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

CARL C. WHEATON

OBJECTIVES OF CODE

The purpose and spirit of both the code and of the court rules requires a liberal construction of procedural provisions. The code itself requires its provisions to be “construed to secure the just, speedy, and inexpensive determination of every action.”

COVERAGE

The Civil Code, while not supplanting special procedure statutes, such as divorce, applies to such statutes where it is not repugnant to their provisions.

PARTIES

a. Defined

A party to an action is a person whose name is designated on the record as a plaintiff or defendant.

b. When One Is Party

Persons named as defendants are parties until the court makes disposition as to them, whether or not they have been served with process.

c. Real Party in Interest

In a declaratory judgment proceeding involving the validity of a municipal franchise, the city whose franchise is involved is, under Section 527.110 of the Revised Statutes of Missouri, a real party in interest.

Since possession of property gives one a sufficient interest therein to sue in trespass vi et armis, one in possession at the time of an alleged trespass is a real party in interest and may bring such an action.

*Professor of Law, University of Missouri, A.B., 1911, Leland Stanford Junior University, LL.B., 1915, Harvard University. Draftsman for the Missouri Supreme Court Committee on Civil Practice and Procedure.

1. The interpretations are based primarily on Volume 240 through 248 of the Southwestern Reporter, second series. The statutory coverage is confined to those statutes in the Mo. Rev. Stat. (1949) which replace the General Code for Civil Procedure found in the Laws of Missouri, 1943.


4. Downey v. United Weatherproofing, 241 S.W. 2d 1007 (Mo. 1951).

5. Ibid.


Where the Board of Public Works of Rolla was incorrectly made the plaintiff in an action to have a city contract declared void, on appeal the supreme court affirmed the judgment for the plaintiff on condition that the city within fifteen days adopt the acts of its Board of Public Works in connection with the case and ask to be substituted as the plaintiff in the action.8

An action can only be brought in the name of the state when this is provided for by statute.9

In an action to cancel a trustee's deed given to a purchaser in connection with a foreclosure sale, it was held that the trustee would be a proper party, but that he was not an indispensable party, since he had no interest in the subject matter of the suit.10

Members of a local church congregation may, in their own names and in behalf of other members of the congregation, bring an action against the parent church and others who claim to act as trustees for the local church, to enjoin the defendants from interfering with the holding of religious services in the church building used by the local church and from selling and disposing of realty used by the local church organization, and such action should not be brought in the name of the state or in the name of the local church.11

In an interpleader suit, each claimant of property involved is in effect a plaintiff, who must recover on the strength of his own title, not on the weakness of his adversary's claim of title.12

Where A sued B and C, it was held that B could, in a single pleading, sue C as a cross-claim defendant and others as third-party defendants.13 It should be noticed that no question of misjoinder was raised in the trial court.

9. State ex rel. and to use of Northside Church of God v. Church of God, 247 S.W. 2d 542 (Mo. App. 1952).
11. State ex rel. and to Use of Northside Church of God v. Church of God, supra note 9.
13. Elzea v. Hammack, 244 S.W. 2d 594 (Mo. App. 1951).
Otherwise the holding seems incorrect, since the pleading of cross-claims and claims against third-party defendants are treated differently under the Missouri procedure statutes.

Under the third-party practice statute, it should appear that the third-party petition, offered to be filed, tenders issues which would make the third-party defendant liable either to the original plaintiff or to the original defendant. And, if the plaintiff cannot have a judgment against the tendered third-party defendant, it is imperative that the third-party petition tender issues which would make the third-party defendant liable to the third-party plaintiff.14

When the original plaintiff declines to accept the tendered third-party defendant as a defendant in the case, and declines to amend his petition to state a cause of action against such tendered third-party defendant, no judgment can be had in favor of the plaintiff against the tendered third-party defendant. Where the plaintiff did not amend and state a cause of action against the tendered third-party defendant, but had by contract covenanted not to sue the third-party defendant, it was not material to the merits of the controversy that the third-party petition filed by the defendant stated a cause of action in favor of the plaintiff and against the third-party defendant, for, under such circumstances, the plaintiff could in no event have a judgment against the third-party defendant.15

Under the third-party practice statute, the third-party defendant is bound by the adjudication of the third-party plaintiff’s liability to the plaintiff.16

j. Substitution of

The substitution of trustees in bankruptcy in place of a corporation which was sued prior to the bankruptcy proceeding against it is not required by Section 507.100(4) of the Revised Statutes of Missouri, relating to the substitution of parties in cases in which there are corporate parties.17

Pleadings

a. Sufficiency of

A petition before a court must be one in the first instance which is sufficient to initiate the exercise of the court’s jurisdiction before any further proceeding or relief is warranted thereon.18

14. State ex rel. and to Use of Merino v. Rose, 240 S.W. 2d 705 (Mo. 1951). Compare Byrnes v. Scaggs, 247 S.W. 2d 826 (Mo. 1952).
15. Ibid.
In determining whether a petition states a claim, only the well-pleaded facts of the petition are properly considered. 19

A mere conclusion of a pleader is insufficient as part of a pleading. This rule has been applied to an allegation that the negligence of a third-party defendant was either the direct or the sole cause of a collision; 20 to a statement that "the said County Board of Education in the attempted call for said special election for the purpose of forming said proposed Enlarged School District... failed and neglected to comply with provisions of Section 8 of said Senate Bill No. 307... in the following particulars:... That said purported election of October 21, 1949 was not duly and regularly called by the County Board of Education of DeKalb County, Missouri;"; 21 and to allegations of plaintiffs that they had complied with mandates set out in a warranty deed without alleging what the mandates were. 22

b. Affirmative and Negative Defenses

1. Laches

Some cases applying the rules of pleading recognized in classical equity hold that the pleader must excuse long delay in the assertion of a right by averments of fact rebutting a "presumptive inequity," and that, in the absence of such averments, a bill is inadequate. This doctrine, however, has never been, or at least is not now, accepted in this state as a requirement of proper pleading. Conceivably, a plaintiff might plead enough evidentiary facts to show himself guilty of laches; if so, the action would be properly dismissed on motion. Otherwise, laches is a question of fact to be determined by all of the circumstances. 23

2. Estoppel

Estoppel is an affirmative defense. 24

3. Sole Cause

A "sole cause" defense is not an affirmative defense but is one that can be made under a general denial or under an answer specifically denying the negligence charged in the petition. Hence where the defendants' answer

19. State ex rel. and to the Use of Northside Church of God v. Church of God, supra note 9.
22. State ex rel. and to the Use of the Northside Church of God v. Church of God, supra note 9.
23. In Re Thompson's Estate, 246 S.W. 2d 791 (Mo. 1952).
24. Howard National Bank & Trust Co. v. Jones, 243 S.W. 2d 305 (Mo. 1951).
specifically denied all of the charges of negligence in the amended petition, a "sole cause" plea in the answer was surplusage.\textsuperscript{25}

c. \textit{Counterclaims}

The purpose of Section 509.420 of the \textit{Revised Statutes} is to discourage separate litigations covering the same subject matter and to require their adjudication in the same action. It is also a means of bringing all logically related claims into a single litigation through the penalty of precluding the later assertion of omitted claims.\textsuperscript{26}

Where there was a collision between two automobiles and one of the owners settled an action against him through his insurance company, he could not later sue the owner of the other car for a claim arising out of the collision, since his cause involved a compulsory counterclaim. The plaintiff argued that the counterclaim was not compulsory, since the settlement of the first action, which was in the hands of representatives of the insurance company, was made by them before the time to answer the petition had expired, and since the insurance company did not represent him as to his counterclaim. These arguments, I believe, were properly rejected, as the compulsory counterclaim section clearly makes no exception to actions involving the facts of this case.\textsuperscript{27}

d. \textit{Amendments to Pleadings}

In a slander action, the plaintiff was permitted to amend his petition by changing the date of the alleged slanderous statement from the time originally alleged in the petition to another date.\textsuperscript{28}

In a negligence action the court was held properly to have permitted the plaintiff to amend his petition by interlineation by adding an additional assignment of negligence, since it did not appear that the defendant was misled or prejudiced by the amendment or that the court abused its discretion in permitting the amendment.\textsuperscript{29}

Where the record showed that, on motion of the defendant, the plaintiff's original petition was dismissed with leave to plead further within 20 days, and that the plaintiff thereafter filed his amended petition, and where it appeared that the plaintiff probably had had an opportunity to discover all of the facts pertaining to his claim and that the specific reasons for the

\textsuperscript{25} Abernathy v. St. Louis Public Service Co., 240 S.W. 2d 914 (Mo. 1951); Spicer v. Hannah, 247 S.W. 864 (Mo. App. 1952).

\textsuperscript{26} Keller v. Keklikian, 244 S.W. 2d 1001 (Mo. 1951).

\textsuperscript{27} \textit{Ibid.}

\textsuperscript{28} Delcour v. Wilson, 245 S.W. 2d 467 (Mo. App. 1952).

\textsuperscript{29} Merrick v. Bridgeways, Inc., \textit{supra} note 17.
defendant's attack upon his original petition were made known to the plaintiff prior to the court's first order of dismissal, it was held that, if thereafter the plaintiff did not state a claim upon which relief could be granted, substantial justice would not be served by enabling the pleader to avail himself of trial procedure.\(^{30}\)

Where an action to recover death benefits under an industrial policy was tried by both parties upon the apparent assumption that the sufficiency of consideration for the release of all claims under the policy was a proper issue, though the insufficiency of such consideration was not pleaded, the pleadings were considered as amended to conform to the evidence.\(^{31}\)

Where an attorney testified as to the date of the deposit of a deed, permission to amend the petition by interlineation to conform to the proof and to show delivery as of the date testified to, was held not to be error, where the allowance of the amendment did not prejudice the defendants in maintaining their defense on the merits.\(^{32}\)

A suit which is prematurely brought may not be maintained, even though the cause of action has perchance accrued by the time the case is called for trial; nor may an amended petition in such a case set up a cause of action which had not accrued at the time the original petition was filed. One can not effectively amend a petition which had no standing when it was originally filed.\(^{33}\)

e. **Joinder of Different Bases for Claim**

In an action by a switchman against a railroad under the Federal Employers' Liability Act for injuries sustained when the switchman alighted from a switch engine and was struck by a locomotive traveling on a parallel track, the switchman could plead conjunctively that the railroad failed to maintain a safe place to work, and that the switch engineer failed to keep a lookout and to warn the switchman of the approaching locomotive.\(^{34}\)

When a plaintiff has but a single cause of action which may be stated in different ways so as to meet different phases of the evidence as the same may possibly develop at the trial, he may state such cause of action in different counts, and cannot be compelled to elect upon which count or theory he will proceed.\(^{35}\)

32. Wilcox v. Coons, 241 S.W. 2d 907 (Mo. 1951).
33. Slater v. Missouri Edison Co., 245 S.W. 2d 457 (Mo. App. 1952).
34. Timmerman v. Terminal R.R Ass'n of St Louis, 241 S.W. 2d 477 (Mo. 1951).
35. Tabor v. Ford, 240 S.W. 2d 737 (Mo. App. 1951).
f. Joinder of Causes

Under Sections 379.195 and 379.200 of the Revised Statutes of Missouri, an action against an insurer can not be joined with one against the insured, if the insurer objects to such joinder. It has a right not to be sued in connection with the claim against the insured until judgment is obtained against said insured.36

Motions in General

a. Replace Demurrers

Motions now take the place of the old demurrer which has been abolished.37

b. Grounds for

The lack of jurisdiction over the subject matter or over the person, improper venue, insufficiency of process or the service thereof, lack of legal incapacity to sue, pendency of another action between the same parties for the same cause in this state, misjoinder of several claims, and the improper interposition of a counter-claim or cross-claim have all been made grounds for a motion to dismiss.38

This is also true of nonjoinder of parties.39

c. Speaking Motions

The grounds for any of the above stated objections may be supplied in motions by an affidavit accompanying the motion and may be controverted by affidavit.40

However the new code retains the rule that the objection must appear on the face of the pleadings when the petition is attacked for failure to state a claim.41

d. Admission of Allegations

A motion to dismiss a petition for failure to state a cause of action admits, for the purposes of the motion, the truth of all facts well pleaded in the pleading attacked and any inferences fairly deducible therefrom.42

e. Waiver of Ground for Motion

Under the provisions of Section 509.340 of the Revised Statutes of Missouri, a party waives all objections available to him by failure to assert the

38. Ibid.
41. Ibid.
42. Bedell v. Daugherty, 242 S.W. 2d 572 (Mo. 1951); Vandeventer v. Shields, 241 S.W. 2d 53 (Mo. App. 1951).
same by timely motion, except failure to state a claim upon which relief can be granted, failure to state a legal defense to a claim, and lack of jurisdiction over the subject matter.\textsuperscript{43}

Under the provisions of our former code of pleading, it was uniformly held that a defect of parties was waived by a failure to raise the point by demurrer or answer. The provisions of the present law have not changed this rule. The waiver of a defect in parties, if it exists, is no less effective where a defendant fails to plead at all, than where a party, having pleaded, fails to raise the point.\textsuperscript{44}

\textbf{f. Construction of Petition on Motion}

Upon a motion to dismiss a petition for failure to state facts upon which relief may be granted, the court construes the petition most favorably to the plaintiff.\textsuperscript{45}

\textbf{g. Ground Given by Court for Dismissal}

If a court properly dismisses a petition, it is immaterial on what ground it acts or what ground it assigns for its decision.\textsuperscript{46}

\textbf{Motion for Judgment on the Pleadings}

A motion for a judgment on the pleadings raises only issues of law and will lie only when the moving party, on the face of the pleadings, is entitled to judgment as a matter of law.\textsuperscript{47}

Therefore, where the pleadings raised an issue of fact, the motion was denied.\textsuperscript{48}

During the year, it has also been decided that one making such a motion admits only the facts pleaded by his adversary and not the latter’s conclusions of law.\textsuperscript{49}

\textbf{Offer of Judgment}

Where a buyer made an offer of judgment for the difference between the amount paid and the price charged on one order, and the seller, who had sufficient notice of the limitation on the authority of the buyer’s agent but who claimed the difference between the price originally fixed in another order and the increased price to which the agent had unauthorizedly changed

\textsuperscript{43} Casper v. Lee, \textit{supra} note 10.
\textsuperscript{44} \textit{Ibid.}
\textsuperscript{45} Bedell v. Daugherty, \textit{supra} note 42.
\textsuperscript{47} Struckoff v. Thompson, 241 S.W. 2d 39 (Mo. App. 1951).
\textsuperscript{48} Struckhoff v. Thompson, \textit{supra} note 47; Brand v. Brand, 243 S.W. 2d 981 (Mo. 1951).
\textsuperscript{49} Brand v. Brand, \textit{supra} note 48.
the order, rejected the offer, judgment for the amount of the offer with costs against the seller from the date of the offer was proper.\textsuperscript{60}

\textbf{Motions for Directed Verdicts}

Demurrers to the evidence have been replaced by motions for directed verdicts.\textsuperscript{61}

Though, in a jury case, the defendant mistakenly moved to dismiss instead of making a motion for a directed verdict, since Section 510.280 of the \textit{Revised Statutes of Missouri} authorizes a dismissal even if a motion for a directed verdict is made, an appeal from an involuntary dismissal was permitted.\textsuperscript{62} This is a reasonable result, since form should not prevail over substance.

The general rule is that, if a party has adduced in support of his case evidence which is substantial, when coupled with inferences that may be legitimately drawn therefrom, the case is for the jury and a motion for a directed verdict should be overruled. In other words, the court will not \textit{weigh} the evidence.\textsuperscript{63}

Therefore, a verdict may be directed for a defendant only when the facts in evidence and the legitimate inferences drawn therefrom are so strongly against a plaintiff as to leave no room for reasonable minds to differ.\textsuperscript{64}

If a trial court properly directs a verdict for a defendant, it is immaterial that the court may have assigned an erroneous or insufficient reason therefor.\textsuperscript{65}

In a negligence action, a motion for a directed verdict under the new code challenges, as did the former demurrer to the evidence, all of the assignments of negligence covered by the pleadings. If the motion is overruled and the plaintiff thereupon submits only part of such assignments, he does so with knowledge that such assignment or assignments so submitted have been challenged, and the court is deemed to have known, when it permitted such submission, whether it regarded the issue or issues submitted had been

\begin{itemize}
  \item \textsuperscript{50} Werner v. Welsh Co., 247 S.W. 2d 311 (Mo. App. 1952).
  \item \textsuperscript{51} Girratono v. Kansas City Public Service Co., 243 S.W. 2d 539 (Mo. App. 1951).
  \item \textsuperscript{52} Merit Specialities Co. v. Gilbert Brass Foundry Co., 241 S.W. 2d 718 (Mo. 1951).
  \item \textsuperscript{53} Hillhouse v. Thompson, 243 S.W. 2d 531 (Mo. 1951); Girratono v. Kansas City Public Service Co., \textit{supra} note 51.
  \item \textsuperscript{54} Altenderfer v. Harkins, 243 S.W. 2d 558 (Mo. App. 1951); Cline v. City of St. Joseph, 245 S.W. 2d 695 (Mo. App. 1952).
  \item \textsuperscript{55} Powers v. Shore, 248 S.W. 2d 1 (Mo. 1952).
\end{itemize}
supported by sufficient evidence. Thereafter, when the defendant renues his objections by his after-trial motion to set aside the judgment and for judgment in his favor (as in the case of the old demurrer to the evidence when the objections were renewed by motion for a new trial), the objections are deemed to be directed to and leveled at only the issues of negligence submitted and all assignments not submitted to the jury are, as formerly, for the time being, considered waived and discarded by the plaintiff. The appellee court is not bound to search the record for other assignments which the evidence may have made submissible. 56

Instructions

In civil actions there must be a request for an instruction to place on the court a duty of giving such instruction. 57

A complaint that a court erred in orally instructing the jury to disregard an argument was held to be without merit. Section 510.300 of the Revised Statutes of Missouri, which requires that instructions shall be in writing, is applicable only to instructions which submit to the jury the issues being tried. 58

Motion for Judgment in Accordance with Motion for Directed Verdict

The effect of Sections 510.280 and 510.290 of the Revised Statutes of Missouri is that, upon the overruling of a motion for a directed verdict at the close of all the evidence, the authority of the court to determine the legal questions thereby presented, and to set the judgment aside, without ordering a new trial, is not exhausted by its refusal of the motion. If the motion for a directed verdict is refused, the court is deemed to have submitted the cause to the jury subject to a later determination of the legal questions so raised, if again presented, after verdict and judgment, by the defendant on a motion to set aside the verdict and judgment and to enter judgment in accordance with the motion for a directed verdict. In such event, the court may then again consider and pass on the legal questions theretofore raised upon the whole record. The words "in accordance with his motion for directed verdict" are a reference to the summary method of disposing of the case without retrial, and do not mean that the court must

58. O'Donnelly v. St. Louis Public Service Co., 246 S.W. 2d 539 (Mo. App. 1952); Reliable Life Ins. Co. v. Bell, 246 S.W. 2d 371 (Mo. 1952).
consider the record only as it stood at the close of all the evidence. The primary purpose of this motion is to obtain the correct judgment without the expense and delay of a new trial.  

If a trial court rules correctly on this type of after-trial motion, it is immaterial that it may have assigned an erroneous or insufficient reason for its ruling.  

**Cases Tried Without a Jury**

**a. Findings of the Court**

Under Section 510.310(2) of the Revised Statutes of Missouri, it is the duty of the trial court on request of either party to dictate or prepare and file a brief opinion containing a statement of the grounds for its decision.

**b. Fact Issues**

In a case tried without a jury, fact issues on which no findings are made are deemed found in accordance with the result reached.

**c. Motion to Amend Judgment**

A motion to amend the judgment in a case tried by a court extends the time to appeal to the same extent that a motion for a new trial defers it.

**d. Duties of Appellate Courts**

It is the duty of an appellate court to hear de novo a case tried without a jury. It should reach its own opinion on the facts where the evidence is conflicting. It should, however, give great deference to the decision of the trial judge on the facts, since he had the superior advantage of hearing and observing the witnesses as they testified.

This rule has been applied to equity cases to actions at law, to an ac-

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60. Brown v. Moore, 248 S.W. 2d 553 (Mo. 1952).
62. Maas v. Dreckschage, 244 S.W. 2d 397 (Mo. App. 1951).
64. Bank of Kennett v. Clayton, 245 S.W. 2d 678 (Mo. App. 1952).
65. Bohnsack v. Hanebrink, 240 S.W. 2d 903 (Mo. 1951); Milanko v. Austin, 241 S.W. 2d 881 (Mo. 1951); State ex rel. Taylor v. Anderson, 242 S.W. 2d 66 (Mo. 1951); Feeney v. Cook, 242 S.W. 2d 524 (Mo. 1951); Hubert v. Magidson, 243 S.W. 2d 337 (Mo. 1951); Arbyrd Compress Co. v. City of Arbyrd, 246 S.W. 2d 104 (Mo. App. 1952); Strafer v. Bodney, 247 S.W. 2d 630 (Mo. 1952); Milgram v. Jiffy Equipment Co., 247 S.W. 2d 668 (Mo. 1952); Florida v. Wilkerson 247 S.W. 2d 678 (Mo. 1952); Handlan v. Handlan, 247 S.W. 2d 715 (Mo. 1952); Baldwin v. Baldwin, 247 S.W. 2d 741 (Mo. 1952); Jones v. Linder, 247 S.W. 2d 817 (Mo. 1952); Been v. Jolly, 247 S.W. 2d 840 (Mo. 1952); Duke v. Crossfield, 240 S.W. 2d 180 (Mo. App. 1951); Bowman v. City of East Prairie, 240 S.W. 2d 203 (Mo. App. 1951); Dildine v. Rimpson, 240 S.W. 2d 214 (Mo. App. 1951); North Kansas City v. Kelley, 242 S.W. 2d 582 (Mo. App. 1951); Kessler v. United Agencies, 243 S.W. 2d 779 (Mo. App. 1951); Maas v. Dreckschage, 244 S.W. 2d 397 (Mo. App. 1951); Skatoff v. Solomon, 244 S.W. 2d 590 (Mo. App. 1951).
66. Peterson v. Bledsoe, 241 S.W. 2d 375 (Mo. 1951); Taylor v. Taylor, 243 S.W. 2d 310 (Mo. 1951); Martin v. Lewis, 244 S.W. 2d 87 (Mo. 1951); Star-Times
tion partly in equity and partly at law, to actions for divorce, to a will contest, and to a hearing before the state tax commission.

This law has been held to be inapplicable where there is no conflict in the oral testimony, where a case is submitted upon an agreed statement of facts, or where a case is dismissed because the cause was res adjudicata. The reason given for the result in the last case was that de novo means anew or again. Since the case had never been tried on the merits, the appellate court could not have the benefit of the opinion of the trial judge upon the credibility of the witnesses that appeared before him and could not, naturally, consider again evidence which had never been presented.

It has been decided that appellate courts, upon considering evidence anew, should not reverse the trial judge’s findings on the facts unless those findings were against the clear weight of the evidence.

It has also been held that sufficiency of evidence in a nonjury case may be challenged on appeal though no motion for a new trial is filed. This seems to be correct, since Section 510.310(4) of our Revised Statutes states that the question of the sufficiency of the evidence may be raised in the appellate court “whether or not the question was raised in the trial court.”

**NEW TRIALS**

**a. Necessity for Motion**

It has been held that whether a board of public works had authority

Publishing Co. v. Buder, 245 S.W. 2d 59 (Mo. 1952); Harbin v. Schooley Stationary and Printing Co., 247 S.W. 2d 77 (Mo. 1952); Fisher v. Peterson, 240 S.W. 2d 176 (Mo. App. 1951); Prugh, Combest and Land, Inc. v. Linwood State Bank, supra note 61; Liberty Mutual Ins. Co. v. Mercantile Home Bank and Trust Co., 241 S.W. 2d 493 (Mo. App. 1951); Conley v. Dee, 246 S.W. 2d 385 (Mo. App. 1952); Werner v. Welsh Co., 247 S.W. 2d 311 (Mo. App. 1952); Toler v. Atlanta Life Ins. Co., 248 S.W. 2d 53 (Mo. App. 1952); Truck Leasing Corp. v. Swope, 248 S.W. 2d 84 (Mo. App. 1952); Coats v. Sandhofer, 248 S.W. 2d 455 (Mo. App. 1952).

67. VanEaton v. Dennis, 242 S.W. 2d 21 (Mo. 1951).

68. Johns v. McNabb, 247 S.W. 2d 640 (Mo. 1952); Beldt v. Beldt, 240 S.W. 2d 983 (Mo. App. 1951); Fossett v. Fossett, 243 S.W. 2d 625 (Mo. App. 1951); Mayo v. Mayo, 244 S.W. 2d 415 (Mo. App. 1951); Brake v. Brake, 244 S.W. 2d 786 (Mo. App. 1951); Phelps v. Phelps, 246 S.W. 2d 838 (Mo. App. 1952); Lasswell v. Lasswell, 248 S.W. 2d 47 (Mo. App. 1952).

69. Capps v. Adamson, 242 S.W. 2d 556 (Mo. 1951).

70. Ulman v. Evans, 247 S.W. 2d 693 (Mo. 1952).


73. Richter v. Frieden, 243 S.W. 2d 783 (Mo. App. 1951).

74. Bohnsack v. Hanebrink, supra note 65; Kimberly v. Presley, 245 S.W. 2d 72 (Mo. 1952); Patterson v. Wilmont, 245 S.W. 2d 116 (Mo. 1952); Harbin v. Schooley Stationery and Printing Co., supra note 66; Pfeffer v. Kleb, 241 S.W. 2d 91 (Mo. App. 1951); Werner v. Welsh Co., 247 S.W. 2d 311 (Mo. App. 1952); Toler v. Atlanta Life Ins. Co., 248 S.W. 2d 53 (Mo. App. 1952); Truck Leasing Corp. v. Swope, 248 S.W. 2d 84 (Mo. App. 1952).

75. Handlan v. Handlan, supra note 65.
to maintain an action for or in behalf of a city to annul a contract was not properly before the supreme court for review, where such authority was not questioned in a motion for a new trial or in assignments of error and the transcript did not show that the question had been presented to or considered by the trial court.76

b. Grounds for

Where a summons could not be served on a juror regularly selected because of a change of address, and the jury commissioner ascertained the address of a person of the same name as that of the selected juror by reference to a telephone directory and the summons was served on such person at a changed address, the fact that the person upon whom the summons was served and who actually served was one other than the person regularly selected, though of the same name, was not such a departure from the manner of selection of jurors as prescribed by statute as would warrant the granting of a new trial, when the juror who served was otherwise competent and the mistake was innocent and without fraud.77

A motion for a new trial complained that the trial court erred in the giving of "erroneous, misleading, illegal and prejudicial instructions asked by the plaintiff, and in particular Instruction No. 1 offered on behalf of plaintiff because said instruction is inconsistent with and diametrically opposed to the evidence. . . ." It was held that the general charge of error contained in this motion for a new trial being applicable to all instructions given on behalf of the plaintiff, though coupled with a specific assignment of error in the giving of a specified instruction, was sufficient to justify the consideration on appeal of other specifications of error in the giving of the specified instruction.78

An award of excessive damages justifies the granting of a new trial.79 In ruling on the question of excessiveness, the trial court must weigh all of the evidence relating to the nature, extent, and cause of the injuries involved.80

New trials may also be granted on the ground of newly discovered evidence, though motions for new trials based on that ground are not favored.81

Newly discovered evidence to justify the granting of a new trial, must

77. Sullivan v. Kansas City Public Service Co., 248 S.W. 2d 605 (Mo. 1952).
79. Carver v. Missouri-Kansas-Texas R.R., 245 S.W. 2d 96 (Mo. 1952).
80. Nix v. Gulf, Mobile and Ohio Ry., 240 S.W. 2d 709 (Mo. 1951).
81. Gromowsky v. Ingersol, 241 S.W. 2d 60 (Mo. App. 1951); Hayes v. Adams, 244 S.W. 2d 123 (Mo. App. 1951).
be material evidence and must be of such a character as would probably produce a different result on a new trial. 82

Merely cumulative evidence may not be a basis for granting a new trial on the ground that it is newly discovered. 83

Further, in order that newly discovered evidence may be a ground for granting a new trial, the evidence must come to the knowledge of the movant after the trial. 84 Also, failure to procure the evidence before a trial ends must not be because of lack of diligence. 85

Diligence in this connection means that degree of assiduity, industry, or careful attention called for under the circumstances of the case and does not require impeccable, flawless investigation in all situations. 86

Where newly discovered evidence was documentary evidence, and the necessity of the production of it by the defendant could not have been foreseen by the defendant until it was too late to produce it at the trial, because the plaintiff did not disclose the real theory of his case until near the end of the trial, and the newly discovered evidence went to the very heart of the controversy, the trial court should grant the defendant's motion for a new trial on the ground of newly discovered evidence. 87

The fact that a juror, not appreciating the restraint imposed on him as a juror and having no improper motive, spoke to a medical witness for the purpose of exchanging pleasantries with the doctor was not necessarily a ground for a new trial, where the doctor said nothing more to the juror than he had testified to on the stand. 88

c. Form of Motion

An unsigned motion for a new trial may be validity granted, since such a motion need not be verified and the omission of the signature was a mere matter of form. 89

d. Discretion of Court

While trial courts have wide discretion in passing on motions for a new trial where there is error in the record, and may even grant a new trial irrespective of the grounds assigned in a motion for a new trial, yet the power

82. Hayes v. Adams, supra note 81.
85. Ibid.; Hayes v. Adams, supra note 81.
86. Foerstel v. St. Louis Public Service Co., supra note 84.
89. Peterson v. Bledsoe, supra note 66.
of the trial court to grant a new trial is discretionary only as to questions of fact and matters affecting the determination of issues of fact. There is no discretion in the law of a case, nor can there be an exercise of sound discretion as to the law of a case.\textsuperscript{90}

It is within the trial court's discretion to grant a new trial on the ground that the verdict of the jury is against the weight of the evidence. However, such discretion is to be judicially, not arbitrarily exercised.\textsuperscript{91}

It has recently been held that where the defendants in an action on promissory notes made no case for the jury, the trial court abused its discretion in granting the defendants a new trial on the ground of an excessive verdict where the judgment was merely for the alleged principal, interest, and attorney's fees contracted for in the notes.\textsuperscript{92}

e. Stating Reasons for Granting Motion

A trial court in granting a new trial is required by statute to specify in the order granting the new trial the "grounds therefor," but the trial judge is not required further to set forth in a separate memorandum his reasons for the grounds specified or the mental process by which he determined the grounds specified in the order. So that, even though a trial judge may have by memorandum given obscure, incorrect or erroneous reasons for directing the entry of an order granting a new trial on the ground that the verdict was against the weight of the evidence, nevertheless his ultimate decision is conclusively presumed to have been that embodied in the required order, and by force of it the order must be considered as in fact made on the ground as specified — "the verdict was against the weight of the evidence."\textsuperscript{93}

An order requiring the plaintiff to remit a portion of a damage judgment is construed as then granting the defendant a new trial on the ground that the verdict is excessive with the privilege in the plaintiff of retaining that portion of the judgment considered not excessive and defeating the defendant's new trial.\textsuperscript{94}

A trial court's order granting a new trial on the ground that the verdict was either excessive or inadequate is the equivalent of the granting of a

\textsuperscript{90} Lukitsch v. St. Louis Public Service Co., 246 S.W. 2d 749 (Mo. 1952). See also Nix v. Gulf, Mobile and Ohio Ry., supra note 80 and Wicker v. Knox Glass Associates, 242 S.W. 2d 566 (Mo. 1951). For cases applying this rule to new trials granted because of newly discovered evidence, see Hayes v. Adams, supra note 81, and Foerstel v. St. Louis Public Service Co., supra note 84.

\textsuperscript{91} Burr v. Singh, 243 S.W. 2d 295 (Mo. 1951).

\textsuperscript{92} Latta v. Robinson Erection Co., 248 S.W. 2d 569 (Mo. 1952).

\textsuperscript{93} Burr v. Singh, supra note 91.

\textsuperscript{94} Carver v. Missouri-Kansas-Texas R.R., supra note 79.
new trial upon the ground that the verdict is against the weight of the evidence.\textsuperscript{95}

According to Supreme Court Rule 1.10, if a trial court, in granting a defendant's motion for a new trial, makes a general finding that there is error in giving an instruction for the plaintiff, without pointing out the ground on which he based his judgment, his ruling is presumed to be erroneous and the burden is on the defendant to sustain the decision of the trial court.\textsuperscript{96}

\textbf{f. Effect of Not Making Remittitur}

When a remittitur is not made within the time required in an order granting a new trial subject to remittitur, the motion for a new trial stands sustained.\textsuperscript{97}

\textbf{g. Granting New Trial on Court's Initiative}

A trial court may grant a new trial on its own initiative.\textsuperscript{98} However, it must do so within thirty days after entry of the judgment in the case involved.\textsuperscript{99}

\begin{center}
\textbf{Objections to Trial Errors}
\end{center}

As is well known, objections must be made to the trial court to errors occurring before that court in order to preserve them for consideration by an appellate court of this state. During the year our appellate courts have applied this rule to testimony both on direct examination\textsuperscript{100} and on cross-examination,\textsuperscript{101} to remarks of counsel during trial,\textsuperscript{102} to remarks of the trial judge,\textsuperscript{103} to a motion for a directed verdict,\textsuperscript{104} to instructions,\textsuperscript{105} to failure to postpone a trial temporarily,\textsuperscript{106} to an argument,\textsuperscript{107} and to the coverage of a judgment.\textsuperscript{108}

\begin{itemize}
  \item 95. Nix v. Gulf, Mobile and Ohio Ry., supra note 80.
  \item 96. Lillard v. Bradford, 243 S.W. 2d 359 (Mo. App. 1951).
  \item 98. Ford v. Spiller, supra note 83, Ridenour v. Duncan, 246 S.W. 2d 765 (Mo. 1952); Hynes v. Risch, 243 S.W. 2d 116 (Mo. App. 1951).
  \item 99. Ridenour v. Duncan, supra note 98; Hynes v. Risch, supra note 98.
  \item 100. LeGrand v. Drive-It Co., 247 S.W. 706 (Mo. 1952); Lonnecker v. Borris, 245 S.W. 2d 53 (Mo. 1952).
  \item 101. Ibid.
  \item 102. Wilcox v. Coons, supra note 32.
  \item 103. Southall v. Columbia National Bank, 244 S.W. 2d 577 (Mo. App. 1951).
  \item 104. Vandeventer v. Shields, 241 S.W. 2d 53 (Mo. App. 1951).
  \item 105. Lonnecker v. Borris, supra note 100; Padgett v. St. Louis Public Service Co, 240 S.W. 2d 970 (Mo. App. 1951); Whaley v. Milton Construction and Supply Co., 241 S.W. 2d 23 (Mo. App. 1951).
  \item 106. Allison v. Mildred, 245 S.W. 2d 86 (Mo. 1952).
  \item 107. Enyart v. Santa Fe Trail Transportation Co., 241 S.W. 2d 268 (Mo. 1951); Geers v. St. Louis Public Service Co., 247 S.W. 2d 318 (Mo. App. 1952).
  \item 108. Tabor v. Ford, 240 S.W. 2d 737 (Mo. App. 1951).
\end{itemize}
It is also clear that the general rule is that one must specify his ground for an objection to an alleged error in a proceeding before a trial court. But one need go no further to save a ruling for an appeal thereon than to make a clear objection to it.

Where a trial court sustained the defendant's objections but, in most instances, the defendant did not request further action on the part of the trial court, the defendant could not assert upon appeal as error failure of the trial court to do more than was requested by the defendant.

The old Missouri law that the failure of a petition to state a cause of action might be taken advantage of for the first time on appeal still prevails.

**Appeal**

**a. Right Statutory**

It is true that the right to appeal is statutory and exists only when statutes permit appeal, but it is equally true that appeals are favored and statutes granting them must be liberally construed.

**b. Aggrieved Party**

Where a suit is dismissed by the plaintiff, the defendant is not "aggrieved" within the meaning of the statute, and is not entitled to appeal. A co-defendant of one who has been given an improper instruction or who makes an improper argument which injures the co-defendant is an aggrieved party.

**c. Piecemeal Appeal**

The general rule is that appeals may not be taken piecemeal. This doctrine has recently been applied to an order dismissing a cross-claim.

However, Supreme Court Rule 3.29 provides that when a separate trial of any claim, counterclaim, or third-party claim is had, a separate

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judgment which is entered will be deemed a final judgment for the purpose of appeal. This had been held to apply to cross-claims, although they are not specifically referred to in the rule.\textsuperscript{118}

d. Defense Waived

The \textit{usual} rule is that defenses not presented in motions or in pleadings are waived for the purpose of appeal. This maxim was applied in a broker's action against prospective purchasers for commission for services in connection with an attempted sale of realty. As the purchasers did not set up the defense of dual employment in their answer, they could not assert for the first time in the court of appeals the defense that the contract sued upon was void as against public policy.\textsuperscript{119}

e. Final Judgments

Appeals may be taken from final judgments.\textsuperscript{120} A final judgment must dispose of all issues in the case.\textsuperscript{121}

During the year it was decided that an order setting aside a default judgment was appealable as a final judgment.\textsuperscript{122}

On the other hand, is was decided that, where one claim was asserted against two defendants jointly in a personal injury action, an order of the trial court sustaining the motion of one defendant for a new trial prevented the entry of a final appealable judgment in the case, and that an appeal by the plaintiff from a denial of his motion for a new trial after a verdict in favor of the other defendant would be premature.\textsuperscript{123}

Also, where a suit was dismissed as to one defendant but no disposition was made as to the other defendants, it was held that the judgment was not final, even though the other defendants had not been served, and an appeal from the order of dismissal was premature.\textsuperscript{124}

Further, where the custody of an infant child of parties to a divorce action was sought by the plaintiff in a complaint and by the defendant in a cross-bill, and the trial court made an entry awarding the custody of the child to the defendant temporarily only, such entry was said not to be an

\begin{itemize}
  \item \textsuperscript{118} \textit{Ibid.}
  \item \textsuperscript{119} Shepley \textit{v.} Green, 243 S.W. 2d 772 (Mo. App. 1951).
  \item \textsuperscript{120} Green \textit{v.} Green, \textit{supra} note 3.
  \item \textsuperscript{121} Graham \textit{v.} Bottorff, 240 S.W. 2d 191 (Mo. App. 1951); Green \textit{v.} Green, \textit{supra} note 3, Allcorn \textit{v.} Allcorn, 241 S.W. 2d 806 (Mo. App. 1951); Kidd \textit{v.} Katz Drug Co., \textit{supra} note 116.
  \item \textsuperscript{122} Casper \textit{v.} Lee, \textit{supra} note 10.
  \item \textsuperscript{123} Wicker \textit{v.} Knox Glass Associates, \textit{supra} note 90.
  \item \textsuperscript{124} Downey \textit{v.} United Weatherproofing, Inc., \textit{supra} note 4.
\end{itemize}
appealable "final judgment," as it did not make a final award of the child's custody.\textsuperscript{126}

Likewise, a court of appeals has decreed that an order overruling a motion to dismiss a petition was not a final judgment. The court believed that the order did not finally settle anything since the defendant could refuse to plead further and could permit judgment to go against him, or he could plead to the petition and try the case on the merits.\textsuperscript{126}

\textbf{f. Order Relating to Receivers}

In addition to permitting appeals from final judgments, Section 512.020 of our Revised Statutes allows an appeal from an order of a trial court in a receivership suit denying a motion to revoke an order appointing a receiver.\textsuperscript{127}

\textbf{g. Special Orders}

It also allows an appeal from "any special order after a final judgment." This provision refers to orders in special proceedings attacking or aiding the enforcement of a judgment. It includes an order refusing a motion to stay, or to forbid the issuance of, an execution, a judgment having been rendered for the plaintiff.\textsuperscript{128}

\textbf{h. Miscellaneous Orders}

An order overruling a motion to strike out the reinstatement of a case which at one time had been dismissed for want of prosecution was held not to be appealable, since it did not fall within any category of appealable orders provided for in Section 512.020.\textsuperscript{129}

The same conclusion was reached in connection with an order quashing or dissolving an attachment where the cause had not been tried on the merits.\textsuperscript{130}

\textbf{i. How Taken}

1. Notice of Appeal
   
   \textbf{(a) Necessity for}

   The vital step for perfecting an appeal is the timely filing of a notice of appeal.\textsuperscript{131}

\textsuperscript{125} Green v. Green, supra note 3.
\textsuperscript{126} Graham v. Bottorff, supra note 121.
\textsuperscript{127} Harbin v. Schooley Stationery and Printing Co., supra note 66.
\textsuperscript{128} City of Caruthersville, v. Cantrell, 241 S.W. 2d 790 (Mo. App. 1951).
\textsuperscript{129} Mitchell v. Johnston, 241 S.W. 2d 902 (Mo. 1951).
\textsuperscript{130} Scheele v. Long, 244 S.W. 2d 395 (Mo. App. 1951).
\textsuperscript{131} Hynes v. Risch, supra note 98.
(b) Time for Filing

Since the right of appeal is statutory, a notice of appeal must be filed within the time prescribed by statute or an appellate court will be without jurisdiction to hear an appeal of a case.\textsuperscript{132}

When a motion for a new trial is filed, the judgment does not become final until the motion is disposed of either by the passing of ninety days when it is deemed denied under Section 510.360 of our Revised Statutes or by action of the court upon the motion prior to the expiration of the ninety day period. The above section and Section 510.340, as clarified by Supreme Court Rule 3.24, have been construed to mean that when the thirty days after the entry of judgment have passed and the motion for a new trial has been ruled upon, the judgment is then final, and the trial court is without further power to disturb it.\textsuperscript{133}

Thus where judgment was entered on March 30 and, within the proper time, a motion for a new trial was filed, and that motion was overruled on May 1, 32 days after the entry of judgment, the judgment became final on the overruling of the motion, and notice of appeal on May 23 was without effect because it was not made within 10 days after the judgment became final, notwithstanding that orders of the trial court after May 1 attempted to set aside the order of May 1, since such orders were void.\textsuperscript{134}

On the other hand, where judgment for the plaintiff in a personal injury action was entered on April 26, 1950, and on July 3, 1950, the trial court entered an order requiring remittitur within ten days as a condition of an overruling of a motion for a new trial, the order became appealable upon the expiration of the ten-day period granted the plaintiff to make his choice as to remittitur, and the plaintiff's appeal on July 22, 1950, within ten days after the expiration of the ten-day period for remittitur, was a timely and proper appeal from the order of the court sustaining the defendant's motion for a new trial.\textsuperscript{135}

(c) Place of Filing

The fact that by mistake a notice of appeal reciting that the plaintiff appealed to the proper court of appeals was filed in the supreme court does not invalidate the appeal to the court of appeals. The notice and any other papers filed with the supreme court should be transmitted to the court of appeals.\textsuperscript{136}

\textsuperscript{132} Ibid.
\textsuperscript{133} Ibid.
\textsuperscript{134} Ibid.
\textsuperscript{135} Wicker v. Knox Glass Associates, supra note 90.
\textsuperscript{136} Skatoff v. Solomon, supra note 65.
2. Request for Special Order Allowing Appeal

Similarly, it was held that in the absence of intentional fraud upon the court or parties and when no want of jurisdiction is apparent in the application for a special order allowing an appeal, the order made thereunder granting the same is not invalidated by the fact that when the appeal is later perfected the appellate court determines its lack of jurisdiction of the appeal. The appeal is merely transferred to the proper court.\(^\text{137}\)

3. Transcript

(a) Verification of

Section 512.110 of our Revised Statutes provides only two methods of verification of the transcript of the record on appeal. If the parties agree that the transcript "correctly includes all of the record, proceedings and evidence," a complete transcript need not be approved by the trial court. But the trial court must approve an abbreviated transcript or a complete transcript upon failure of the parties to agree that it is a complete transcript.

The "correctness" of any alleged complete transcript is involved either where the adverse party expressly refuses to agree, or where the parties fail within a reasonable time to agree, that the transcript is a complete one. In either instance, there is a "dispute concerning the correctness" which the trial court must resolve. Where the respondents in their motion allege, and the appellant in his reply admits, that the respondents' counsel refused to agree to a transcript because it was not "complete and correct" in that it did not include all of the evidence, and it was also conceded that the trial judge refused to approve the transcript when it was submitted to him, the correctness of the transcript was involved and the transcript was incomplete without the approval of the court.\(^\text{138}\)

(b) Extension of Time

Time for filing a transcript may be extended even after the original period provided for its filing has expired.\(^\text{139}\)

(c) Necessity for Inclusions in

Failure to include in a transcript any reference to evidence objected to excuses an appellate court from noticing that evidence.\(^\text{140}\)

(d) Supplemental Transcript

Supreme Court Rule 1.04 authorizes, but does not require, a respondent dissatisfied with an appellant's transcript to file "such additional part of

\(^{137}\) Edmondson v. Edmondson, \textit{supra} note 2.


\(^{139}\) Fiorella v. Fiorella, 240 S.W. 2d 147 (Mo. App. 1951).

\(^{140}\) Wilcox v. Coons, \textit{supra} note 32.
the record as he deems necessary.” This does not deprive a respondent of the right to move for the dismissal of an appellant’s incorrect or defective transcript. Nor is there a duty upon the appellate court to complete an incorrect or defective transcript although it does have discretion in the matter.241

4. Briefs
(a) Abandonment of Grounds for Appeal
Where a plaintiff gave notice of an appeal but filed no brief in the supreme court as an appellant, the supreme court would treat the appeal as having been abandoned.242

If a question is timely raised in the trial court but is not briefed, an appellate court will deem such a question abandoned.243

(b) Jurisdictional Statement
The appellant’s brief, stating that since the amount involved was $35,000, the supreme court had jurisdiction did not violate Supreme Court Rule 1.08 requiring a statement demonstrating that court’s jurisdiction.244

(c) Statement of Facts
To comply with the court rule 1.08 with respect to briefs a statement of facts should tell the appellate court what the law suit is about and should be in narrative form.245

Usually, a statement which omits essential facts on which an appellant’s adversary relies is insufficient. However, when both parties appeal and their combined briefs contain the facts on which they both rely, the fact that the brief of one of them does not contain the facts on which the other relies will not result in a dismissal of either appeal.246

Though the court rules require a fair and concise statement of facts without argument, fairness of the statement is not to be sacrificed for conciseness.247

(d) Points and Authorities
The supreme court rule that the appellant’s brief shall contain points relied on, specifying allegations of error, with citations of authorities there-

142. Pemberton v. Ladue Realty and Construction Co., 244 S.W. 2d 62 (Mo. 1951).
144. Wood v. St. Louis Public Service Co., 246 S.W. 2d 807 (Mo. 1952).
145. Page v. Laclede Gas Co., 245 S.W. 2d 23 (Mo. 1952).
147. Ibid.
under, contemplates particularization in the statement of such points and citations of authorities to specific points to which they apply.\textsuperscript{148}

Therefore, where the appellant's brief contains no assignments of error except certain abstract propositions of law, without in any way showing their applicability to the case at bar, the brief is devoid of any statement of the points relied on and does not specify the allegations of error as required by our rule 1.08.\textsuperscript{149}

Thus, the abstract statement "Claimant entitled to expenses for cost of operation and hospital bills," does not constitute a compliance with Rule 1.08 governing briefs.\textsuperscript{150}

Again, where the defendant's points and authorities attacked the plaintiff's verdict, asserting that an instruction (1) failed to submit the evidentiary facts relied on to show negligence, (2) assumed negligence, (3) authorized a finding of negligence not pleaded, (4) permitted the jury to speculate and was confusing, (5) was indefinite and uncertain and failed to define important words and submit the true issues, (6) omitted essential facts and submitted a mere conclusion of law, (7) gave the jury a roving commission to find negligence, and (8) ignored conflicting issues of fact and failed to instruct on issues raised by them, if they did not inform the appellate court wherein the instruction was defective in any of the eight allegations of error. They failed, therefore, to present the instruction for the consideration of the upper court.\textsuperscript{151}

However, it has been decided that, though the assignments of errors in an equity case, which the appellate court is required to try anew on the record, consisted merely of abstract statements of law, the appeal would not be dismissed, where there was but a single obvious question in the case.\textsuperscript{152}

An assignment of error in overruling the defendant's motion for a directed verdict, which referred to and discussed only the evidence offered by the plaintiff and made no reference to the defendant's testimony in defense of the action, was erroneous, because all of the evidence supporting the plaintiff's theory of the case must be considered in determining whether

\textsuperscript{148} State\textit{ ex rel.} Houser v. St. Louis Union Trust Co., 248 S.W. 2d 592 (Mo. 1952).

\textsuperscript{149} Clark v. Empire Trust Co., 248 S.W. 2d 603 (Mo. 1952).

\textsuperscript{150} Brammer v. Brinkley Mining Co. of Missouri, 244 S.W. 2d 584 (Mo. App. 1951).

\textsuperscript{151} Carver v. Missouri-Kansas-Texas R.R.\textit{ supra} note 79. Also, see Hillhouse v. Thompson,\textit{ supra} note 53.

\textsuperscript{152} Milanko v. Austin, 241 S.W. 2d 881 (Mo. 1951).
the trial court erred in overruling the defendant's motion for a directed verdict made at the close of all the evidence.153

(e) Argument

Where the appellant failed to point out, by specific page references to the transcript, the rulings by which the trial court was alleged to have erroneously excluded evidence, it was held not to be the duty of the appellate court to search the record in order, if possible, to discover such errors.154

Assignments of error which are not argued are waived and will not be considered by an appellate court.155

(f) Reply Brief

Issues submitted in an appellant's brief on the original submission are not to be enlarged by presentations in a reply brief, as a respondent is entitled to an opportunity to answer an issue presented by an appellant.156

j. Burden of Proof

Where the trial court granted the defendant's motion for a new trial on the grounds of erroneous instructions, without specifying which of the two instructions submitted by the plaintiff and given by the court was erroneous, the movant had the burden on appeal to point to the erroneous instruction and to the error which it is purported to contain.157

k. Changing Theories on Appeal

It is said to be elementary law that a case must be heard in the appellate court upon the same theory as that upon which it was tried in the lower court.158

l. Matters Considered on Appeal

In absence of an appeal by the defendant and in view of a request in the defendant's brief for an affirmance of the trial court's judgment, the appellate court would not, on appeal by the plaintiff from an allegedly inadequate judgment in a personal injury action, pass on the question of

154. Southall v. Columbia National Bank, 244 S.W. 2d 577 (Mo. App. 1951). For another case requiring page references to the transcript, see LeGrand v. U-Drive-It Co., supra note 100.
155. Hillhouse v. Thompson, supra note 53.
whether the plaintiff's evidence showed him to be guilty of contributory negligence as a matter of law.\textsuperscript{159}

Again, where the original petition was not brought up in the transcript, and there was nothing to show such a petition raised a constitutional question, the supreme court could not determine whether such a question was raised by the original petition.\textsuperscript{160}

It has further been held generally that, where the appealing party filed no after-trial motions, the appellate court was precluded from reviewing an error occurring in the trial of the case other than whether a submissible case was made.\textsuperscript{161}

Although plain errors may be considered even though they are not effectively raised on the appeal,\textsuperscript{162} for them to be noticed by the appellate court they must have resulted in manifest injustice or in a miscarriage of justice.\textsuperscript{163}

On the other hand the supreme court is loath not to rule the case on appeal on the merits.\textsuperscript{164}

The appellate court will decide whether an order appealed from is appealable, since that question relates to the court's jurisdiction over the cause.\textsuperscript{165}

\textbf{m. When Appellate Court Obtains Jurisdiction}

After the notice of appeal and the transcript in a case are filed with the appellate court, that court has exclusive jurisdiction of a motion to remand the cause for a new trial because of newly-discovered evidence.\textsuperscript{166}

\textbf{n. Duty of Appellate Courts}

1. In General

An appellate court must render such a decree as it thinks should have been rendered in the trial court.\textsuperscript{167}

\begin{itemize}
  \item \textsuperscript{159} Davis v. City of Mountain View, 247 S.W. 2d 539 (Mo. App. 1952).
  \item \textsuperscript{160} Swisher Investment Co. v. Brimson Drainage Co., 245 S.W. 2d 75 (Mo. 1952).
  \item \textsuperscript{161} Lilly v. Boswell, 242 S.W. 2d 73 (Mo. 1951). For further applications of this doctrine, see Blase v. Austin, 242 S.W. 2d 29 (Mo. 1951); Taylor v. Baldwin, 247 S.W. 2d 741 (Mo. 1952); Wilson v. Kansas City, 248 S.W. 2d 671 (Mo. App. 1952).
  \item \textsuperscript{162} Pettus v. City of St. Louis, 242 S.W. 2d 723 (Mo. 1951). Also see Johnson v. Kansas City Public Service Co., 214 S.W. 2d 5 (Mo. 1948).
  \item \textsuperscript{163} Geers v. St. Louis Public Service Co., supra note 107; Louis Steinbaum Real Estate Co. v. Maltz, supra note 109.
  \item \textsuperscript{164} Carver v. Missouri-Kansas-Texas R.R., supra note 79.
  \item \textsuperscript{165} Graham v. Bottorff, supra note 113; Green v. Green, supra note 3; City of Caruthersville v. Cantrell, supra note 128.
  \item \textsuperscript{166} Curry v. Thompson, 247 S.W. 2d 792 (Mo. 1952).
  \item \textsuperscript{167} Duke v. Crossfield, 240 S.W. 2d 180 (Mo. App. 1951).
\end{itemize}
2. In Connection with Pleadings

In passing upon the sufficiency of a petition an appellate court must indulge every reasonable intendment in favor of the petition. It may also take into consideration the ultimate facts which may be inferred from the facts well pleaded, as well as all inferences which logically flow from such pleaded facts.

It should also consider the petition as a whole with all of its several allegations giving such construction thereto as will do substantial justice.

3. As to Matters Involving Discretion of Court or Jury

Appellate courts will not reverse decisions of trial courts on matters within the discretion thereof unless the trial courts abuse such discretion. During the year, this doctrine has been applied to rulings relating to a motion for permission to examine a party physically, to the admissibility of evidence, to instructions, to arguments, to the modifying of a decree dealing with the custody of children and to an appeal on the ground of the insufficiency of the evidence.

4. Weighing Evidence

On appeal from a judgment rendered on a verdict of a jury, an appellate court is not authorized to weigh the evidence.

In particular, it has been said that where, under the law and the evidence, the matter simply comes down to a question of the credibility of witnesses, the reviewing court will defer to the trial judge who heard and saw them.


170. Rhodes v. Rhodes' Estate, 246 S.W. 2d 98 (Mo. 1952).


173. Roush v. Alkire Truck Lines, 245 S.W. 2d 8 (Mo. 1952).


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

1. Substantial Evidence

In those cases in which the question is as to whether or not a submis-
sible case has been presented, an appellate court will not disturb a decision
in the trial court, if it concludes that the finding is based upon substantial
evidence.\(^{179}\) Some courts have stated that they would not disturb a decision
rendered in a trial court, if there was any evidence supporting the holding
in that court.\(^{180}\)

A somewhat unusual application of this rule is found in the decision
that it would be improper to review a trial error in the submission of one
element of negligence when a submissible case was made upon other ele-
ments thereof that were pleaded.\(^{181}\)

The general rule has been stated to the effect that only when there is
a complete absence of probative facts to support the conclusion reached
in the trial court does a reversible error appear. Where there is an eviden-
tiary basis for the jury's verdict, the jury is free to discard or disbelieve
whatever facts are inconsistent with its conclusion. The appellate court's
function is exhausted when that evidentiary basis becomes apparent, it
being immaterial that the court might draw a contrary inference or feel
that another conclusion is more reasonable.\(^{182}\)

2. Evidence Considered

It has been held recently that, in determining whether the plaintiff
has made a submissible case, the evidence in the defendant's favor should
be disregarded and only that evidence favorable to the plaintiff, together
with all reasonable inferences therefrom, should be considered, and that
the plaintiff is entitled to the aid of any evidence offered by the defendant
which is favorable to the plaintiff and not in conflict with the fundamental
theory of his case.\(^{183}\)

\(^{179}\) Peterson v. Bledsoe, \textit{supra} note 66; Higgins v. Terminal R.R. Association
of St. Louis, 241 S.W. 2d 380 (Mo. 1951); Dowdell v. Hasset, 247 S.W. 2d 691 (Mo.
1952); Hillhouse v. Thompson, \textit{supra} note 53; Clark v. City of Springfield, 241 S.
W. 2d 100 (Mo. App. 1951); Rosenblum v. St. Louis Public Service Co., 242 S.W. 2d
304 (Mo. App. 1951); E.F. Drew and Co. v. Brooks Supply Co., 243 S.W. 2d
621 (Mo. App. 1951); Delcour v. Wilson, 245 S.W. 2d 467 (Mo. App. 1952).

\(^{180}\) Thompson v. Thompson, 240 S.W. 2d 137 (Mo. 1951); Sprankle v.
Thompson, 243 S.W. 2d 510 (Mo. 1951); Union Service Co. v. Lyons, 240 S.W. 2d
153 (Mo. App. 1951).

\(^{181}\) Lilly v. Boswell, \textit{supra} note 161.

\(^{182}\) Spears v. Schantz, \textit{supra} note 158.

\(^{183}\) See v. Wabash R.R., 242 S.W. 2d 15 (Mo. 1951). The following cases
support one or more of the points decided in the \textit{See} case: Stokes v. Carlson, 240
S.W. 2d 132 (Mo. 1951); Banta v. Union Pacific R.R., 242 S.W. 2d 34 (Mo. 1951);
Some courts have stated more specifically and correctly that all evidence favorable to the plaintiff must be taken to be true.\(^\text{184}\)

The doctrines referred to above have been applied in cases of appeals where a motion for a directed verdict has been overruled,\(^\text{185}\) and where a motion for a judgment pursuant to a motion for a directed verdict has been refused.\(^\text{186}\)

\[\text{p. Appeals on Ground of Excessive or Inadequate Verdicts or Judgments} \]

\[\text{1. Reluctance of Court to Interfere} \]

It has been well said that, in determining whether a verdict is excessive, there is a vital distinction, which an appellate court is prompt to recognize, between its own position and that of the trial court. The distinction is, of course, that the appellate court can only review the amount of the verdict as a question of law presented on the cold record, while the trial court has both the plaintiff and the other witnesses before it, and is not only entitled to weigh the evidence, but can actually see for itself and draw its own conclusions as to what the extent of an injury appears to be. Because of the advantage which the trial court's position gives it in this respect, an appellate court in any event accords great weight to whatever is revealed regarding the trial court's viewpoint of the compensation to be awarded; and where, by ordering remittitur, it has directly passed upon the question of the excessiveness of the verdict, the appellate court, while in no sense bound by its decision, is always most reluctant to interfere.\(^\text{187}\)

 Malone v. Gardner, 242 S.W. 2d 516 (Mo. 1951); Cloughly v. Equity Mutual Ins. Co., 243 S.W. 2d 961 (Mo. 1951); Utlaat v. Glick Real Estate Co., 246 S.W. 2d 760 (Mo. 1952); Wright v. Stevens, 246 S.W. 2d 817 (Mo. 1952); LeGrand v. U-Drive-It Co., supra note 100; Brown v. Moore, supra note 60; Joplin v. Franz, 240 S.W. 2d 209 (Mo. App. 1951); Hillhouse v. Thompson, supra note 53; Clark v. City of Springfield, supra note 179; Maisch v. Kansas City Stock Yards Company of Maine, 241 S.W. 2d 487 (Mo. App. 1951); Schwindegruber v. St. Louis Public Service Co., supra note 109; Rosenblum v. St. Louis Public Service Co., 242 S.W. 2d 304 (Mo. App. 1951); Rayburn v. Fricke, 243 S. W. 2d 768 (Mo. App. 1951); Roux v. Silver King Oil and Gas Co., 244 S.W. 2d 411 (Mo. App. 1951); Davenport v. Midland Bldg. Co., 245 S.W. 2d 460 (Mo. App. 1952); Riley v. St. Louis Public Service Co., supra note 88; Cline v. City of St. Joseph, 245 S.W. 2d 695 (Mo. App. 1952); Meriwether v. Lombard, 246 S.W. 2d 363 (Mo. App. 1952); Spicer v. Hannah, supra note 25; In re Gaebler's Estate, 248 S.W. 2d 12 (Mo. App. 1952).

184. Joplin v. Franz, supra note 183; Hillhouse v. Thompson, supra note 53; Clark v. City of Springfield, supra note 182; Meriwether v. Lombard, supra note 182.


2. Excessiveness or Inadequacy Must Be Shocking

The question of the amount of damages is primarily for the jury. The jury’s broad discretion in fixing the amount of the award is conclusive on appeal, especially where the verdict has the approval of the trial court, unless the appellate court can say that the verdict is so shocking and grossly excessive or inadequate as to indicate that the amount of the verdict is due to passion and prejudice; and that the broad discretion granted to the jury and to the trial court in weighing the evidence has been arbitrarily exercised and abused.\(^{188}\)

The mere fact that a verdict is excessive does not in and of itself establish that it was the result of passion and prejudice.\(^{189}\)

3. Substantial Evidence

Although an appellate court will not weigh the evidence relating to a plaintiff’s disabilities on appeal from an order granting a new trial on the ground that a verdict was excessive, it will examine the record to determine whether there was substantial evidence to sustain the trial court’s view that such disabilities were not as serious or as permanent as claimed or that some of the disabilities did not result from the accident involved in the plaintiff’s action.\(^{200}\)

4. Evidences Considered

The same types of evidence are, in general, considered on appeal in determining whether or not a verdict or judgment is excessive or inadequate as are looked to in deciding whether or not a submissible case has been made.\(^{201}\)

The supreme court has said that, in deciding whether or not a verdict is excessive, it could only consider evidence that was before the jury.\(^{202}\) However, it suggested that it might order a new trial, if after-trial facts


\(^{189}\) Carver v. Missouri-Kansas-Texas R.R., supra note 79.

\(^{190}\) Nix v. Gulf, Mobile and Ohio Ry., supra note 80.

\(^{191}\) Enyart v. Santa Fe Trail Transportation Co., supra note 107; Wicker v. Knox Glass Associates, supra note 90; Harrington v. Thompson, 243 S.W. 2d 519 (Mo. 1951); Polizzi v. Nedrow, supra note 174; Brown v. Moore, supra note 60; Arl v. St. Louis Public Service Co., 243 S.W. 2d 797 (Mo. App. 1951); Jones v. Terminal R.R. Association of St. Louis, 246 S.W. 2d 356 (Mo. App. 1952). Also see cases in notes 183 through 186.

\(^{192}\) Curry v. Thompson, 247 S.W. 2d 792 (Mo. 1952).
were of such a decisive character as to render reasonably certain a different result on a retrial than that obtained at the original hearing.193

5. Regard for Trial Court’s Attitude

The fact that a trial court has refused to set aside a verdict as excessive has been held to be significant by the St. Louis County Court of Appeals, when the problem of acting on an appeal from a judgment on a verdict which was claimed to be excessive was before it.194

6. Evidence Contrary to Facts

In determining whether or not a verdict is excessive, an appellate court is not required to consider evidence contrary to known physical facts.195

7. Reducing Judgment

An appellate court is usually reluctant to order a further reduction of a verdict after the trial court has considered and passed upon the matter and has once substantially reduced the amount thereof. This is because of the trial judge’s advantage of having seen and heard the parties and the witnesses as they appeared before him, giving him a better opportunity to evaluate their testimony than the upper court has.196

q. Trial Court’s Decision Presumed Correct

On appeal, the presumption is that the trial court’s decision was correct, and the burden is on the appellant affirmatively to show error as a condition precedent to reversal.197

For example, in an equity case to establish a wife’s ownership of property upon the theory of a resulting trust, where the appellant did not in his transcript set out deeds nor file originals in the supreme court, the supreme court assumed that the relevant deeds properly described the property and that the trial court properly incorporated the description from the deeds into the decree.198

Further, the appellate court presumed that, in the final determination of the trial court, it considered only competent and relevant evidence.199

r. Two Motions for Directed Verdict

Where a defendant moved for a directed verdict at the close of the plaintiff’s case, but did not stand on that motion and offered testimony in

193. Ibid.
197. James v. James, 248 S.W. 2d 623 (Mo. 1952); Johnson v. Johnson, 240 S.W. 2d 184 (Mo. App. 1951).
198. James v. James, supra note 197.
defense of the action, and, at the close of the evidence, re-offered a motion for a directed verdict, which was overruled, the reviewing court could only consider whether the trial court erred in overruling the last motion.\textsuperscript{200}

\textit{s. Judgment of Appellate Court}

1. Dismissal for Noncompliance with Rules of Court

There may, under Rule 1.15 of the supreme court, be a dismissal of an appeal for failure to comply with its Rule 1.08 relating to the statement of the facts in a brief.

There was a dismissal ordered where the appellant's statement did not purport to tell the facts of the case and was not a statement of the facts in any form but was a recitation of the proceedings.\textsuperscript{201}

On the other hand, an appeal was not dismissed, though the appellant's statement of facts was insufficient, where the respondent made his own statement which offended as much as had the appellant's.\textsuperscript{202} The same action was taken though the statements of fact were insufficient, where there was but a single issue to be considered,\textsuperscript{203} and where the appellate court believed that justice required that the case be decided upon the merits since it presented the problem of the construction of the "vigilant watch ordinance" of the city of St. Louis.\textsuperscript{204}

Again, it has been decided that, having ruled on the issues of an appeal on its merits, it was not necessary to consider the respondent's motion to dismiss the appeal as an alleged attempt to appeal from an order of the court overruling a motion for a new trial, and for alleged violation of Supreme Court Rules 1.08 and 1.09.\textsuperscript{205}

2. Judgment Affirmed or Reversed

Where there was insufficient evidence to support a finding of liability and there was no indication that other evidence was available, the reviewing court did not consider the contentions relating to the amendment of the petition, but affirmed the judgment on a directed verdict for the defendant.\textsuperscript{206}

\textsuperscript{200} Altenderfer v. Harkins, 243 S.W. 2d 558 (Mo. App. 1951).
\textsuperscript{201} Page v. Laclede Gas Light Co., 245 S.W. 2d 23 (Mo. 1951).
\textsuperscript{202} See v. Wabash R.R., supra note 183.
\textsuperscript{203} Peterson v. Bledsoe, supra note 66.
\textsuperscript{204} Abernathy v. St. Louis Public Service Co., supra note 25. Also see the case in note 79.
\textsuperscript{205} Coleman v. Ziegler, 248 S.W. 2d 610 (Mo. 1952).
\textsuperscript{206} Oliver v. Oakland Country Club, 245 S.W. 2d 37 (Mo. 1951).
Although an order setting aside a default judgment on the ground of irregularities could not be sustained on the ground specified of record by the trial court, it was held that the defendant was entitled to have other assignments of error in the motion reviewed and to have the order affirmed if it could be sustained on such other grounds.\(^{207}\)

Where the appellate court on a first appeal held that the evidence of the defendant's negligence was sufficient to make a case for the jury, and the evidence at the second trial was not substantially different, and the former ruling on appeal was not palpably wrong, the court on a subsequent appeal refused to depart from its conclusion that the evidence was sufficient to take the case to the jury and, therefore, affirmed the judgment below.\(^{208}\)

Ordinarily, withdrawal and exclusion of erroneously admitted evidence leaves no ground for reversing a judgment on account of such admission.\(^{209}\)

An appellate court is precluded from reversing a judgment unless it believes that an error was committed against the appellant which materially affected the merits of the action.\(^{210}\)

This rule has been applied to the admission, and to the lack, of evidence,\(^{211}\) to an offer of proof,\(^{212}\) to the refusal of a requested instruction,\(^{213}\) to a stricken argument,\(^{214}\) to the recognition of one of two verdicts after the discharge of the jury,\(^{215}\) and to the overruling of a motion for a new trial.\(^{216}\)

Reversal was ordered in an action by an employee against his employer for personal injuries sustained in the operation of a tractor, where his wife's testimony was offered solely to show that the defendant was guilty of negligence in not furnishing safe machinery. Her testimony that the employer offered to see his employee through the summer and to take care of hospital bills was thought to be so highly prejudicial that the withdrawal of the testimony from the jury was insufficient to correct the error of its admission.\(^{217}\)

\(^{207}\) Casper v. Lee, supra note 10.

\(^{208}\) Lonnecker v. Boris, supra note 100.

\(^{209}\) Spears v. Schantz, supra note 158.


\(^{211}\) Kunz v. Munzlinger, 242 S.W. 2d 536 (Mo. 1951); LeGrand v. U-Drive-It Co., supra note 100; Fisher v. Peterson, 240 S.W. 2d 176 (Mo. App. 1951).

\(^{212}\) Bohmsack v. Hanebrink, supra note 65.


\(^{214}\) Pettus v. St. Louis Public Service Co., supra note 162.


\(^{216}\) Roush v. Alkire, supra note 173.

\(^{217}\) Spears v. Schantz, supra note 158.
Also it was decided that an improper argument of counsel for a motorist in a personal injury action against another motorist and a bus company with respect to the whereabouts of bus passengers, whose names the bus driver took at the scene of the accident, and the drawing of an inference unfavorable to the bus company because of the non-production of those passengers as witnesses, was not cured by an instruction to the jury that there was no imputation to be cast against any party for nonproduction of witnesses and that the names and addresses of all witnesses that were in the files of the court were available to all of the parties. The judgment for the plaintiff against the bus company was reversed, as the court had refused to strike the offensive argument, and had not instructed the jury to disregard it.\textsuperscript{218}

3. Cause Remanded

Where a cause of action for wrongful discharge was remanded for another trial because of a prejudicially erroneous admission of evidence, the appellate court did not determine whether the instructions given were prejudicially erroneous or whether the verdict was excessive.\textsuperscript{219}

When necessary, a new trial may be granted upon a reversal.

Sometimes the new trial is ordered to be of the entire case, as in instances in which the appellate court is not satisfied with the disposition of any part of the issues involved and it believes that evidence will be available properly to decide the case.\textsuperscript{220}

At other times, the mandate is that the new trial shall be only of part of the issues involved in the case.

Thus, where it neither appeared nor was argued on appeal that the plaintiff's right of recovery was limited to a judgment against the defendants jointly, it was held that the granting of a new trial to one of the defendants did not necessitate the granting of a new trial to the other defendant.\textsuperscript{221}

Where the only error of the trial court relates to damages, the new trial ordered may be confined to that issue.\textsuperscript{222}

\begin{itemize}
\item \textsuperscript{218} O'Donnell v. St. Louis Public Service Co., \textit{supra} note 58.
\item \textsuperscript{219} Wilson v. St. Louis-San Francisco Ry., 247 S.W. 2d 644 (Mo. 1952).
\item \textsuperscript{220} Nix v. Gulf, Mobile and Ohio Ry., \textit{supra} note 80; \textit{In re City of Kinloch}, 242 S.W. 2d 59 (Mo. 1951); Foerstel v. St. Louis Public Service Co., \textit{supra} note 85; Davis v. City of Mountain View, \textit{supra} note 159.
\item \textsuperscript{221} Nix v. Gulf, Mobile and Ohio Ry., \textit{supra} note 80.
\item \textsuperscript{222} Lilly v. Boswell, \textit{supra} note 161; Thompson v. St. Louis Public Service Co., \textit{supra} note 97.
\end{itemize}
4. Penalty for Vexatious Appeal

Where the supreme court reversed a judgment for the plaintiff and ordered the trial court to restore the defendant to all things lost by reason of the judgment and thereafter on a second appeal reversed the order denying restitution and ordered the trial court to grant restitution and a third appeal was taken from an order granting restitution on the ground that trial court had discretion to deny restitution, the supreme court awarded damages in the amount of 5% of the judgment under the statute permitting a penalty in case of a vexatious appeal.223

Rehearing

Where there were two separate actions relating to the same premises which dealt with different causes of action, the appellate court held that it would not be justified in deferring the disposition of a motion for a rehearing on the appeal in one cause until the final determination of the appeal in the other action.224

Transfer

Where a question of general interest and importance was involved in a cause appealed to a court of appeals, on reversing the judgment, it transferred the case to the supreme court.225

Where the supreme court had never specifically overruled a certain line of cases with the result that uncertainty in the law existed the court of appeals transferred the cause to the supreme court for re-examination of the law.226

Where a court of appeals, after affirming a judgment for the plaintiff in an action for injuries sustained in an automobile collision, transferred the cause to the supreme court because of general interest or importance of a question involved, the supreme court could finally determine the cause as if it had come to it on an original appeal.227

223. De Mayo v. Lyons, 243 S.W. 2d 967 (Mo. 1951).