, including the tract upon which the building was erected, and also for the use of that part of the public which might desire to use the roadways or to patronize the stores or offices in the building. The public used the roadways for seventeen years. This is a suit by an adjacent property owner for a declaratory judgment to the effect that the property is subject to a public easement by common law dedication. The lower court so held.

On appeal, the court states that in order to establish a common law dedication it must be shown: (1) that the owner, by his unequivocal action, intended to dedicate to public use; (2) that the land so dedicated must be accepted by the public; and (3) that the land so dedicated must be used by the public. The court finds that the evidence failed to establish that the disputed area was unequivocally dedicated to public use or that the invest-


*General Counsel, Farm Credit Administration of St. Louis, formerly Professor of Law, University of Missouri, A.B., University of Missouri, 1914; LL.B., Harvard, 1917; S.J.D., Harvard, 1932.

1. 352 Mo. 1122, 180 S. W. (2d) 49 (1944).
ment company ever intended so to dedicate it; and the court reverses the
judgment below, and remands the cause with directions to the lower court
to enter a decree to the effect that no dedication had been made.

The cases dealing with common law dedication can be searched in vain
for any clear-cut, logical formulation of the doctrine. Most of the decisions
seem to base such a dedication upon a well-shaken mixture of implied grant
and estoppel. If dedication is an implied grant, the position of the court
that both acceptance and use by the public are necessary seems hard to
justify. If the theory is estoppel, then intention to dedicate should not be
a prerequisite. And whether the theory be grant or estoppel, the reason for
the requirement that dedication or intention to dedicate be "unequivocal"
is not readily apparent.

Perhaps dedication in a particular case may properly be supported as
an implied grant, whereas in another situation the elements of estoppel may
be present. This diversity of circumstance may explain, even if it does not
justify, the confusion of the two concepts.

The estoppel theory is simple. If the owner, by his words or actions,
represents to the public that he has set aside the property for their use, and
the public relies thereon to its damage, the owner should be estopped to deny
the representation, even though he actually did not intend to make a dedi-
cation.

The theory of implied grant is not so simple, primarily because of the
different kinds of intention which are involved. If a deed of dedication
were relied on, the deed doubtless would not be valid unless executed by the
grantor with the intention to make a conveyance; but the grantor's intention
would have no bearing upon the interpretation of the instrument. Similarly,
if the grant is oral, or implied, the intention of the grantor to make some sort
of conveyance is no doubt a necessary element. But the grantor's intention
should not determine the scope or the interpretation of the conveyance. Here
the investment company clearly intended to give the public the right to use
the disputed tracts. The company's representative testified that the area in
dispute was for the use of that part of the public which might desire to use
those properties. Therefore the necessary intention to give, or convey, or grant
a permissive use, seems to have been established. The real issue seems to be
as to the scope or extent of the right given to the public. Did the investment
company grant to the public title to the property, or even an easement? Or
did it merely permit public use of the land without conveying to the public
and property interest or estate? On such an issue the intention of the owner should be immaterial. The agreement between the owner and the public is to be ascertained by the interpretation, in the light of attendant circumstances, of the words and actions of the parties, regardless of what the unexpressed intention of the grantor may have been. In the case at hand, nothing more than a permissive use seems to have been established.

Roberts v. Randleman is an ejectment suit in which the respective claims of title depend upon the interpretation of a deed executed in 1928 by James Morrison. The deed first purports to convey the property in question to Jennie M. Morrison, her heirs and assigns. Following the description of the property, however, appear the following provisions: "The second party to have full rights and privilege to sell or dispose of same at anytime for her own needs. But it is understood after the death of the second party that all property belonging to her shall go to the heirs of James Morrison, as the second party shall see fit." The habendum clause runs to "the said party of the second part, and unto her heirs and assigns forever." The grantor died in 1929. The grantee died testate in 1932, and by her will, executed in 1930, devised the land to Lottie Randleman, not related to James Morrison, who is sued in ejectment by the heirs of James Morrison. The plaintiffs prevail. Defendant's contention that the deed vested the fee in Jennie Morrison is rejected by the court. When all of the clauses are read together, the court says, it is clear that the grantee received only a life estate. The right given to the grantee "to sell or dispose of same at any time for her own needs" is not, in the court's view of the case, inconsistent with the theory that a life estate only was given to the grantee; nor is the power to designate the manner in which the property should be distributed among the heirs of James Morrison. The court states that the deed vested in the grantee a life estate, with power of disposal during her lifetime if necessary for her maintenance, and with the additional power by will to divide the property among the heirs of the grantor. Since the property was not used for maintenance of the grantee, and was not devised by the grantee to an heir of the grantor, it reverts to the grantor's heirs. The decision seems sound.

Runnerfield v. Mason is a suit for partition brought against George H. Mason by his children. Defendant by his answer seeks a determination of

2. 352 Mo. 980, 180 S. W. (2d) 674 (1944).
3. 352 Mo. 865, 179 S. W. (2d) 732, 733 (1944).

http://scholarship.law.missouri.edu/mlr/vol10/iss4/2
title. The dispute concerns the interpretation and effect of a deed executed by John H. Mason. The deed describes John H. Mason as the party of the first part, and "George H. Mason and his children" as parties of the second part. The deed purports to convey the land in question unto "the said parties of the second part." The habendum clause and the warranties run to "the said parties of the second part and unto their heirs and assigns forever." The grantor reserves to himself the use and control of the lands so long as he shall live. At the date of the execution of the deed, George H. Mason had one child, plaintiff Hazel May Rummerfield. The other two children of George H. Mason, the remaining plaintiffs, were born after the deed was executed, but prior to the death of the grantor. The three children contend that they and George H. Mason are tenants in common, each owning an undivided one-fourth interest. George H. Mason claims the absolute fee title. The court holds that the deed created a life estate in the defendant, with remainder in the children, both those in being at the time of the execution of the deed and those born thereafter.

The defendant, in support of his claim to a fee, relies upon Rines v. Mansfield, Tygard v. Hartwell, and Garrett v. Wiltse, applications of the rule that if a deed makes an absolute conveyance, provisions of the deed purporting to limit the grantee's title will be rejected on the ground of repugnancy. The court distinguishes these cases by reason of variations in the wording of the respective instruments involved. The court sustains defendant's contention that the deed could not create a tenancy in common in George H. Mason and the three children, since two of the children were not in existence when the deed was executed. In holding that the deed created a life estate in the defendant, with remainder in the children, the court relies primarily upon Kinney v. Mathews. In the Kinney case the conveyance was to a woman "and all her children she now has or ever will have." At the date of the conveyance the woman had three children. Subsequently, four other children were born to her. The court reviewed the English and American cases in some detail, and concluded that the only way to give effect to the manifest intent of the grantor that afterborn children should take was to hold that the deed vested a life estate in the mother, with remainder in the children.

4. 96 Mo. 394, 9 S. W. 798 (1888).
5. 204 Mo. 200, 102 S. W. 989 (1907).
6. 252 Mo. 699, 161 S. W. 694 (1913).
7. 69 Mo. 520 (1879).
Wild's Case, decided in 1599, is the leading case on the point in question. The case is generally supposed to stand for the following propositions: (1) if A conveys to B and his children, and B has no children at the date of the conveyance the instrument creates an estate tail in B; (2) if A conveys to B and his children, and B has children at the date of the conveyance, and additional children are born to B thereafter, a joint tenancy is created in B and the children in esse at the time of the execution of the deed, and the after-born children take nothing. These principles are regarded merely as rules of construction, to be given effect only in the absence of provisions in the instrument to the contrary.

The present case concerns only the second proposition, since one child of George H. Mason was in being when the deed was executed. Several decisions subsequent to Wild's Case have held that the use of the word "children," when only one child is in existence on the date of execution of the deed, is not sufficient to nullify the rule of construction. It is believed that in most jurisdictions the deed here involved would be held to vest title in George H. Mason and Hazel May Rummerfield as tenants in common, and that under it no interest would pass to the after-born children. The Missouri court does not discuss such a possibility. The court, by reason of its reliance upon Kinney v. Mathews, in which the conveyance was in favor of children born and to be born, seems to assume that the word "children" necessarily includes those coming into existence after the execution of the deed.

The court fails to mention still a further possibility. If the deed could be interpreted as creating an estate tail at common law, then, by virtue of the statute, George H. Mason would have a life estate, with remainder in his children. However, in view of the absence of words of inheritance, the deed seems not to come within the statute.

Nor does the statute abolishing the Rule in Shelley's Case apply. Almost universally the courts have taken the position that under a deed similar to that in the Kinney case, purporting to convey to A and his children born and to be born, the only way to give effect to the conveyance in so far as the after-born children are concerned is to hold that the deed creates a life estate in A, with remainder to his children in fee. Kales

8. 6 Co. 16b.
9. 69 Mo. 520 (1879).
contended, however, that after the Statute of Uses such a deed could operate as a bargain and sale or covenant to stand seized, vesting title in those grantees in esse for the benefit of the class.  

Regardless of what the situation may have been under the feudal system of tenure and conveyancing, it should now be possible to give effect to the deed according to its terms. A conveyance to "George H. Mason and his children" does not purport to differentiate between the character of the estate going to George and that granted to the children. Upon any sound basis of interpretation, the deed creates a tenancy in common. If technical rules of property prevent such an interpretation, the result is unfortunate. There seems to be no reason, other than a technical one, why the deed cannot vest title in the father and living children for the benefit of the father and all children as a class, the interests of the grantees in existence at the execution of the deed to be subject to the possibility of diminution as other beneficiaries come into existence.

*Mann v. Mann*  is a partition suit, in which the defense is that defendants had acquired title to the land by adverse possession. Benjamin F. Mann was the common source of title. He died intestate in 1913, owning 37 1/2 acres of Missouri River bottom land, of which the tract in question is a part, leaving six children as his only heirs. Immediately thereafter each child went into possession of one-sixth of the 37 1/2 acre tract, and the children farmed the tracts separately. Orange L. Mann, one of the heirs, purchased the interest of one of his sisters who had taken possession of the plot adjoining the tract occupied by him, and thereafter Orange L. Mann farmed both tracts, a total of thirteen and a fraction acres, being the property in dispute. The partition suit is brought against Orange L. Mann by the other heirs of Benjamin F. Mann. There was a verdict and judgment that Orange L. Mann had acquired title to the tract by adverse possession, and partition was therefore denied. Plaintiffs filed a motion for new trial, which was sustained by the court on the ground that the court erred in refusing plaintiff’s request for a directed verdict in the nature of a demurrer to defendants’ evidence on the issue of adverse possession. The Supreme Court now holds that there was sufficient evidence to justify a finding that Orange L. Mann claimed the land as his own, and not as a cotenant with his brothers and sisters, and that the other heirs knew that he claimed to be the sole owner, and that he was in possession under a claim of ownership for the statutory period. The court

12. **Kales, Future Interests** (2d ed. 1920) § 476.
therefore reverses the cause and remands the case to the trial court with direction to set aside the order granting a new trial, to reinstate the verdict, and to enter final judgment for defendants in accordance with the verdict.

The court concedes that ordinarily the possession of one tenant in common is the possession of all tenants in common, and that therefore one such tenant does not ordinarily acquire title by limitation against the other tenants in common. But, the court says, if the tenant in possession does some act which amounts to a disseizin or repudiation or denial of the rights of his cotenants, such as to show an intention to hold adversely to the cotenants, all of the requisites of adverse possession are present. The court in this case finds adequate evidence of such disseizin, repudiation or denial. The language of the court at this point in the opinion might seem to indicate that the intention of the cotenant in possession to hold adversely to the other cotenants is the ultimate fact upon which adverse possession depends. The occupant's intention should, it seems, be immaterial. The issue should be one as to whether the occupant has, by words or actions, treated or dealt with the land as his own. Objective acts, and not subjective intention, should control.

The plaintiffs contend that the action of the trial court in granting a new trial should be affirmed, because the court erred in giving an instruction to the effect that actual notice by plaintiffs of defendants' adverse occupancy and possession was not necessary to the establishment of defendant's claim. The court upholds the instruction. The court says that it is sufficient if defendants' adverse occupancy be overt and notorious and that actual knowledge by plaintiffs of such occupancy need not be established.

_Publicity Bldg. Realty Corporation v. Thomann_14 is a creditors' bill brought for the purpose of setting aside an alleged fraudulent conveyance and for other relief. The debtor had conveyed property by warranty deed to one of his creditors. At the time of the conveyance, the grantor and grantee entered into a written agreement which gave the grantor the right within two years to repurchase the property for the same consideration for which it was conveyed, namely, the amount of the debt. The agreement also provided that during the two-year period the grantee might sell the property to any one else at any price after first giving the grantor the opportunity to purchase at that price. The issue was whether this agreement, when construed with the deed, converted the latter into a mortgage securing the debt.

rather than a payment of the debt. The court states that the right given the
grantee to sell to any one else is in conflict with the theory that the deed
was security for the debt. Furthermore, the court says, extrinsic evidence
indicates that the parties intended the conveyance of the property as pay-
ment of the debt, not as security for the debt, and that the intention of the
parties must control. The nature of this extrinsic evidence is not indicated.
The court refuses to set aside the conveyance.

There is much loose talk in the cases to the effect that an instrument,
though in form an absolute conveyance, will be construed as a mortgage
if so intended. The courts usually are not too specific as to whether they
mean actual, subjective intention, or apparent intention. Nor is it clear
whether they refer to the intention of the grantor, or to the common inten-
tion of grantor and grantee. In view of the uncertainty as to the nature of
the intention referred to, it is not surprising that the authorities evidence
considerable confusion as to the manner in which the intention may be
established. Some courts, in permitting proof of intention in such a case,
have trouble with the parol evidence rule.

Part of the confusion in the application of the doctrine is due to the fact
that the language of the courts implies that the instrument is not given effect
in accordance with its terms. Any such idea is a misconception. The deed
is still a deed. It is given effect as a conveyance. There is no attempt to
change the language of the instrument, and the parol evidence rule is, there-
fore, not involved. The question is: admitting that the property was con-
veyed, what was the effect of the conveyance on the debt? Was the deed
given in satisfaction of the debt, or as security for the debt? That question
is not one of actual subjective intention of the grantor, or of the grantor and
grantee, but is a question of agreement, of contract. To state that the deed
will be construed as a mortgage leads only to confusion. The situation
is simply that if the deed was given as security for the debt, the grantee has
only a security title, and the grantor will consequently have the right to
demand a retransfer upon payment of the indebtedness.

TAXATION

Paul G. Ochterbeck*

During the year 1944 there were five cases decided by the Supreme
Court of Missouri which are of great importance to most practicing attorneys.

*Attorney, St. Louis, LL.B., University of Missouri, 1931.
A statute adopted in 1913 was held to conflict with a constitutional provision adopted in 1920. The Sales Tax Act was construed with respect to sales in which goods were delivered outside the State of Missouri. A successor partnership was held to be a successor employing unit under the Unemployment Compensation Law even though the partner owning the majority interest in the first partnership was not a member of the second partnership. An income tax deduction on account of dividends received from a corporation was limited to that fraction of the 2% tax paid by the corporation which the taxable net income as numerator bears to the total dividend distributed as denominator.

A number of other cases were decided which are of interest to most attorneys but which are not of great importance due to the limited scope of the subjects involved. All cases will be discussed on a topical basis.

I. Tax Statute in Conflict With Constitutional Provision

In State ex rel Hughes v. Southwestern Bell Telephone Co. the provisions of Section 8716, Missouri Revised Statutes, 1939, enacted in 1913, permitting commissioners of road districts to make unlimited tax levies for general purposes were held to be in conflict with Section 23 of Article X of the Old Constitution (added in 1920) and void. This case should be of great interest to all attorneys after July 1, 1946. Undoubtedly many conflicts will remain between our statutes and our New Constitution after July 1, 1946. The reasoning in this case should be very helpful in determining whether or not the New Constitution is actually in conflict with an old statute.

II. Sales Tax

In the cases of American Bridge Co. v. Smith, and Binkley Coal Co. v. Smith decided concurrently, the Supreme Court of Missouri held that a "Sale at retail" means any transfer of ownership of or title to tangible personal property which occurs in the State of Missouri and that the exemption clause in the Sales Tax Act excludes from taxation all retail sales transactions in interstate commerce even though the transfer of title to the tangible personal property takes place in Missouri. The discussion

1. 352 Mo. 715, 179 S. W. (2d) 77 (1944).
2. Sec. 2 of "Schedule" of Constitution of 1945 permits inconsistent laws to remain in force until July 1, 1946.
3. 352 Mo. 616, 179 S. W. (2d) 12 (1944).
4. 352 Mo. 627, 179 S. W. (2d) 17 (1944).
clearly demonstrates that the Missouri Legislature does not desire to tax sales in interstate commerce either by means of a sales tax or a use tax. The reasoning in giving full effect to the exemption provision is sound and might be found to be helpful in other cases.

III. Unemployment Compensation Taxes

In the case of Arado v. Keitel, a successor partnership was held to be a successor employing unit under the Unemployment Compensation Law. The first partnership was composed of three men, two of whom owned a 15% interest each and a third who owned a 70% interest. The second partnership was composed of the two partners who had owned the 15% interest each in the first partnership and a stranger to the first partnership. The Supreme Court held that inasmuch as there were no partnership agreements specifying who was to control either partnership that the two partners who were the same in each partnership had the right of control in the event of a dispute and that the second partnership was therefore a successor employing unit of the first. The fact that the partner owning the 70% interest actively directed and controlled the first partnership was held to make no difference for he was held to be acting on behalf of all of the partners. This case should prove helpful to large law firms whose membership in the firm is constantly changing, due to retirement and death.

IV. Income Taxes

In the case of Orr v. Hoehn, the Supreme Court of Missouri clearly set out the formulas to be used in computing the income tax deduction authorized by Section 11350, Missouri Revised Statutes, 1939, on account of dividends received from a corporation which had paid income taxes to the State of Missouri. In order to compute the deduction the dividend received is multiplied by 2% (the rate of taxation on corporations) and then this result is again multiplied by the fraction obtained from the following rules:

"If the dividends distributed are equal to or greater than the net earnings, then in determining the amount the stockholder may deduct from his state income tax, the taxable net income of the distributing corporation will be the numerator and the net income the denominator of the fraction or portion the stockholder may deduct. . . .

5. 182 S. W. (2d) 176 (Mo. 1944).
6. 182 S. W. (2d) 596 (Mo. 1944).
"But if the dividend distributed is less than the net income, then in determining the amount the stockholder may deduct from his state income tax, the taxable net income of the distributing corporation will be the numerator and the total dividend distributed the denominator of the fraction or portion the stockholder may deduct."

This case was the result of the State Auditor reversing a prior ruling of that office. The prior interpretation was held to be without any effect inasmuch as Section 11350, supra, was held to be plain and unambiguous.

V. TAXES LEVIED BY MUNICIPAL CORPORATIONS

The Supreme Court of Missouri during 1944 decided three cases involving the validity of municipal ordinances levying taxes of 5% on the gross receipts of public utilities. In the case of Laclede Power & Light Co. v. City of St. Louis, an ordinance levying a 5% license tax on the gross receipts received from the business of supplying electricity for compensation contained an exemption clause that was held to be applicable only to the Union Electric Co. This exemption provision was held to render the ordinance a "special law" and void under Section 53 of Article 4 of the Constitution of 1875. In the case of Union Electric Co. v. City of St. Charles, the Court held that under the provisions of Section 6986, Missouri Revised Statutes, 1939, the City of St. Charles had the right to levy a license tax of 5% of the gross receipts on every person engaged in supplying electricity for any purpose; that the words "light, power ... companies" contained in the Statute is a generic term which includes companies supplying electricity for light, heat and power purposes; and that the Sales Tax Act did not repeal the foregoing statute authorizing a city to levy license taxes. In the case of Springfield City Water Co. v. City of Springfield, the Court held that under the provisions of Section 6609, Missouri Revised Statutes, 1939, the City of Springfield was authorized to levy an occupation tax of 5% on the gross receipts of every person engaged in supplying water for compensation through pipes laid in the streets, etc.; that the statute did not require that all twelve utilities named therein be taxed as a single class but permitted subclassification on a reasonable basis; and that the Sales Tax Act did not repeal the statute in question.

7. Id. at 599.
8. 182 S. W. (2d) 70 (Mo. 1944).
9. 181 S. W. (2d) 526 (Mo. 1944).
10. 182 S. W. (2d) 619 (Mo. 1944).
VI. Taxation of Insurance Companies

In the case of the Metropolitan Life Insurance Co. v. Scheufler, the Supreme Court of Missouri held that under the provisions of Section 6094, Missouri Revised Statutes, 1939, which levies 2% tax on "direct premiums received" by foreign insurance companies that the Metropolitan Life Insurance Company was not allowed to deduct from gross premiums received the amounts refunded to industrial policyholders for payment of premiums at their collection office. The amounts refunded were held to be "premiums received" and subject to the 2% tax.

VII. Special Tax Bills

In the case of Kammeyer v. City of Concordia, the supreme court, following the case of Ruckels v. Pryor, held that a class action could be maintained to void unpaid special tax bills for fraud but that plaintiffs who had paid their tax bills should be dismissed from the action. The court further held that the action was one in equity for the cancellation of the tax bills and that the prayer for declaratory judgment was not controlling.

VIII. Drainage Taxes

In the case of Boudreau v. Riverland Levee District, the supreme court held that the remedy provided by Section 12517, Missouri Revised Statutes, 1939, for the collection of assessments was the exclusive remedy; that the collection of assessments by suit brought pursuant to the above statute cannot be enjoined; and that any fraud or collusion by the district officials and landowners must be set up in that suit and not by way of a separate suit in equity as was attempted in this case.

IX. Tax Sales and Titles

During 1944 the supreme court rendered three more decisions involving the Jones-Munger Law. In the case of Burris v. Bowers, the court held that a tax deed which followed the form prescribed by the Jones-Munger Law was valid and not subject to attack upon the ground that the deed did not recite in detail that all the statutory steps had been taken. In the case

11. 180 S. W. (2d) 742 (Mo. 1944).
12. 352 Mo. 742, 179 S. W. (2d) 76 (1944).
14. 184 S. W. (2d) 403 (Mo. 1944).
15. 352 Mo. 1152, 181 S. W. (2d) 520 (1944).
of *Sharp v. Richardson*, the court held that the assessment of taxes was void because the description of the land was not accurate and that a sale pursuant to such an assessment was void. In the case of *State ex rel Baumann v. Marburger*, the court held that where property was sold at the third offering for back taxes for 1931-1936 and where the amount received was applied to the taxes for 1937 and part of taxes for 1936 that such sale did not extinguish the lien for the taxes for 1931 to 1935 and the unpaid portion of taxes for 1936 where the owner redeemed the property within the statutory period. This case will help to prevent the use of the Jones-Munger law for the purpose of reducing or avoiding taxes.

In the case of *Spitcafusky v. Hatten*, the court upheld the validity of the *Land Tax Collection Act*. This case and the Land Tax Collection Act are interesting in that they demonstrate the progress being made to foreclose long standing tax delinquencies on real estate and to convey a marketable title by judicial decree not subject to attack.

**X. Exemption From Taxation**

In the case of *State ex rel Cairo Bridge Commission v. Mitchell*, the Court held that a tax exemption clause contained in a prior act of Congress was included by reference in the later act of Congress authorizing the Cairo Bridge Commission to purchase the bridge over the Mississippi River at Cairo, Illinois. The case is interesting in that it decides that the rule of strict construction against tax exemptions of private property is not applicable to public property.

In the case of *Curators of Central College v. Rose*, a special act of the legislature enacted in 1851 granting a tax exemption to William Jewell College and "any other institution of learning in this State" was held not to be part of the Charter of Central College created by a special act of the legislature enacted in 1855 so as to be protected by Section 10 of Article I of the Constitution of the United States.

17. 182 S. W. (2d) 163 (1944).
18. 182 S. W. (2d) 86 (Mo. 1944).
19. Missouri Laws (1943), p. 1029 (Effective at present time only in Jackson County).
20. 352 Mo. 1136, 181 S. W. (2d) 496 (1944).
XI. GENERAL RULES OF CONSTRUCTION

A. Primary Rule of Construction

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically,' is properly given consideration."\textsuperscript{22}

B. Strict Construction

"While statutes authorizing a particular tax are to be construed strictly against the taxing authority (A. J. Meyer & Co. v. Unemployment Comp. Commission, 348 Mo. 147, 152 S. W. 2d 184), a tax exempting statute will be strictly construed against him who claims to be exempt under it. Mississippi River Fuel Corporation v. Smith, 350 Mo. 1, 164 S. W. 2d 370.\textsuperscript{23}

The foregoing rule of strict construction is not applicable to public property.\textsuperscript{24}

C. Construction of Statute by State Officers

Where the terms of the statute are clear or where conflicting executive interpretations of the statute existed, then such executive constructions of the taxing statute are without weight in determining the meaning of the statute.\textsuperscript{25}

D. "Expressio Unius Est Exclusio Alterius"

The above maxim must be applied with caution as it is a mere auxiliary rule of construction in aid of the fundamental objective of seeking the lawmakers' intention.\textsuperscript{26}

\textsuperscript{22} American Bridge Co. v. Smith, 352 Mo. 616, 623, 179 S. W. (2d) 12, 15 (1944).
\textsuperscript{23} American Bridge Co. v. Smith, 352 Mo. 616, 624, 179 S. W. (2d) 12, 15 (1944).
\textsuperscript{24} State ex rel. Cairo Bridge Comm. v. Mitchell, 352 Mo. 1136, 1143, 181 S. W. (2d) 496, 499 (1944).
\textsuperscript{26} Springfield City Water Co. v. City of Springfield, 182 S. W. (2d) 613, 618 (Mo. 1944).
The survey of the decisions for the year under review in the field of Torts does not include a discussion of matters involving the humanitarian doctrine. It is hoped, on the return from the service of the editor of this portion of the annual survey of the work of the court, that the humanitarian cases for this year and last year will be carried in the Review, thus continuing the analysis by Mr. William Becker in one of our most live fields of the law and provide a continuity that another cannot well give.

I. NEGLIGENCE

A. Duties of persons in certain relations

1. Possessors of Land

The duty of a possessor to business invitees as to dangerous conditions existing on the premises of which the possessor has knowledge, or about which he should have known from a reasonable inspection of his premises, extends only to those dangers which are neither known to the visitor or where, although he may know that the condition is dangerous, he reasonably may not be expected to appreciate the chance of harm or the gravity of it. An instruction was proper in *Steinmetz v. Nichols*,\(^1\) where the action was for injuries sustained by an electric meter man in a fall on the premises of the defendant when a motorshed roof on which the plaintiff was standing and which extended over an open areaway gave way, that there was no duty owed the plaintiff to warn of the condition of the roof "if, in the exercise of ordinary care, the same were in plain sight and the danger thereof, if any, obvious to him." The evidence of the defendants tended to show that the plaintiff saw the shed, that he climbed upon the roof, that the roof appeared rotten from weathering, and that anyone could see plainly that it would break if stepped upon. An instruction of contributory negligence on the same facts was also proper, but this would be on the theory that negligence was found on the part of the defendant. The two theories are quite different yet not inconsistent. Of course, being entitled to expect that the possessor will take reasonable care

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*Professor of Law and Dean of the Law School, University of Missouri. A.B., Ohio Wesleyan University, 1917; J.D., University of Michigan, 1924; S.J.D., Harvard, 1936.

1. 352 Mo. 1047, 180 S. W. (2d) 712 (1944).
to discover the actual condition of the premises and that he will give a warning or make it reasonably safe, the business invitee is not required to be on the alert to discover defects. This is important both in determining whether he is guilty of contributory negligence in failing to discover it, as well as in determining whether the defect is one which the possessor may reasonably believe to be so obvious that he need not use care to warn the visitor, thus owing no duty in the first instance.

The extent of preparation which a business invitee is entitled to expect to be made for his protection will depend upon the type of premises and the purposes for which it is used. One entering a store as a customer is entitled to expect greater precautions for his safety than would a business visitor at the home of the defendant. In *Cameron v. Small*, these considerations were recognized in an action against drugstore owners for injuries received by a patron who, on leaving the store, slipped on a wet sloping concrete ramp which had been installed as a passageway from the door of the store to the sidewalk. The ramp declined six inches from the threshold to the sidewalk line, a distance of forty-two inches, or at the approximate rate of 15 per cent. There was evidence that its surface had become worn as to become slippery, especially when wet, and that this condition had existed for a sufficient length of time for defendants to have discovered it. Neither was the danger so obvious to a patron entering the store by using the ramp to relieve the defendant either on the theory that there was no negligence on his part, as emphasized in the preceding case discussed above, or on the theory that the court could find the patron contributorily negligent as a matter of law, although plaintiff's testimony showed that she "wasn't looking particular at anything" as she used the means of passage. However, the case was reversed and remanded because of error in plaintiff's instruction on contributory negligence by which the jury may have gotten the thought that she could have recovered even without the exercise of reasonable care in observing the ramp in its apparent condition.

In *Darlington v. Railway Exchange Bldg.*, the action was by a tenant's invitee against the landlord for injuries sustained in a fall down an unlighted inside fire escape stairway, used by the tenants as a common passageway. The rights of an invitee or an employee of a tenant are

generally stated to be coextensive with those of the tenant as against the tenant’s landlord for its negligence in failing to keep halls and stairways used by tenants in common. The landlord is held by law to have reserved control of such portions for the common use and to be responsible for the reasonable safety thereof. The case turned on whether the vestibule and fire escape stairway were a common passageway at night. There was evidence that the landlord had invited tenants and their employees and invitees to use the office building at night, and had long acquiesced in the use of the inside fire escape stairway as a common passageway in the daytime. Whether this stairway was used as a common passageway at night with the landlord’s invitation through its long standing acquiescence so as to make the landlord liable for its maintenance and safety was for the jury. The plaintiff’s evidence showed that tenants and invitees had used the stairway as a common local passageway for years both day and night with the knowledge of the defendant, and that no notice or warning to refrain from that use had ever been given. The question was raised as to the defendant in any event was required by law to keep the stairway lighted, there being no agreement to do so, and no statute or proof of any ordinance so requiring. The court distinguished previous Missouri authorities which were decided on the common law rule that there was no such obligation and noticed that an increasing number of jurisdictions seem to be coming to the view that “the landlord is bound to light common halls or stairways if they are inherently dangerous in construction, and not merely with respect to some transitory condition.” Here the stairway was inherently dangerous in construction because the top of it was only seven inches to the side of the entrance door, and the angle and resistance of the door tended to divert the user in that direction when he could not see at night.4

2. Railroads

A slight extension in the liability of a railroad company to tolerated

4. The automobile cases involving negligence, other than the humanitarian cases not included here, are of insufficient importance to treat specially: Sparks v. Auslander, 182 S. W. (2d) 167 (Mo. 1944) (whether on the evidence a submissible case): Padget v. Missouri Motor Distributing Corp., 177 S. W. (2d) 490 (Mo. 1944), where plaintiff was awarded a new trial after verdict for defendant and defendant appealed. The trial court had instructed for the defendant that “negligence is a positive wrong”. A similar instruction had resulted in reversal in Blunk v. Snider, 342 Mo. 26, 30, 111 S. W. (2d) 163, 165 (1937), where the court clearly distinguished negligence and a positive wrong. The latter “... is a wrongful act, wilfully committed. ... In order to commit a positive wrong there must be an intent.”
intruders (gratuitous licensees) is found in *Whittle v. Thompson*, although judgment was for the defendant apparently on the issue of contributory negligence. This was an action for injuries to a W. P. A. employee who was struck while walking along a path near the track on defendant’s right-of-way by an unfastened swinging door of a refrigerator car in defendant’s passing railroad train. The employees on a W. P. A. project regularly used this path on their way to and from work, notwithstanding warning signs that trespassing “is absolutely forbidden.” However, the employees of the defendant company knew that the employees of the project were regularly ignoring the notice to trespassers. Being mere licensees, the defendant contended that its only duty was not wilfully and wantonly to injure the plaintiff. The court reasoned that if a railroad company is required to exercise ordinary care to avoid injuring a licensee near the track by a warning of the approach of the train, why should it not be required, as a protection to the licensee, to exercise ordinary care in inspecting its trains at the point of origin and enroute to discover and eliminate highly dangerous defects so as to include protection against highly dangerous objects connected with a moving train.

In *Neal v. Kansas City Public Service Co.*, the plaintiff alleged that he had been struck in the head by a robber with a blackjack or other deadly weapon during a holdup. While being rushed to the hospital, the ambulance in which he was riding was struck by one of defendant’s street cars at a street intersection. Plaintiff was thrown out of the ambulance onto the street. When he reached the hospital later he had a skull fracture and other injuries. Whether the injuries for which recovery was sought were received in the collision or in the holdup and whether certain disabilities existing at the time of the trial resulted from injuries received in the collision, or from subsequent disease, were major issues. The trial court refused its demurrer at the close of all the evidence. The defendant-appellant contended on appeal that there was no substantial evidence from which a jury could find that the skull fracture and resulting disability suffered were caused by the negligence of the defendant, relying on the principle that if the injury may have resulted from one or two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable

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5. 352 Mo. 637, 179 S. W. (2d) 22 (1944).
6. 184 S. W. (2d) 441 (Mo. 1944).
produced the result, otherwise the plaintiff fails in his action if the action leaves it to conjecture. In determining whether the trial court ruled properly on the demurrer to the evidence the appellate court found it unnecessary to determine whether there was substantial evidence that the plaintiff's skull fracture, and the disabilities resulting therefrom, were caused by the alleged negligence of the defendant, or whether the evidence showed with reasonable certainty that the plaintiff received the skull fracture at the time of the collision, since there was substantial evidence that plaintiff received other actual physical injuries of a substantial nature in the collision, and such injuries were entirely sufficient to carry the case to the jury on the issue of personal injury and damage, and regardless of what the evidence showed or did not show with reference to when and where the skull fracture was received.

Wellinger v. Terminal R. R. Association of St. Louis⁷ was an action under the Federal Employers' Liability Act for injuries sustained by the plaintiff, a mail handler, in a fall from a baggage truck. After loading the mail from the hand propelled baggage truck into the mail car, he attempted to alight from the baggage truck by climbing over the side bars which were constructed for the primary purpose of retaining mail pouches and parcels of baggage upon the platform of the truck, and in so doing he alleged that he was caused to fall when one of the side bars slipped from its slot in the frame and dropped down. The defendant contended that no submissible case had been made out since the side bars were provided for the sole purpose of preventing mail pouches and baggage from falling off the truck and, therefore, no duty was owed to keep the side bars secure with reference to their use in alighting from the truck. The question was whether the use was within the general principle that a master has a duty to provide a servant with reasonably safe appliances, or whether the use fell within the qualification of the general principle where there is a diversion of the instrumentality from the purpose for which it was intended. Where a master acquiesces in a use for some purpose, other than that for which it was intended, he is placed in a position as if the used appliance had been furnished to use for the purpose. From the nature of the task which mail handlers were expected to perform, the court thought it reasonable that the defendant should have anticipated that such employees in using the truck for this purpose would use such "convenient, quick and natural means"
as were available in getting on and off, "especially since the duties of a mail or baggage handler would frequently necessitate an expeditious clearing of the way for the departure of a train, as was the case when the plaintiff sustained his injury." Furthermore, "from the length of time the practice had 'gone on,' the defendant must have known of the practice and not having forbidden the practice, must have consented to it."

3. Municipal Corporations

The responsibility of a city for the death of a motorist, resulting when a low section of a heavily travelled street had become dangerous from ac-

8. The following cases involving injuries where the defendant was a railroad are not sufficiently significant to do more than note the nature of the facts: Walsh v. Terminal R. R. Ass'n of St. Louis, 182 S. W. (2d) 607 (Mo. 1944) (in an action for injuries sustained from failure of railroad switching crew to warn plaintiff, who was unloading a car, of the switching movement, evidence held sufficient to present jury question as to whether switching crew knew of plaintiff's presence in car and thereby had a duty to warn him); Long v. Thompson, 183 S. W. (2d) 96 (Mo. 1944) (involving last chance rule of Kansas and a finding under Kansas law of contributory negligence as a matter of law, where evidence showed from a point 20 feet from defendant's tracks motorist's view of tracks was unobstructed for 2,000 feet, so that had he approached the track at a speed of 4 or 5 miles an hour he could have stopped in four or five feet); Trower v. Missouri-Kansas-Texas R. R., 184 S. W. (2d) 428 (Mo. 1944) (a guest in an automobile colliding with defendant's train may have been in helpless peril after he had warned the driver, yet the defendant's engineer was only required to act upon appearances, which he saw or should have seen with reference to whether or not the automobile would not or could not stop before passing over the crossing and inevitably coming in contact with the train, under the Kansas last clear chance doctrine); Jones v. Thompson, 184 S. W. (2d) 407 (Mo. 1944) (where switching crew had reason to believe that express and mail men were in the two cars, express messenger had right to assume that the switching movements would be made with reasonable care, even though he had in the interim gone into the mail car, and the unusual and abrupt stop of car, causing sliding door to close on messenger's hand holding to the door jamb to prevent being thrown from the car, was the proximate cause of the injury distinguishing cases where plaintiff was riding in a more dangerous part of train than authorized); Taylor v. Lumaghi Coal Co., 352 Mo. 1212, 191 S. W. (2d) 536 (1944) (applying and upholding constitutionality of Federal Employers' Liability Act as amended in 1939, where railroad brakeman whose principal task for his whole work on day of injuries received, while doing local switching for coal company in its yards, was to take interstate freight train to its destination was carrier's employee, and, therefore, part of his duties was in "furtherance of interstate or foreign commerce" within that Act, so as to render the state Workmen's Compensation Act inapplicable and to entitle him to bring a common-law action against the coal company for his injuries); McCurry v. Thompson, 352 Mo. 1199, 181 S. W. (2d) 529 (1944) (action under Federal Employers' Liability Act for injuries to railroad employee when steel ram which he and coemployees were holding was dropped suddenly by coemployees without warning); Smith v. Thompson, 182 S. W. (2d) 63 (1944) (action under Federal Employers' Act against lessor and lessee railroads for death of lessee's brakeman struck by lessor's train on theory that the brakeman was blinded by bright lights on lessee's locomotive, while violating lessor's rule requiring a train to conceal its headlight when it turns out to meet another or has
cumulated silt from an adjoining field which on becoming muddy caused a slippery condition, was presented in *Glasgow v. City of St. Joseph.* A cultivated field on one side of the street sloped toward the street from which rains would wash silt from the field onto the pavement, and it would accumulate, if not removed, in the dip or depression to a depth of several inches. After a rain the place would be muddy and slick. No marker, warning, or caution sign protected the place. After a rain of about seventy-five hundredths of an inch had fallen in the early hours of the morning, the plaintiff's husband received injuries resulting in his death when the automobile which he was operating collided with another car as a result of the slippery and dangerous condition at this low place in the pavement. Negligence was predicated in permitting the condition to continue which allowed the silt to accumulate at this particular place and become slippery and dangerous after rains, a result of natural elements within common knowledge. This condition had existed for a period of from two to four years and was known to city officials, police officers and others who would at times remove the silt for a period of two or more years. These facts were held to make a submissible case of actionable negligence against the city for failure to keep its streets in a reasonably safe condition for the traveling public.

The defendant also claimed reversible error because the plaintiff's main instruction failed to condition the verdict on a finding, among others, that plaintiff gave a written notice to the city of her right of action under Section 6577 of Missouri Revised Statutes, 1939. It was held that the 60 days notice provided for in that section was not applicable to a statutory claim for wrongful death. The statute was interpreted to apply only to notice by "the person so injured" who will claim damage from the city under the common law cause of action. Plaintiff's cause of action differed in that it was statutory for the wrongful death of her husband which was not within the 60 day period. It was a new cause of action, not accruing simultaneously with and not constituting a revival of her husband's cause of action.

stopped clear of main tracks or is standing to meet trains at end of double track or at junction); *Copeland v. Terminal R. R. Ass'n of St Louis*, 182 S. W. (2d) 600 (Mo. 1944) (action under Federal Employers' Liability Act for death of brakeman on theory that the railroad employees were negligent in switching operations, in that they caused train to move with unnecessary and unreasonable force and speed while attempting to give slack to enable brakeman to uncouple cars).

http://scholarship.law.missouri.edu/mlr/vol10/iss4/2
4. Supplier of a chattel

Zesch v. Abrasive Co. of Philadelphia and Production Tool and Supply Co.,10 involved the liability of a vendor and of a manufacturer for injuries received by the plaintiff, a tool and die maker, when an abrasive cutting-off wheel, manufactured by the Abrasive Company and purchased by the plaintiff's employer from the Production Company, exploded while being used by the plaintiff in the shop of his employer in the performance of a grinding operation. Negligence was alleged against both the vendor and manufacturer for failure to inspect and test the wheel for defects. No new legal principles were enunciated but the case is interesting in the application of settled principles to the facts. Citing previous Missouri authority based on the Restatement of Torts, it was held that a vendor is under no obligation to test articles manufactured by others for the purpose of discovering latent or hidden dangers. Should a retail seller have an opportunity to observe conditions which as a competent dealer in such commodities should cause him to realize that the goods are or are likely to be in any condition dangerous for use, he must use his special opportunities and exercise his special competence for the purpose of discovering whether the goods are or are not safe for the use for which they are sold. But in this case the vendor could not have discovered the flaw by an exterior inspection or by a test by sounding, and there was nothing shown in evidence which should have caused the vendor to have realized that the wheel was unsafe for use. He owed no duty, under the facts, to subject the wheel to a rigid inspection of test for a latent flaw. The trial court was upheld in overruling the motion to set aside the involuntary nonsuit.

As against the manufacturer a submissible case was made out on the theory that the wheel, when lawfully used for the purpose for which it is manufactured, was reasonably certain to place life and limb in peril when negligently made, and was a thing of danger which placed the manufacturer under a duty to make it carefully. And if the article "which may contain a latent imperfection making the article reasonably certain to be a thing of danger (though it is carefully manufactured), where it is shown that the imperfection could be disclosed by a test, it would seem reasonable that the manufacturer in the exercise of ordinary care would be under a duty to make the test."

10. 183 S. W. (2d) 140, 145 (Mo. 1944).
In *Willis v. Atchison, Topeka & Santa Fe Ry.*, the action was by consignee's employee for injuries sustained when a freight car loading device with an automobile thereon fell on the employee while he was assisting in unloading the car. The case turned on whether the terminal carrier made a reasonable inspection, and whether it reasonably could have discovered the condition or defects in the loader that caused the rack to fall. Although the defective gears in the hoist mechanism were not visible, the evidence was such that a jury could find that the defect was discoverable by a reasonable inspection.

**B. Res ipsa Loquitur**

Where a thing has produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such that in the ordinary course of events does not happen if due care has been exercised, the fact of injury under these circumstances is sufficient to make a submissible case based upon general allegations of negligence. The *res ipsa loquitur* doctrine does not dispense with the requirement that the one alleging negligence must prove it, but it relates only to the method by which the defendant's negligence may be proved. However, it is absolutely necessary that the foundation be laid for the application of the doctrine, by proving the attendant facts and circumstances from which the jury may infer that the injury was caused by the defendant's negligence. In *Hendricks v. Weaver*, in an action for wrongful death of plaintiff's minor child caused by suffocation from smoke, the plaintiff's evidence showed that the fire originated in that portion of the building in the possession and control of defendants, but there was no evidence that the fire originated from an alleged explosion of an oil stove and full tank. The mere fact that the fire originated in that portion of the building in the possession and control of the defendants was insufficient to support an inference that the fire was due to the negligence of the defendant. There was no evidence of defective equipment when the stove was last in operation, or when the alleged explosion occurred with reference to when the fire started, or other circumstances to show that the fire was due to defendant's negligence in the operation of an oil stove. Therefore, defendant's demurrer to the plaintiff's evidence should have been sustained, making it unnecessary for the court to pass upon alleged error in instructions in submitting the case.

11. 352 Mo. 490, 178 S. W. (2d) 341 (Mo. 1944).
12. 183 S. W. (2d) 74 (Mo. 1944).
The question of the sufficiency of the circumstantial evidence to justify the jury in inferring the existence of the defendant’s negligence was also presented in *La Vigne v. St. Louis Public Service Co.* This was an action submitted under the *res ipsa loquitur* rule for injuries sustained by a streetcar passenger when she was thrown to the floor by the unusual jolting and lurching of the car. Under the *res ipsa* rule, the plaintiff was not limited to the negligence of the motorman, so that the giving of an instruction that the only duty owed by the streetcar company was to see to it that its motorman exercised the highest degree of care was error, since the evidence did not conclusively exclude all other bases of negligence which might have caused the usual jolting and lurching. To be compared with the circumstantial evidence on which the *res ipsa* rule was based in this case is the case of *Benton v. St. Louis-San Francisco R. R.*, in which a switchman claimed personal injuries against the railroad, alleging that the switch was properly set for the train movement and that due to some defect unknown to him the switch lever and ball were thrown over striking him on the foot as he was riding on the step of the tender of the engine. The Court held that the *res ipsa loquitur* doctrine could not be relied on because the plaintiff’s evidence as to what happened was so contrary to physical facts as to be unbelievable.

In applying the doctrine of *res ipsa loquitur* to cases between employee and employer, the further problem arises as to how much control the injured employee could have over the instrumentality that injures him and still recover under the rule. One of the basic facts upon which the rule is predicated is that sole control and management of the instrumentality causing the injury must be in the defendant; otherwise the fact of injury and the surrounding circumstances would not be sufficient to point to negligence on the part of the defendant as the cause of the injury. In *Cantley v. Missouri-Kansas-Texas R. R.*, the plaintiff, defendant’s engine or switch foreman and footboard yardmaster, brought an action under the Federal Employers’ Liability Act for injuries sustained as a result of the derailment of a locomotive tender during a switching movement which caused the footboard on which the plaintiff was standing to catch on the

13. 181 S. W. (2d) 541 (Mo. 1944).
14. 182 S. W. (2d) 61 (Mo. 1944).
15. 183 S. W. (2d) 123 (Mo. 1944).
rail and be bent back under the tender, throwing plaintiff between the rails. The plaintiff based his cause of action upon the *res ipsa loquitur* doctrine. The evidence showed that the speed of the movement was an important causative factor and the jury could find that the speed was the sole causative factor. Since the plaintiff was in charge of the switching operation and could control the speed of the movement, the plaintiff had to prove that exclusive control and management of the appliance or thing causing the injury was in the defendant as a part of his *res ipsa* case, and that he did nothing to cause such extraordinary operation and his resultant injury. The doctrine cannot be invoked where the injuring agency is partly or entirely under the control or management of the plaintiff.\(^{16}\)

C. **Imputed negligence**

It is elementary that the principle of *respondeat superior* as a theory of liability of a master is applicable only when the act complained of was done in the course of the employment of the employe, the master being responsible, not because the servant acted in his name or under color of employment, but because the servant was actually engaged in and about his employer's business and carrying out his purposes. In *Milazzo v. Kansas City Gas Co.*,\(^{17}\) a meter reader employed by the defendant gas company, after entering the plaintiff’s premises, made an insulting remark in answer to the plaintiff's question whether he was reading the meter correctly. After reading the meter and as he was leaving the premises an argument began, based upon the original insulting remark by the meter reader, and was followed by an assault upon the plaintiff. There was evidence that his duty was to read meters, to answer customers' questions concerning the readings and, when requested, to show customers how to read meters or give them the readings. When he entered the store he had been questioned by the plaintiff as to why his bill had been as usual, in spite of having been away for two or three weeks and therefore not using gas during that time. To the question “Are you sure that you are reading it correctly,” the reader answered, “God damn right, you bastard, what do you think?” He then went on down the steps to the basement and proceeded with his business of reading the meters. Plaintiff waited where he was until the reader came

\(^{16}\) For a more comprehensive comment on the application of the *res ipsa loquitur* doctrine to actions by an employee against his employer, see (1944) 9 Mo. L. REV. 2813.

\(^{17}\) 180 S. W. (2d) 1 (Mo. 1944).
back upstairs when he said to him, "What do you mean coming into my place of business calling me a bastard?" Further words brought on the fight, the plaintiff's evidence tending to show that the meter reader made the attack. Plaintiff was corroborated by several witnesses. The defendant offered no evidence, although the meter readers's deposition was received in evidence in which he denied having called the plaintiff a bastard, and contended that he merely defended himself from the plaintiff's assault. The court bases its conclusion on the ground that the controversy did not concern the business intrusted to the meter reader but concerned his insulting remarks to the plaintiff. However, it seems to one reading the case that the court brushed aside the evidence that part of the meter reader's duty was, in addition to reading meters, to answer customers' questions relating to the meter readings. The case as reported shows that plaintiff's question was a reasonable one which in no manner justified the meter reader's very ugly reply. The opinion concludes that "The words used were not accompanied by any attempt to exhibit the book to plaintiff, nor were they preceded by any discussion of or request for the readings taken." (Italics ours) It seems to the writer that from the evidence this is a too narrow view of the authorized duties in answering questions asked by customers.

Atterbury v. Temple Stephens Co.\textsuperscript{18} was an action against the proprietor of a store and manager for injuries sustained by a customer when, upon leaving the store, he tripped on chicken wire fencing which had been stretched on the sidewalk in front of the store by the manager. A verdict was returned against the corporate defendant but in favor of the manager. The corporate defendant filed a motion for a new trial and in arrest of judgment, contending that the judgment could not stand because it could only be liable under the doctrine of \textit{respondeat superior}, and the jury having exonerated the servant \textit{ipso facto} exonerated the master. The petition, evidence and customer's instruction were broad enough to predicate liability against the master not solely upon the negligence of the named servant in whose favor a verdict was found, but as well upon the negligence of another servant, not a party to the action, who had waited on plaintiff in the store and then carried the groceries to the plaintiff's car, for failing to warn the customer of the danger. The evidence was conflicting as to whether this clerk preceded the plaintiff, as they came out of the the store, or whether

18. 181 S. W. (2d) 659, 660 (Mo. 1944).
he came out behind. However, the evidence did show that the clerk was through the door and on the sidewalk when the plaintiff fell, hence the jury could draw the inference that he could and should have seen the wire and warned the plaintiff. The negligence alleged against the "defendant corporation, by and through its agents, servants and employees," was placing the wire on the sidewalk and failing to give notice, and the failure to warn was as important as placing the wire on the sidewalk. The instructions were also based on the same theory.19

D. Defenses in negligence cases

The same rule applicable in cases where a pedestrian steps upon the tracks of a railway without looking for the approach of cars, as constituting contributory negligence as a matter of law, was applied in Danzo v. Huntefeld20 to a pedestrian who attempted to cross a city street bearing heavy vehicular traffic at a place elsewhere than at a street intersection. The facts were that plaintiff moved westwardly across Troost Avenue in Kansas City into northbound traffic at a place other than a street intersection. One of the defendants had a Coca-Cola truck double parked a foot or eighteen inches from the plaintiff's truck which was parked along and parallel to the curb in front of his store. Wishing to make a business errand and finding his free passage interfered with by the Coca-Cola truck, he decided to catch a street car approaching from the north at the street intersection. He got out of his truck, stepped along to the westward in front of the Coca-Cola truck, looked first between his truck and the parked Coca-Cola truck which obstructed his view to the extent that he did not get a full view to the southward, then started walking without looking

19. Other cases involving liability based upon imputed negligence are Schrader v. Kessler, 178 S. W. (2d) 355 (Mo. 1944), and O'Shea v. Pattison-McGrath Dental Supplies, Inc., 352 Mo. 855, 180 S. W. (2d) 19 (1944). The latter presented a question for the jury as to whether, at the time of the accident, the motorist was acting within the scope of his employment which required him to operate the automobile as city salesman for his employer. At the time of the accident he was returning from lunch to the branch store of his employer where he had been selling supplies during that week. When in the field he was paid a mileage rate on the upkeep of his car. But during the week of the accident there was no mileage charge. A new trial was granted on the ground of inadequacy of the verdict. Schrader v. Kessler involves the question as to whether plaintiff who has control of company's agents and employees contributing to his injury could recover against defendant for negligence in erecting scaffold, various parts of the scaffold having been removed or changed by the employees under plaintiff's control. The theory of the case seems to be personal contributory negligence rather than imputed negligence.

20. 180 S. W. (2d) 722 (Mo. 1944).
again to the southward when he could see approaching traffic, into the east portion of the street bearing heavy vehicular traffic for vehicles traveling northward. Here he was struck by the right front fender of the defendant's florist delivery truck which was traveling northwardly at a rate of fifteen or twenty miles an hour, its right side passing about a foot or a foot and a half from the left side of the Coca-Cola truck. Plaintiff was familiar with the conditions of traffic in the street, knowing that automobiles and vehicles might be coming along the street there at any time. Thus it appeared from plaintiff's own evidence that he was guilty of negligence in stepping into the portion of the street, upon which he should have anticipated vehicular traffic, without looking for vehicles in the direction from which they would be expected to approach.

Another defense which has been developing in the negligence cases during the past ten years is that of sole cause. Where plaintiff bases his case on primary negligence the defense is used principally in situations where plaintiff was riding in a car driven by a third person. Such was the case of *Gower v. Trumbo.* Since contributory negligence is a foreign issue in a humanitarian case, the defense of sole cause may be the best defense available to the defendant. Rather than rest on disproving some fact essential to the plaintiff's humanitarian case by means of the converse humanitarian instruction, defendant not infrequently attempts to make the case turn on the conduct of the plaintiff or a third person as having been the sole cause of the injury. To insure that the jury in no manner be confused with concurring negligence on the part of the defendant, the problem in the use of this defense is not so much in its legal theory, as it is in meeting the requirement of the court that the defendant hypothesize facts, based upon his evidence, to show a sole cause situation, and warrant a finding of sole cause and of his freedom from any negligence charged against him. The matter of sufficient hypothesization in these respects cannot be sufficiently analyzed here. Four cases decided in the year under review may be studied and compared with much profit in attempting to understand the problem involved and wherein are sufficient differences in the instructions as to give some basis for comparison. The cases are:

21. 181 S. W. (2d) 653 (Mo. 1944).
22. See my study *The Defense of Sole Cause in the Missouri Negligence Cases* (1945) 10 Mo. L. Rev. 1.
An interesting application on the care which a guest in an automobile must exercise for his own protection, to avoid being contributorily negligent, is found in Trower v. Missouri-Kansas-Texas R. R. 27 Here the guest warned the driver of the approach of defendant’s train, and had the driver continued on at the rate of fifty or fifty-five miles per hour, from the time plaintiff first saw the train 250 feet from the crossing, or even at the rate of thirty miles per hour, the automobile would have passed safely over the crossing. Instead, the driver applied the brakes which brought the automobile to the crossing where a collision resulted. It was contended by the defendant that the plaintiff was negligent in failing to utilize an opportunity to cause the driver to continue on across the crossing in safety, and that the act of the driver in applying the brakes and slowing the speed of the automobile, after the warning of the train’s approach by the plaintiff, was at the instance and direction of the plaintiff so as to impute the negligence of the driver to him. The court held that words “Look out, there’s a train” did not express a suggestion that the brakes should be applied and the speed of the automobile slackened. Furthermore, the evidence that plaintiff felt and saw that the brakes were applied and the speed of the automobile reduced could not be said as a matter of law to make the plaintiff negligent in failing to direct the release of the brakes or to cause the automobile to be speeded up. Nor should plaintiff’s failure to direct the driver to speed on over the crossing be considered as a manifestation of sanctioning the act of the driver in applying the brakes. The court stated further that “In weighing the question of whether plaintiff was negligent in failing to direct the driver to release the brakes and to

23. 183 S. W. (2d) 873 (Mo. 1944).
24. 183 S. W. (2d) 892 (Mo. 1944).
25. 352 Mo. 343, 177 S. W. (2d) 467, 469 (1944) (the court states that it “... will not attempt to give the instructions any designation such as converse instructions or sole cause instructions, but will determine whether under the evidence they properly submitted disputed questions of fact to the jury,” but the cases cited and compared involved sole cause instructions).
26. 181 S. W. (2d) 653 (Mo. 1944). Another possible use for the defense of sole cause may develop in the cases under the Federal Employers’ Liability Act, since under the Amendment to that Act of 1939 the defense of assumption of risk is no longer available. See McCurry v. Thompson, 352 Mo. 1199, 181 S. W. (2d) 529 (1944); Copeland v. Terminal R. R. Ass’n of St. Louis, 182 S. W. (2d) 600 (Mo. 1944).
27. 184 S. W. (2d) 428, 431 (Mo. 1944).
speed on over the crossing in such an emergency, regard must be had to the possibility that by interfering the plaintiff would have increased rather than diminished the danger”.

E. Burden of Proof

Time and again our court has called attention to an instruction on the burden of proof which instructs the jury that the plaintiff must sustain his case to the satisfaction of the jury or to the reasonable satisfaction of the jury. But lawyers and trial courts continue to use the phrases and although the court has not yet reversed a case on that ground alone one may expect such a holding. These phrases were contained in a burden of proof instruction in Johnson v. Dawidoff.28 After calling attention again to former efforts of the court to provide a standardized instruction on the burden of proof the court said: “Those cases disclose the trend of recent opinions. A reading of them will also show that Missouri is one of few states in which such an instruction has been tolerated. It is certain, in view of what we have said, that if a trial court should grant a new trial and assign as a reason therefor the giving of such instruction this court will sustain the ruling. We will not hazard to speculate on how soon Missouri will join the majority of the jurisdictions condemning such instructions as casting a greater burden on a plaintiff than should be required under the law.”29

One month later the court, in Padgett v. Missouri Motor Distributing Corp.,30 did sustain plaintiff’s motion for a new trial after verdict for the defendant where the burden of proof instruction contained these same phrases. There was an additional error in the instruction, in that the jury was told that “negligence is a positive wrong.” As pointed out in previous decisions a positive wrong requires that there be an intent and intent is not an element of negligence.31

28. 352 Mo. 343, 177 S. W. (2d) 467, 472 (1944). Since the judgment on the evidence was for the proper party, the verdict for the defendant was not disturbed.

29. A rather complete annotation since 1936 on this instruction may be found in the annual survey of the work of the supreme court in each volume of this Review under the title “Torts.”

30. 177 S. W. (2d) 490 (Mo. 1944).

31. Other cases in this field which contributed little of significance to the case law on the subject: Rothe v. Hull, 352 Mo. 926, 180 S. W. (2d) 7 (1944) (question in an action for a battery against a physician for removing Fallopian tubes, when employed to remove the plaintiff’s appendix, whether his general authorization impliedly authorized him to remove the tubes); Menke v. Rovin, 352 Mo. 826, 180 S. W. (2d) 24 (1944) (the court examines the sufficiency of the allegations in a petition for deceit arising out of the sale and purchase of real estate, together with the instructions); Kleinschmidt v. Johnson, 183 S. W. (2d) 82 (1944), and
I EXPRESS TRUSTS

A Construction

St. Louis Union Trust Co. v. Clarkes involved the construction of the trust created in 1877 by Robert Campbell and his wife.

The settlors had conveyed property to trustees in trust for the common use and benefit of the wife and their three children. The trust deed provided that on March 16, 1885, the trustees should convey the property to the wife and three sons, in fee simple, provided circumstances had not made it inexpedient to at that time vest the shares of Hazlett K. Campbell and another brother. If such circumstances existed, the wife and Hugh Campbell, Jr., or the survivor, were empowered to fix the terms under which the two brothers were to receive their interests: The wife was also given the power to dispossess of her share by deed or will. In 1885, the wife being dead, Hugh Campbell, Jr., had the share of Hazlett K. Campbell conveyed to a trustee for the benefit of Hazlett during his life, with the remainder to his heirs.

It was the contention of the defendant, administrator of Hazlett’s estate, that under the 1885 deed Hazlett acquired an equitable fee in the property, that the wife acquired a fee simple interest in one-fourth of the property, one-third of which descended to Hazlett, and that by reason of those facts an inheritance tax was now payable by the administrator. The administrator also contended that the trustees did not have the power to convey only a life estate to Hazlett.

The Supreme Court affirmed the finding of the trial court that Hazlett acquired no vested interest in the property, that the wife had only a contingent interest, which lapsed on her death, and that the conveyance of Hazlett’s share to the trustee was within the intent and meaning of the original trust instrument.

Kleinschmidt v. Bell, 183 S. W. (2d) 87 (1944) (actions for alleged libel against two publishers of newspapers for statements made against the candidacy of plaintiff for circuit judge to the effect that he had permitted gambling in county while prosecuting attorney).

*Attorney, Columbia. A.B., University of Missouri, 1933; LL.B., 1936.

1. 352 Mo. 518, 178 S. W. (2d) 359 (1944).
II. IMPLIED TRUSTS

A. Constructive Trusts

In *Strype v. Lewis* the plaintiff brought a declaratory judgment action against her former husband, appellant here, and his estranged wife, the respondent, to establish a trust in real estate which the appellant’s father had devised to the respondent. Plaintiff, who had been awarded a judgment for maintenance, alleged that the testator and the defendants, conspiring to defraud her, had agreed that the respondent was not to own the property, but was to hold title in trust for her husband.

The husband set up an alleged oral agreement between the testator and the respondent, whereby the latter was to act as trustee only until the husband became able to look after the property. It was his contention that the property should be impressed with a constructive trust in his favor.

The alleged trust agreement being void because not evidenced by a writing signed by the testator, the court considered the problem of whether equity should decree a constructive trust where a donee acquires title by virtue of an oral promise to hold it for another and then refuses to carry out his agreement.

The Court agreed with the decision in *Ferguson v. Robinson,* relied on by respondent, that equity will not pretend to enforce an oral promise of a donee by decreeing a constructive trust where there is nothing more than the mere violation of the agreement, but it stated the rule was limited to cases of conveyances and did not apply to cases where property was devised.

The Court followed what it found to be the weight of authority in the latter situation and said that where property is devised in reliance on a promise to hold in trust or reconvey, a constructive trust will be impressed on the property, whether or not fraud or undue influence is present. The unjust enrichment of the devisee, though he did not act wrongfully in inducing the testator to leave the property to him, is given as the basis for the Court’s action in taking the case outside the Statute of Frauds.

Such relief, however, can be granted only upon evidence so convincing that it will leave no doubt in the mind of the chancellor, and in the instant case the Court failed to find evidence of that character.

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2. 352 Mo. 1004, 180 S. W. (2d) 688 (1944).
3. 258 Mo. 113, 167 S. W. 447 (1914).
Martin v. Martin was an action to quiet title to and partition certain real estate which was owned by plaintiff's father at the time of his death. The plaintiffs contended that their mother, who had purchased the property at foreclosure sale after her husband's death, and her grantees who took with knowledge of the facts, became trustees of the property for the benefit of the children, the heirs at law of the father.

The Supreme Court agreed that the widow could not acquire title and hold it for herself and against her children, in view of her position as natural guardian of the minor children and as a co-tenant in the homestead property, and that the legal title she acquired was held in trust for such of her children who might elect, within a reasonable time after coming of age, to pay their proportionate shares of the purchase money. However, since the children had not offered to make such payments, and had delayed unreasonably in seeking to recover the property, the lower court's judgment for the defendants was affirmed.

B. Resulting Trusts

Carr v. Carroll was an action to establish a resulting trust in certain real estate.

Plaintiffs' position was that one of the plaintiffs had furnished the purchase money, that at his direction title had been taken in the name of the defendant, and that a resulting trust arose in favor of the plaintiffs.

Defendant took the position that plaintiffs' case was based on an express oral agreement and that there could not be a resulting trust where it arose by virtue of an agreement. Defendant also contended that plaintiffs' evidence did not meet the degree of proof required.

The Court answered defendant's first contention by citing the leading case of Condit v. Maxwell, where it was stated that "a failure to put the declaration of trust in writing does not prevent a trust from resulting by operation of law, from the acts of the parties." The Court agreed with defendant's position that an oral agreement alone would create neither an express trust nor a resulting trust, but held there was sufficient evidence in the instant case to meet the degree of proof required to establish a resulting trust in favor of the plaintiffs.

4. 181 S. W. (2d) 544 (Mo. 1944).
5. 178 S. W. (2d) 435 (Mo. 1944).
6. 142 Mo. 266, 275, 44 S. W. 467, 468 (1898).
Biondo v. Biondo was an action to have a resulting trust declared in property which plaintiff's husband, now deceased, had conveyed to the defendants. Plaintiff contended that her husband had paid the purchase price of the land, but that title was taken in the names of the defendants so as to prevent her from collecting alimony and support for her children, which had been decreed, and that a resulting trust arose in favor of her and the minor children as his heirs, subject to her rights in the property. There was a judgment for the defendants.

The evidence showed that the decedent had paid part of the purchase price, but had not been able to pay it all, and the defendants furnished the balance.

The Court denied plaintiff's contention that a resulting trust arose. It stated that this was not the case of one person furnishing the consideration and another taking title, so as to imply that the one furnishing the purchase money intended the purchase for his own benefit.

In Cisel v. Cisel, the plaintiff brought suit against his former wife to partition and sell real estate which had been purchased before their divorce, title to which had been taken in their joint names as tenants by the entirety.

The defendant's position was that she paid the entire purchase price of the property and that a resulting trust arose in her favor.

The evidence showed that after the parties were married they entered into a written contract providing that any property, real or personal, thereafter acquired by either should be held by them as tenants by the entirety. The defendant admitted that when the property was purchased she knew the deed was made to both, and intended that the property should belong to both.

The lower court found for the plaintiff, adjudging title in the parties as tenants in common.

That judgment was affirmed by the Supreme Court. The Court pointed out that this was not a situation where a resulting trust would arise, even though the wife had furnished all the purchase money, since the husband had not taken title in their joint names without her consent, but she had agreed and intended for title to be taken in that manner.

7. 179 S. W. (2d) 734 (Mo. 1944).
8. 352 Mo. 1097, 180 S. W. (2d) 748 (1944).
MISSOURI LAW REVIEW

WILLS AND ADMINISTRATION

GEORGE W. SIMPKINS

Kansas City Life Insurance Company v. Rainey is a case of considerable importance in its effect on the insurance business. In that instance the deceased had purchased two "Investment Annuity Policies" for $50,000.00 providing for the income to be paid to him for life and the principal to be paid on his death to a named person. His executor contended that such policies involved no element of insurance and were testamentary in character, pointing out that their proceeds would be taxable as part of the decedent's gross estate for Federal Estate Tax purposes. Nevertheless, the Missouri Supreme Court held that the policies were contracts for the benefit of third parties, were non-testamentary in character, and the deceased's estate had no claim to the proceeds of the policies.

The remaining decisions on this subject fall readily into the accustomed classifications and do not involve any startling innovations in Missouri jurisprudence.

1. CASES INVOLVING THE PROBATE OF WILLS

In Norwood v. Norwood, it was held that the decision in a prior proceedings, in which the present plaintiff and defendant were among the adversary parties, that a will allegedly executed in 1939 was not the last will and testament of the deceased constituted res adjudicata of this fact so as to prevent defendant from contending that the will here involved executed in 1935 had been validly revoked by the 1939 will.

Kinsella v. Kinsella is a case where plaintiff was forced to trial after the overruling of motions for continuance resulting in a verdict sustaining the will. Plaintiff sought reversal on appeal because one of the beneficiaries under the will had not been served and another was in military service as to whom an application for a discretionary continuance under the Soldiers' and Sailors' Civil Relief Act had been denied. It was held that inasmuch as the will was sustained, these defects were cured since neither was harmed by any error which may have been committed.

In State ex rel. Bier v. Bigger the Court en banc upheld the validity

*Attorney, St. Louis. A.B. Harvard, 1930; J.D. Washington University, 1933.
1. 182 S. W. (2d) 624 (Mo. 1944).
2. 183 S. W. (2d) 118 (Mo. 1944).
3. 183 S. W. (2d) 905 (Mo. 1944).
of Section 532, Missouri Revised Statutes, 1939, which limits the time when wills may be presented for probate to within one year after the first publication of the notice granting letters testamentary or of administration. The primary attack on the validity of the Statute was on the constitutional ground that its title was inadequate. The Court extended the rule of the earlier cases on this subject by holding that the bar of his special statute of limitations was applicable even though the administrator had fraudulently concealed the existence of the will.

There were two cases involving factual disputes as to the mental capacity of testators to make wills, but they involve no new legal principles.5

Finally, the Court held6 that the Missouri Statute (Mo. Rev. Stat., 1939, § 526) requiring children or their descendants to be named or provided for in the will is not satisfied by a provision in the will that “I am not married and have no children” and a further provision leaving $1.00 to “any person who might contest this will.” The Court held that it was immaterial that the testator intended to disinherit these descendants of his on the ground that according to the testator’s belief he had never been legally married to their grandmother, holding that such intention to be effective must appear on the face of the will under the statutes of Missouri.

2. CASES INVOLVING THE CONSTRUCTION OF WILLS

Most will construction cases turn so exclusively on the peculiar language of the wills involved as to be of little general interest.7 However, the reports contain another example of the long continued litigation which results from cases involving disputed construction of wills. Three times previously cases as to the correct construction of the will of John E. Liggett had been before the Court.8 During the year 1944 the Court construed the judgment in the last of these cases and held that income taxes paid by the trustee who had been administering the property pending the dispute must be deducted from the share going to the party whom the Court had adjudged entitled to receive the income.9

5. Taveggia v. Petrini, 352 Mo. 400, 177 S. W. (2d) 513 (1944); Morrow v. Board of Trustees of Park College, 181 S. W. (2d) 945 (Mo. 1944).
7. Such is true in the cases of Riesmeyer v. St. Louis Union Trust Company, 180 S. W. (2d) 60 (Mo. 1944); Lang v. Taussig, 180 S. W. (2d) 698 (Mo. 1944); and Ryan v. Ryan, 182 S. W. (2d) 301 (Mo. 1944).
3. **Elections by Widows and Widowers**

All three of the cases decided by the Court in 1944 involve claimed waivers of the right to elect to take under the statutes granting widows interests in their husband’s estate regardless of his will.

In *Wahl v. Pate* it was held that to constitute a waiver the widow’s acts must be with full knowledge of her rights, unequivocal in character and such that they cannot readily be adjusted upon an accounting.

In *Borchers v. Borchers* a provision in a will seeking to bar the bringing of partition suits was held ineffective as to the widow who had renounced the will. The Court further reiterated its earlier holding that there is no waiver of the right to elect to take a child’s share by the claiming of homestead because the two are not inconsistent.

In *Opel’s Estate* involved the relative rights under the wills of a husband and wife where the wife survived her husband by only nine days and was during all said period so sick she was unable to transact business and may not even have realized her husband had died. The Court refers to its earlier ruling in *Dean’s Estate* that no election was necessary to entitle the widow to one half the estate where the deceased died without issue. The court further held that action of the residuary legatees under the wife’s will in seeking to have the husband’s will construed so as to give her a fee simple rather than a life estate did not bind the executor of the wife’s will since the executor did not join in asserting such claim in these proceedings. An alleged contract to make mutual wills is held not to have been proved.

4. **Procedural Questions**

The opinion last mentioned is far more important from a procedural standpoint. It squarely holds that in an appeal to the circuit court in administration proceedings there is no right to a trial by jury and if a jury is empanelled, its verdict is merely advisory, like the verdict of a jury in an equity case.

In a case involving proceedings under the Federal Employers’ Liability Act, the court reiterated the rule earlier laid down in the case of *In re*

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10. 177 S. W. (2d) 461 (1944).
11. 352 Mo. 601, 179 S. W. (2d) 8 (1944).
12. 352 Mo. 592, 179 S. W. (2d) 1 (1944).
13. 350 Mo. 494, 166 S. W. (2d) 529 (1942).
Allen's Estate\textsuperscript{15} that a probate court has inherent power to remove an administrator in a proper case, but extended it by holding that the record need not show any notice to the person being removed. The court further held that the fact that a widow had previously renounced her preferential right to administer did not disqualify her so as to prevent the probate court appointing her after removing the prior administrators.

In Johnson v. Johnson\textsuperscript{16} the familiar principle of equitable retainer was applied to allow the collection out of the debtor's distributive share in the estate of notes which otherwise would have been outlawed by the Statute of Limitations. However, in Old v. Heibel\textsuperscript{17} the doctrine was significantly limited by holding that where Heibel had been acting under a will leaving him a one-sixth interest in certain real estate and had misappropriated the assets in his charge, the doctrine of equitable retainer did not allow the collection of such misappropriation out of his one-sixth interest in the real estate as against a judgment creditor who had obtained a judgment against Heibel prior to the decedent's death which judgment had automatically become a lien on such one-sixth interest in the real estate.

In State ex rel Bovard v. Weill,\textsuperscript{18} it was held that there was no breach of an administrator's bond merely because he did not pay an allowed claim, when the administrator had no money with which to pay such claim.

As is always true, there were a number of other cases in which matters affecting administration were discussed, but these primarily involved disputes on other phases of the law and only announced already well settled principles of the law of administration.

WORKMEN'S COMPENSATION

JOHN S. MARSALEK\textsuperscript{*}

In connection with compensation claims arising out of occupational disease, the determination of liability as between successive employers of the injured workman, and successive insurance carriers of the employers, produces a number of problems. It is a well known fact that in most instances, occupational diseases develop slowly and gradually, and produce an effect which the employe recognizes as an occupational condition only

\textsuperscript{15} 307 Mo. 674, 271 S. W. 755 (1925).
\textsuperscript{16} 352 Mo. 787, 179 S. W. (2d) 605 (1944).
\textsuperscript{17} 352 Mo. 511, 178 S. W. (2d) 351 (1944).
\textsuperscript{18} 182 S. W. (2d) 521 (Mo. 1944).
*Attorney, St. Louis, LL.B. Washington University, 1911.
after long exposure. In their early stages such conditions are generally imperceptible to the employe, and medical diagnosis is uncertain or impossible. During the period of development, the employe may work for different employers, or the same employer may be covered by successive insurance carriers. Whether the compensation liability is to be borne by the last employer or insurer, or should be apportioned, has been a frequent subject of judicial inquiry.

A phase of this question came before the Supreme Court of Missouri during 1944 in *King v. St. Louis Steel Casting Company*, a proceeding by the widow of an employe to recover compensation on account of his death. The employe died in June, 1942, as the result of silicosis. He had worked as a sandblaster for the named defendant from 1929 until a few months before his death. He was exposed to silica dust to some extent during the entire period of his employment. During this time, as improved protective devices became available, they were adopted and put in use by the employer, thus tending to lessen the degree of exposure. There was evidence that a change in the employer's method of sandblasting occurred in 1941, and that the amount of fine dust was thereby increased. The employe worked regularly and appeared to be in good health until December, 1941, when he became ill. From that time his decline was rapid until his death.

The employer's compensation risk was insured by The Traveler's Insurance Company from 1930 to August, 1940, and by the Liberty Mutual Insurance Company from August, 1940 to July, 1942. In the compensation proceeding the employer and both insurers were named as defendants. The Workmen's Compensation Commission rendered an award in favor of the widow and against the employer and the Liberty Mutual, and in favor of the Traveler's. The Liberty Mutual appealed to the circuit court, and after affirmance of the award appealed to the supreme court.

The supreme court affirmed the judgment of the circuit court, and in its opinion held, in accordance with the great weight of authority elsewhere, that in compensation cases based upon occupational disease, liability accrues and attaches to the employer and insurer as of the date of the employe's disability. In placing the entire obligation to the employe or dependents upon the insurer at the time of disability, the opinion follows the terms of the standard workmen's compensation policy, whereby the insurer agrees to pay promptly to any person entitled thereto, under the workmen's com-

1. 182 S. W. (2d) 560 (Mo. 1944).
pensation law, the entire sum due because of the obligation for compensation imposed upon the employer. In holding that the liability attaches to the employer at the time the employee becomes disabled, the opinion is consonant with the general theory applied in compensation cases, under which an employer is held liable when an employee, who is able to work and earn his livelihood, becomes disabled by accident or disease incident to the employment, even though the employee's injury or disability may have been contributed to by a prior physical defect or impairment of health.\(^2\)

The rule adopted in the *King* case is the best solution of the problem there presented, consistent with the spirit of the Workmen's Compensation Act. The cardinal purpose of the compensation system is to secure prompt and certain payment of compensation to employees entitled thereto, in lieu of wages. The effort, in the course of the proceeding brought by the employee, to apportion the compensation liability between successive employers or insurers, on any basis which may suggest itself, or in such proceeding to determine difficult problems regarding the time when the employee first contracted the occupational disease, would result in intolerable delay in the payment of compensation to the employee or his dependents. If apportionment of the loss in occupational disease cases is desirable, an independent proceeding for that purpose should be devised, either by statute or by court decision, and such proceeding should not be permitted to delay the payment of compensation to those entitled thereto.

The rule stated in the *King* case cannot be applied indiscriminately. The case of an employee who, by reason of a prior exposure, becomes disabled during a lay-off period after leaving the employment, or while working in a different occupation in which no occupational disease hazard exists, has been the subject of decision in other states. In Wisconsin liability under such circumstances is imposed upon the last employer in whose service the exposure to the disease occurred.\(^3\)

In *Overcash v. Yellow Transit Company*,\(^4\) the principal question before the court was whether an award, rendered by the compensation commission of another state, bars a recovery under the Missouri Workmen's Compensation Act for the same injury or death. The contract of employment between

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3. See Hayes *v.* Ajax Rubber Co., 231 N. W. 584 (Wis. 1930); Schaeffer *v.* Ind. Comm., 265 N. W. 390 (Wis. 1936); Milwaukee Malleable Iron Works *v.* Ind. Comm., 220 Wis. 244 (1936).
4. 352 Mo. 993, 180 S. W. (2d) 678 (1944).
the employer and the employe was made in Kansas. The employe in the course of his employment suffered a fatal accident in Missouri. A recovery on account of the death could have been had under the law of either state, for the Kansas act applies to injuries sustained outside the state, if the contract of employment is made in Kansas, while the Missouri act by its terms applies to all injuries received within the state, regardless of where the contract of employment is made. The employe's widow, as his executrix, instituted proceedings to recover compensation before the Kansas Commission, and stipulated with the employer for an award in her favor. The employer then petitioned the Commission to determine the degree of dependency of the widow and a minor daughter of the deceased employe by a previous marriage. When the petition was called for hearing, the Kansas Commission denied the widow's request for a continuance, and refused her application to dismiss the proceeding. The widow then "walked out" and attempted to abandon the proceeding in Kansas. The Commission rendered an award in favor of the widow and her step-daughter, dividing the compensation equally between them.

In the meantime the widow had instituted a proceeding in her individual capacity under the Missouri act. The employer challenged the jurisdiction of the Missouri Commission on the ground that the Kansas Commission had acquired prior and exclusive jurisdiction of the claim, and that the Kansas award was entitled to full faith and credit, under the Federal Constitution, and was res adjudicata. The Missouri Commission after a hearing rendered an award in the widow's favor. This award was affirmed by the circuit court. The employer thereupon appealed to the Supreme Court of Missouri.

The supreme court in its opinion held in accordance with the law as declared by the United States Supreme Court that the courts of Missouri were required to give full faith and credit to the award of the Kansas Commission; that the award there made determined the extent of the employer's liability, and precluded further recovery under the Missouri act. Collateral questions involved and determined were:

That the contract of employment was made in Kansas, because the last act necessary to a meeting of the minds of the parties or to complete the contract was performed there.

That the Kansas Commission had jurisdiction to make an award, because the contract of employment was made in that state.

That the Kansas Commission, through its examiner, was vested with discretion to deny the widow's applications for a continuance and to dismiss the proceeding, especially since the dismissal would prejudice the rights of the step-daughter, who was a joint claimant under the Kansas act.

That the necessary identity of parties existed to make the rule of res adjudicata applicable against the Missouri claim, although the latter was instituted by the widow in her individual capacity, while the Kansas claim was filed by her as administratrix of her deceased husband. In this connection the court said that the employee's death gave rise to but one cause of action, and the Kansas proceeding was filed by the widow for her own benefit and that of the step-daughter.

That the defense of res adjudicata, urged by the employer before the Missouri Commission, raised an issue of law which the Commission was authorized to decide, and that the Commission's ruling on the question was reviewable by the courts on appeal.

The supreme court accordingly reversed the judgment of the circuit court and remanded the case with directions that the claim be dismissed.

Under the Missouri Workmen's Compensation Act, one who has work performed on or about his premises under a contract is liable for compensation to the contractor, his subcontractors and their employes, provided the work is an operation of the usual business which the owner or proprietor of the premises carries on there. Under such circumstances the owner or proprietor is considered a "statutory employer" of the contractor and his employes, and the latter are barred from maintaining suits against the statutory employer on account of accidental injury or death arising in the course of the work. In the case of Perrin v. American Theatrical Company, the supreme court passed on the status under this provision of the act of a musician who was employed by the owner of a road show, and who was injured on the theater premises where the performances were being given. The plaintiff claimed that his injuries were due to negligence on the part of the theater owner, and brought a suit for damages against the latter. The defense was based on the above mentioned provisions of the Missouri Workmen's Compensation Act. Plaintiff recovered a judgment in the trial court, and on

10. 352 Mo. 484, 178 S. W. (2d) 332 (1944).
the defendant's appeal the judgment was affirmed. The evidence showed that
the defendant, under its contract with the show owner, furnished its theater
and certain service employees, ticket-sellers, extra musicians and stagehands
for the performances. The owner of the show agreed to give the performances
provide the characters, costumes, properties, etc. The supreme court con-
strued the evidence to show that the work in which plaintiff was engaged
was not an operation of the usual business in which defendant theater owner
was engaged; that the defendant was engaged in furnishing the place and
facilities for the show, and that the plaintiff's immediate employer was
giving the performance. Defendant pleaded a provision of its contract with
the show owner authorizing defendant, at the show owner's expense, to obtain
compensation insurance to cover the show owner's employees if the latter
failed to carry such insurance. This term of the contract was urged as an
admission of the applicability of the Missouri act. The court in answer to
this contention held that the provisions of the act could not be enlarged by
waiver, estoppel or contract. The judgment in plaintiff's favor was affirmed.

Cases falling within the general category of injury by overstrain have
been before the supreme court on a number of occasions. The prior cases
rule that if at the time of the injury the employee is engaged in the usual and
ordinary work incident to his employment, and is not subjected to any
unusual strain or exertion, his injury does not constitute an accident. It is
noteworthy that in the prior cases ruled by the court the employees involved,
at the time the alleged accidents occurred, were suffering from serious
physical conditions brought about by natural causes, and that the injuries
were fairly attributable to their physical defects rather than to a sudden,
violet and unusual event occurring in the course of the employment. In
State ex rel United Transports v. Blair, the supreme court en banc
reviewed an opinion of the Springfield Court of Appeals affirming an award
of compensation to an employee for an injury by overstrain which occurred
under circumstances which differed in important particulars from the prior
cases on the subject. The employee, who was in normal health, was changing
an automobile tire. One of the tire lugs was "frozen" and could not be
turned by the method ordinarily employed. The employee then pulled, tugged
and jerked on a pipe attached to a wrench, and stood on the pipe, in an

40 (1941).
12. 352 Mo. 1091, 180 S. W. (2d) 737 (1944).
effort to loosen the lug. As a result of his exertions he suffered a hernia. The court of appeals held that the evidence was sufficient to sustain the Commission's finding of accident; that the injury occurred under unusual circumstances, was sudden and violent, and was accompanied by objective symptoms of injury. The supreme court, on certiorari filed by the employer, said the case was distinguishable from the court's prior decisions on the subject, and that no conflict existed.

Whether the contract of employment was made in Missouri or in Kansas was the issue upon which the decision turned in Deister v. Thompson. The employee sustained fatal injuries while working for the employer on a construction project in Kansas. Arrangements were made by the employer through a union stewart employed on the job, and the business agent of the union in Kansas City, Missouri, under which it was understood that the employee was to report for work on the project. The employee, while at the union headquarters in Kansas City, agreed to accept the proffered employment. He then reported at the job and was put to work. The supreme court held that if the Missouri Commission had found, upon this evidence that the contract was made in Missouri, the finding would have stood for affirmance. Other evidence introduced at the hearing showed that the employer retained the right to accept or reject any workman sent to the job by the union. The men would be supplied by the union with a card, on which there appeared, among other things, a blank space for the employer's notation whether the man was accepted or rejected. These cards were customarily presented at the employer's employment office in Kansas. There was evidence to the effect that Deister was employed in the customary manner. The Missouri Commission found that the contract was not made in Missouri. This finding was affirmed by the circuit court and by the supreme court on the widow's appeal. The court based its opinion on the rule that in determining on appeal whether an award is supported by circumstantial evidence, the evidence most favorable to the award must be adopted, and evidence which would support a different finding should be disregarded. The evidence favorable to the award showed that the last act necessary to complete the contract, the acceptance of the employee, occurred in Kansas. The court further cited the rule that a contract is regarded as made where the final act occurs which makes a binding agreement.