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The Legal History of the State of Missouri

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ESSAY

THE LEGAL HISTORY OF THE STATE OF MISSOURI

THE HONORABLE JOSEPH J. SIMEONE*

INTRODUCTION

Since the State of Missouri was formally admitted into the Union on August 10, 1821 by the proclamation of President James Monroe,¹ Missouri has enjoyed a long and illustrious history. The state continues to be rich in agriculture, wineries, mining, business, and industry. It is the birthplace of many celebrities; was the site of the greatest world's fair ever; hosts a number of prominent sports teams; and boasts a beautiful countryside that includes the cotton fields in the southeast, the farmlands in the northeast, and the beautiful mountains in the southwest. Missouri has been the home of three Presidents of the United States: Harry S. Truman, Ulysses S. Grant, and David Rice Atchison.² It is the home state of the first Governor, Governor McNair; Daniel Boone; Thomas Benton; Samuel Clemens; Joseph Pulitzer, Champ Clark; and two members of President Abraham Lincoln's Cabinet. The most popular novelist of the first part of the twentieth century, Winston Churchill,³ was also from Missouri.

Missouri was also the first state to build a bridge across the Mississippi River. The Eads Bridge, which at the time was called the Gateway to the

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1. That proclamation even has a stormy history.
2. Atchison was President of the United States for one day.
3. Missouri's Winston Churchill is not to be confused with the former Prime Minister of England.

West, opened the vast territory of the West to the country. In fact, numerous journeys to the West began in Missouri with the expedition of Meriwether Lewis and William Clark.

Since its admission to the Union, through the chaos and sadness of the Civil War to the present, Missouri, its citizens, and the law have changed dramatically. At first, Missouri was a purely agrarian society. After the Civil War, the population swelled, the cities grew, transportation and communications vastly improved, the railroads flourished, and new social changes took place. The North-South cleavage was “bandaged,” and the people became one unified state. The law, in Missouri’s early days, reflected the society of its time.

The history of Missouri is replete with deeds of heroism, legal lore, and desperados, including the James brothers. In 1883, Governor Thomas T. Crittenden reported in his annual message that since the close of the Civil War, Missouri had been infested by bands of train and bank robbers. For example, in July 1881, Jesse James and his cohorts robbed a train on the line of the Chicago, Rock Island, and Pacific Railroad, and killed the conductor, William Westfall. To combat these bandits, Governor Crittenden issued a proclamation for the arrest of Jesse James, and offered a \$5000 reward. Less than one year later, the governor proudly reported that Charles and Robert Ford, who were criminal associates of James, had killed him in St. Joseph, Missouri.⁴ In addition, Frank James had voluntarily surrendered himself.⁵

II. THE ERAS OF MISSOURI LEGAL HISTORY

Most people who know about the history of civilized law realize that any law can be an action, a reaction, and a reflection of the contemporary society, and the laws of Missouri are no exception. Since its admission into the federal union in August, 1821, the legal history of Missouri has reflected the society of the particular time. This paper will analyze the four unique and distinct eras of Missouri’s legal history.

During the first era of English common law, lasting from about 1821 until the Civil War, the law dealt with mundane matters and ordinary disputes among ordinary individuals. For example, all the laws before the Civil War were contained in one small 200-page volume. The law in this agrarian period dealt with private disputes over real property; recovery of personal property; a widow’s dower; property rights; adverse possession; and a few crimes of assault and burglary. Meanwhile, none of the judicial opinions from this period would be fodder for today’s blaring evening news since many decisions dealt with the issue of slavery and slaves.

4. *See* Message of Governor Crittenden, Jan. 3, 1883.

5. *Id.*

The second era consisted of substantial economic development from after the Civil War lasting until the early part of the twentieth century. This era reflected economic expansion, protectionism, and conservatism not only in Missouri, but also in the rest of the United States. Based on their feeling of self-reliance, the citizens of Missouri did not want the government to have too much power; they distrusted the legislature and wanted to elect their own judges. This second era was the age of both the iron-horse and the Industrial Revolution, reflected by the boom of the steel and mining industries. Focused on economic expansion, the legislature did not address any major social issues.

The third era began in the early decades of the twentieth century and ended roughly at the end of the 1950s. With the dwindling of the economic era, the legislature began to refocus its attention to social issues, recognizing a need for reform while clinging to traditional values. For the federal government, these social changes were reflected by the rise of administrative agencies. The Missouri legislature, in some respects, mirrored the actions of the federal government. The state's judiciary, however, continued to adhere to the principles of the past in deciding tort, contract, and criminal law matters.

The fourth era, from the 1960s to the 1990s, is self-entitled, "the legal revolution." In the past thirty years, the judiciary and the legislature have recognized new remedies for citizens, have overruled old precedents, and have significantly altered the face of justice in all aspects of civil and criminal law. The author believes Missouri's legal history is now entering a fifth era that may be described as "the era of retrenchment, restriction, or conservatism." Only time will determine the accuracy of this description.

III. THE EARLY PERIOD

A. *The Legislature*

The first Missouri Constitution of 1820 seems to organize (1) the boundaries of the state,⁶ (2) the distribution of governmental powers,⁷ banks,⁸ education,⁹ the militia,¹⁰ and (3) the declaration of citizen's rights, encompassed in the Missouri Bill of Rights, modeled after the federal Bill of Rights.¹¹ At that time, the General Assembly consisted of the Senate¹² and the

6. See, e.g., MO. CONST. of 1820, art. X, § 2 (giving the state concurrent jurisdiction over all rivers forming common boundaries with other states, including the Mississippi River); *id.* at art. III, § 34 (prohibiting counties of less than twenty square miles or more than four hundred square miles).

7. *Id.* at art. II, § 1.

8. *Id.* at art. VIII.

9. *Id.* at art. VI, §§ 1, 2.

10. *Id.* at art. IX, §§ 1-3.

11. MO. CONST. of 1820, art. VIII, §§ 1-27.

House of Representatives¹³ and every legislator had to be at least twenty-four years of age, free, white, and male.¹⁴ This legislative body was empowered to create laws dealing with issues such as slavery and education.¹⁵ For example, while the legislature did not have the power to emancipate slaves without their owner's consent, it did have the power to authorize the owners of slaves to emancipate them.¹⁶ Also, the legislature authorized and established a state university, reflecting its desire to encourage higher education.¹⁷

The early laws passed by the General Assembly were fascinating. All of the laws of Missouri, until almost the end of the Nineteenth Century, were contained in one small volume. The laws of 1825 provided that any free man who committed the crime of rape would be castrated by some *skillful* surgeon; however, a slave who committed rape would be castrated by some person, not necessarily as *skillful*.¹⁸ Ten years later, the laws dealt with joint tenants, administration of decedent's estates, boats and steam vessels, jurisdiction of county courts, and most importantly, crimes and punishments.¹⁹ A particular statute in the laws of 1855 states, "if any person shall play at any game with cards, or dice, or any gambling device on *board any steamboat* at which money may be bet, such person shall be fined \$100."²⁰

B. *The Supreme Court*

Meanwhile, the Supreme Court consisted of three judges who held sessions throughout the state.²¹ The governor had the sole power to appoint all judges, and a two-third vote by both houses of the General Assembly could summarily remove the judges.²²

The Missouri Supreme Court's first judicial decisions after the state's admission into the Union mostly addressed mundane matters involving the common law remedies of "assumpsit" and "detinue."²³ In addition, many of

12. The Senate consisted of at least fourteen and no more than thirty-three Senators. *See* MO. CONST. of 1820, art. III, § 6.

13. The House of Representatives consisted of no more than 100 members. *See* MO. CONST. of 1820, art. III, § 2.

14. *See* MO. CONST. of 1820, art. III, §§ 3, 5.

15. *Id.* at art. III, §§ 26-28.

16. *Id.* § 26.

17. *Id.* at art. VI, § 2.

18. MO. REV. STAT. §§ 9, 99 (1825). *See also* Orville Richardson, *Sexual Offenses Under The Proposed Criminal Code*, 38 MO. LAW REV. 371, 394 (1973).

19. *See generally* MO. REV. STAT. §§ 1-15 (1835).

20. Our forefathers would certainly be surprised to learn riverboat casino gambling is legal today.

21. *See generally* MO. CONST. of 1820, art. V.

22. *See* MO. CONST. of 1820, art. V, §§ 13, 16.

23. Generally, the Supreme Court did not have a great deal of authority to support its early opinions.

these early cases dealt with the recovery of slaves. For example, in 1857, the Court held that a coerced confession from a slave could not be used against the slave at his murder trial.²⁴ Strangely enough, even before *Dred Scott*,²⁵ the Court held that a slave who was moved to a state where slavery did not exist would be entitled to his freedom.²⁶ Other cases reflect the sentiments of the time. For example, the Court supported a guilty verdict for a man who furnished a deck of cards to a group of gamblers because he violated Missouri's gambling statute. In another case, the Court held it to be a crime, punishable by imprisonment, for a married man to live out of wedlock with another woman who was not his wife.²⁷ Later, the Court also held that a child under the age of eighteen was exempt from being imprisoned in the penitentiary, but was not exempt from the death penalty.²⁸ Other cases seem somewhat peculiar by today's standards. For example, in *Nathan v. State*, the defendant was convicted of rape and was sentenced to the punishment of castration.²⁹ In another case, a cripple charged with murder was not permitted to introduce evidence that, due to his weak and crippled condition, he was rendered nervous and peculiarly sensitive.³⁰

Other early Missouri Supreme Court cases dealt with: (1) a widow's dower,³¹ (2) affidavits made by agents,³² (3) defenses used for the recovery of a slaves,³³ (4) the criminal procedure relating to crimes of assault and battery,³⁴

24. See Williamson, *The State v. Mat*, JOURNAL OF MO. BAR, Jan. 1954, at 19.

25. See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

26. *LaGrange v. Chouteau*, 2 Mo. 20 (1828).

27. *State v. Byron*, 20 Mo. 210 (1854).

28. *State v. Adams*, 76 Mo. 355 (1882).

29. 8 Mo. 631, 631-32 (1844).

30. *State v. Shoultz*, 25 Mo. 128 (1850).

31. *Collier v. Wheldon*, 1 Mo. 1 (1821) (holding that where a widow rents property that she has a dower interest, the widow cannot have her dower assigned against the tenant but must instead sue for rent).

32. *Cook v. Globe Printing Co.*, 127 S.W. 332 (Mo. 1910) (charging chairman of a political state committee with making a false affidavit as to campaign contributions to expenses).

33. See generally *Knapp v. Knapp*, 96 S.W. 295, 300 (Mo. App. 1906).

34. *Stots v. Johnson*, 4 Mo. 618 (Mo. 1837) (holding that a faulty battery is an offense that may be tried summarily in a bench trial).

and (5) actions of “debt,”³⁵ and actions³⁶ between partners, ejectment,³⁷ estates,³⁸ the right to trial by jury,³⁹ and procedure.⁴⁰

1. The Death Penalty

For quite a few years in the Nineteenth Century there were very few death sentences and executions. Even as late as the 1930s there were few executions in Missouri.⁴¹ The lack of the imposition of the death penalty in the early history of Missouri, as well as other states, may have been the result of the two hundred offenses that carried the death penalty in Eighteenth Century England. According to the Missouri Department of Corrections, however, the first execution by public hanging took place at the Spanish Military Barracks in New Madrid on January 1, 1803.

The first Missouri Supreme Court case that imposed the death penalty was in 1839 in *Fanny v. State*.⁴² Fanny, a female slave of William Prewitt, was charged with the murder of William Florence, a nine or ten year old boy, who was found dead in Prewitt’s peach orchard.⁴³ The evidence showed that Fanny had killed the boy.⁴⁴ The defense counsel argued that capital punishment could not be inflicted upon a slave, and that the proper punishment should be a whipping.⁴⁵ The Court held, however, that the death penalty applied equally to both slaves and free men.⁴⁶

35. *Edwards v. McKee*, 1 Mo. 123 (Mo. 1821) (finding that an agreement that the price of goods delivered does not preclude an action in debt for the money after the time for payment has elapsed).

36. *Paul v. Edwards*, 1 Mo. 30 (Mo. 1821) (holding that a covenant between partners to divide goods on hand at taking place at certain event, implies a covenant to make final settlement when such division is made).

37. *Laughlin v. Stone*, 5 Mo. 43 (1837) (holding that a person cannot set up an outstanding title in a third person if that person sells land to parties that were in an ejectment action).

38. *Chouteau v. Consoue*, 1 Mo. 350 (1823).

39. *State v. Ledford*, 3 Mo. 102 (Mo. 1832) (holding that summary trials for an assault do not violate a plaintiff’s state constitutional right to a trial by jury).

40. *Laporte v. State*, 6 Mo. 208 (Mo. 1839) (holding that a writ of error will not lie at the decision of a circuit court in delaying a motion to discharge a defendant from recognizance).

41. See WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 285-86 (1974). From 1938 until 1970 there were a total of thirty-nine executions in Missouri. It was not until the 1900s that the Court granted more executions. Between the 1920s and 1940s, the number of executions in the United States exceeded one thousand. See BOWERS, *supra* at 5-7.

42. 6 Mo. 122 (1839). This case was ultimately reversed and remanded for a new trial based on other errors.

43. *Id.*

44. *Id.*

45. *Id.* at 141-42.

46. *Id.* at 142. For a good modern discussion of the death penalty in Missouri, see Ellen Yankiver Suni, *Capital Punishment in Missouri: Recent Developments in the Interpretation and*

Until 1937, the method of execution was public hanging.⁴⁷ In 1886, for example, some 25,000 people watched while a man was publicly hanged in Gallatin, Missouri. Reportedly, the crowd gathered early and many regarded the event as a holiday.⁴⁸ On May 21, 1937, the last person to be publicly hanged in Missouri, Roscoe "Red" Turner, was executed in Galena in front of at least 400 witnesses. The newspapers showed close-up pictures of the accused, with the hood being placed over his head, and his suspended body after it had fallen through the trap.⁴⁹

After 1937, executions were administered by lethal gas.⁵⁰ In March 1938, William Wright and John Brown were the first persons in Missouri to be executed by lethal gas.⁵¹ In 1965, Lloyd Leo Anderson was the last person to be executed before the Missouri Supreme Court outlawed the death penalty.⁵² The Missouri laws provided, and still do, that executions must take place "within the walls of a correctional facility."⁵³ Since the death penalty was recently re-instituted, George (Tiny) Mercer was executed on January 6, 1989.⁵⁴

Despite this history of capital punishment, at the beginning of the Nineteenth Century, there was a movement toward abolishing the death penalty.⁵⁵ The assault on the imposition of the death penalty began in 1764 with Cesare Beccaria's treatise, *On Crimes and Punishments*,⁵⁶ asserting, as we still do today, that deterrence is useless.⁵⁷ Evidence of this momentum consisted of the numerous petitions filed that called for the abolition of the death penalty. The Supreme Court of Missouri's decisions to reverse every death penalty case - on very technical grounds - reflects the effects of this movement. For example, the Missouri Supreme Court reversed a death

Administration of the Death Penalty, 58 UMKC L. REV. 523 (1990); Richard H. Burr, III, *Representing the Client on Death Row: The Politics of Advocacy*, 59 UMKC L. REV. 1 (1990).

47. See James J. Fisher, *Hanging Was a Spectator Sport in 1937 Galena*, KANSAS CITY STAR, April 17, 1991, at G1 (stating that according to Dr. Harriet Frazier, Associate Professor of Criminal Justice at Central Missouri State University in Warrensburg the last person publicly hanged in the United States was killer-rapist Rainey Betho, age 32, in Owensboro, Kentucky).

48. See ST. JOSEPH NEWS PRESS, Oct. 7, 1938.

49. See *id.*

50. Associated Press, *A Look at Capital Punishment in Missouri by the Numbers*, Digital Missourian (visited Oct. 6, 1999) <<http://digmo.org/feature/premium/19numbers.html>>.

51. BOWERS, *supra* note 41, at 285.

52. *Id.* at 286.

53. MO. REV. STAT. § 546.720 (1994).

54. Jerry Hughes, *Execution Evokes a Primal Hate*, ST. LOUIS POST-DISPATCH, at 3A (Sept. 11, 1990).

55. BOWERS, *supra* note 41, at 4-6.

56. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 45-52 (1764).

57. Beccaria proclaimed the supreme value of human life, arguing nothing in the social contract gives the state the right to take human life. See generally *id.*

sentence because an indictment for murder required the words “against the peace and dignity of *the* state.”⁵⁸ Instead, the indictment in the case stated only “against the peace and dignity of state,” omitting the word “*the*.”⁵⁹

The death penalty was abolished in Missouri in 1917, but after a series of police killings, the death penalty was restored in 1919. As of June 1990, eighty-two inmates were on Missouri’s death row; seven inmates have been executed in 1999.⁶⁰

IV. THE POST CIVIL WAR ERA TO THE TWENTIETH CENTURY

A. *A New Constitution*

Even though the Civil War was a great constitutional crisis, with the *Dred Scott*⁶¹ decision acting as a catalyst for that holocaust, the United States Constitution survived, and almost every state, including Missouri, adopted new state constitutions. In 1875, Missouri adopted a “new” state constitution, making the law much more complex and detailed.⁶² Conventions were held to deal with the major problems of the time: railroads, banks, agriculture and suffrage.

The 1875 Missouri Constitution addressed numerous issues. For example, it outlined the rights of persons; the distribution of powers; the limitations of legislative power; the judicial department, revenue, taxation, corporations, railroads, banks, the militia, initiative and referendum; and the specific jurisdiction of a number of special courts.⁶³ Until an amendment in 1924, only *male* citizens were permitted to vote.⁶⁴ Also, no insane person, idiot, or person kept in a “poor-house” was permitted to vote.⁶⁵ This constitution gave the legislature the power to tax corporations, railroads, banks, and other entities and persons; cemeteries were tax exempt, however. The Constitution further provided that “separate free public schools shall be established for the

58. See *State v. Adkins*, 225 S.W. 981 (Mo. 1920).

59. See *id.*; Laurence M. Hyde, *A Missouri Centennial Which has Been Overlooked—Some Comments on Criminal Procedure and Law Enforcement*, 6 MO. B. J. 102 (1935) (discussing other cases where convictions were reversed on technicalities).

60. Those inmates executed in 1999 were Kevin Malone on January 13; James Rodden on February 24; Roy Roberts on March 10; Ray Ramsey, Jr. on April 14; Ralph Davis on April 28; Jessie Wise on May 26; Bruce Kilgore on June 16; and Robert Walls on June 30. See *Missouri’s Death Penalty This Year*, ST. LOUIS POST-DISPATCH, June 20, 1999, at A11.

61. See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

62. The Constitution’s Preamble states, “We, the people of Missouri, with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness, do, for the better government of the State establish this Constitution.” See MO. CONST. of 1875 preamble.

63. See generally MO. CONST. of 1875.

64. MO. CONST. of 1875, art. VIII, § 2 (1924).

65. *Id.*

education of children of African descent.”⁶⁶ The Supreme Court upheld the constitutionality of this provision in *Lehew v. Brummel*.⁶⁷ The Court in *Lehew* held that separate schools for blacks did not violate the United States Constitution’s Fourteenth Amendment.⁶⁸

The 1875 constitution also had specific articles dealing with the formation of corporations, railroads and street railways.⁶⁹ The latter two were to be public highways subject to the power of the legislature.⁷⁰ It is interesting to note this constitution also prohibited lotteries.⁷¹

B. *The Legislature and the Supreme Court*

The judicial decisions rendered by the courts continued to reflect the changing times. While some cases dealt with common subjects such as real property, adverse possession, and mortgages, the law expanded in areas such as business and corporate regulation, family law, commerce, crime and punishment, and private tort remedies. Meanwhile, the legislature recognized women’s rights, passing statutes that recognized a woman as a legal person and allowing a woman to protect her separate property and her dower rights.⁷²

The early judicial decisions dealt with private disputes involving contracts, bailments, property, boats and vessels, evidence, boundary disputes, and criminal law, and gambling.⁷³ There were also actions filed against municipalities for failure to repair defects in the streets,⁷⁴ in addition to criminal cases involving points of evidence. Almost every leading case during the last half of the Nineteenth Century dealt with railroads and negligence, where the Court often decided in favor of the booming industrial corporations. Tort law, specifically remedies, was on the rise due to the Industrial Revolution, whose awesome machines had a great capacity for injuring or smashing the human body. The cases dealt with contributory negligence, assumption of risk, and all the other tort concepts, which precluded recovery.

During the period following the Civil War and into the early years of the twentieth century, the judicial decisions continued to protect business and property rights. The judiciary placed less emphasis on personal and individual

66. MO. CONST. of 1875, art. VIII, § 3 (1932).

67. 15 S.W. 765 (Mo. 1891).

68. *Id.*

69. MO. CONST. of 1875, art. XII, §§ 1-24 (1875).

70. MO. CONST. art. XII, §§ 14 (1875).

71. MO. CONST. art. XIV, § 10 (1875).

72. *See generally* Rogers v. Rogers, 177 S.W. 382 (Mo. 1915) *citing* MO. ANN. STAT. §§ 1735, 8304 (West 1909).

73. Thompson v. Bunton, 22 S.W. 863 (Mo. 1893) (holding that a person who keeps watch at a place of gambling is guilty of an offense); Tyree v. Gingham, 13 S.W. 952 (Mo. 1890) (addressing the duty of the state of care for Confederate soldiers).

74. Squires v. City of Chillicothe, 1 S.W. 23 (Mo. 1886).

rights. For example, the courts protected businesses in general, and railroads in particular. This business protectionism seemed to be the trend throughout the country. In *Ryan v. New York Central Railroad Co.*,⁷⁵ a railroad company's carelessness caused the plaintiff's house to burn down.⁷⁶ Even though there was no question that the railroad company was at fault, the court denied the plaintiff's claim for damages.⁷⁷ The court reasoned, "[t]o sustain such a claim as the present . . . would subject [the railroad] to a liability against which no prudence could guard."⁷⁸ The court added "in a country where men are crowded," it is impossible to "guard against the occurrence of accidental or negligent fires."⁷⁹ Therefore, in a commercial country it seems as though each man runs the hazard of his neighbor's conduct.

Many decisions dealt with railroads and the application of the laws regarding negligence. The law of contributory negligence, which would preclude recovery if a plaintiff was negligent, was not fit for the era of the "iron-horse." Therefore, the Supreme Court of Missouri developed a doctrine that softened the law of contributory negligence. The Court adopted the "humanitarian doctrine," which was unique to the State of Missouri.⁸⁰ The humanitarian doctrine was based on the principle that a defendant will be liable for damages to an injured person or widow of that person if the defendant, operating a dangerous machine, had the "last clear chance" to avoid injuring a human being even if that party was oblivious to the danger.⁸¹ The doctrine was later adopted and modified to serve the era of the street-car and the "new fangled" automobile, until the 1980s, when it was replaced with the principles of "comparative fault."⁸²

Even though the Court seemed to favor big business, there are cases where David did defeat Goliath. For example, in *Glaessner v. Anheuser-Busch Brewing Ass'n.*,⁸³ Anheuser-Busch desired to build and maintain a railroad track across Broadway to the river.⁸⁴ The Mayor and the Board of Aldermen authorized the brewery to build a private railroad across Broadway, but the plaintiff, Mr. Glaessner, sought to stop the building of the tracks across Broadway because the railroad tracks would decrease the value of *his* property

75. 1866 WL 5620 (N.Y.) (1866).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See William H. Becker, Jr., *The Missouri Supreme Court and the Humanitarian Doctrine in the Year 1953*, 19 MO. L. REV. 48, 49 (1954). See also, William H. Becker, Jr., *The Humanitarian Doctrine*, 3 MO. L. REV. 392 (1938).

81. Becker, *The Humanitarian Doctrine*, 3 MO. L. REV. 392; see also *Banks v. Morris*, 257 S.W. 482, 484 (Mo. banc 1924).

82. See *infra* Part VI.

83. 13 S.W. 707 (Mo. 1890).

84. *Id.*

and hurt his small business.⁸⁵ The Supreme Court held that the brewery and the City could not create such a “nuisance” by building a private railroad, stating the “the king cannot license the erection or commission of a nuisance.”⁸⁶

The numerous judicial decisions protecting business seemed to be so one-sided, however, that ordinary citizens began to complain in newspapers. One prominent case involved a suit against J. M. Shepherd, the publisher of a newspaper in Warrensburg, Missouri.⁸⁷ The case had its inception in a personal injury suit brought by Rube Oglesby against the Missouri Pacific Railroad.⁸⁸ The Supreme Court held Mr. Shepherd in criminal and civil

85. *Id.* at 708.

86. *Id.*

87. *Crow v. Shepherd*, 76 S.W. 79 (Mo. 1903).

88. *See id.* at 80:

And now, as the capsheaf of all this corruption in high places, the Supreme Court has, at the whipcrack of the Missouri Pacific Railroad, sold its soul to the corporations, and allowed Rube Oglesby to drag his wrecked frame through this life without even the pitiful remuneration of a few paltry dollars. Learned men of the law say that Rube Oglesby had the best damage suit against a corporation ever taken to the Supreme Court. This very tribunal, after reading the evidence and hearing the arguments of the attorneys, rendered a decision sustaining the judgment of the lower court, which decision was concurred in by six of the seven members of the court. This is usually the end of such cases, and the decision of a Supreme Court, once made, usually stands. But not so in the Oglesby case. Three times was this case, at the request of the railway attorneys, opened for rehearing, and three times was the judgment of the lower court sustained. But during this time, which extended over a period of several years, the legal department of this great corporation was not the only department which was busy in circumventing the defeat of the Oglesby case. The political department was very, very busy. Each election has seen the hoisting of a railway attorney to the Supreme Bench, and, when that body was to the satisfaction of the Missouri Pacific, the onslaught to kill the Oglesby case began. A motion for a rehearing was granted, and at the hearing of the case it was reversed on an error in record of the trial court, and was sent back for retrial. That was in the early part of the year 1902. The case was tried in Sedalia before Circuit Judge Longan, one of the ablest jurists in the state, and we have been informed that no error was allowed to creep into the record at the second trial. Again the jury rendered judgment in favor of Oglesby for \$15,000, and again the case was appealed to the Supreme Court. An election was coming on, and the railroad needed yet another man to beat the Oglesby case. The Democratic nominating convention was kind, and furnished him, in the person of Fox. The railroad, backed by four judges on the bench, allowed the case to come up for final hearing, and Monday the decision was handed down, reversed outright and not remanded for retrial. The victory of the railroad has been complete, *and the corruption of the Supreme Court has been thorough*. It has reversed and stultified itself in this case until no sane man can have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest in the railroad. What hope have the ordinary citizens of Missouri for justice and equitable laws in bodies where such open venality is practiced? And how long will they stand it? The corporations have long owned the Legislature, now they own the Supreme Court, and the citizen who applies to

contempt.⁸⁹ It held that (1) courts have the inherent power to hold a person in contempt, (2) the liberty of the press does not extend to speech which is blasphemous, immoral, seditious or defamatory,⁹⁰ (3) there is no right to a jury trial in a contempt case, and (4) there is no right to scandalize the courts - for “[h]e . . . who seeks to destroy the authority of the courts invites anarchy and sows the seeds for his own undoing. It is the liberty of the press that is guaranteed [sic], not the licentiousness.”⁹¹

C. Social Changes

This was also the era of ultra-conservatism - when the predominate political philosophy was that private individuals should not be aided by, or interfered with, by the government. This era abhorred social legislation and any concept of socialism. One Supreme Court decision that is particularly significant is *Garth v. Switzer*.⁹² The case involved a law adopted in 1895, which imposed a tax to be used for free scholarships for students attending the University of Missouri.⁹³ In order to defray expenses, the Act’s stated purpose was to further education.⁹⁴ The Supreme Court struck down the law as unconstitutional, stating that public funds used for individual students violated the United States Constitution.⁹⁵ Lawyers for the University argued (1) that education is a public purpose for which taxes may be levied and (2) that such scholarships do not amount to “paternalism . . . of a hurtful or dangerous kind.”⁹⁶ The Supreme Court rejected these arguments,⁹⁷ however, and its

either for justice against the corporation gets nothing. Rube Oglesby and his attorney, Mr. O.L. Houts, have made a strong fight for justice. They have not got it. The quivering limb that Ruby left beneath the rotten freight car on Independence Hill, and his blood that stained the right of way of the soulless corporation, have been buried beneath the wise legal verbiage of a *venal court*, and the wheels of the Juggernaut will continue to grind out men’s lives, and a *crooked court* will continue to refuse them and their relatives damages, until the time comes when Missourians, irrespective of politics, rise up in their might and slay at the ballot box the corporation-bought lawmakers of the state.

Id. (emphasis added) (quoting the original text).

89. *See id.* at 81-84.

90. The opinions had lengthy discussions of the constitutional guaranty and the history of free speech in America.

91. *Id.* at 95.

92. State *ex rel.* *Garth v. Switzer*, 45 S.W. 245 (Mo. 1898).

93. *Id.* at 246.

94. *Id.* at 246-48.

95. *Id.* at 248.

96. *Id.* at 251.

97. *See Garth*, 45 S.W. at 251.

Paternalism, whether state or federal, as the derivation of the term implies, is an assumption by the government of a quasi fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing

decision remained the law until it was overruled in 1976 in *Americans United v. Rogers*.⁹⁸

V. THE SOCIAL LEGISLATION ERA – 1920s - 1950s

It was not until the first part of the twentieth century that the legal history of Missouri focused again on the protection of individuals. This change was reflected in various areas of law, despite the fact that contributory negligence was still a complete defense to a negligence action, and assumption of risk continued to preclude recoveries.

The movement towards workers' compensation benefits gradually began to appear on the legal scene, and culminated in the Workmen's (now Workers') Compensation Act, which was passed in 1925.⁹⁹ As evidence of the peoples'

their own affairs, and is pernicious in its tendencies. In a word, it minimizes the citizen, and maximizes the government. Our federal and state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government, a system in which the people are the sovereigns, and the government their creature, to carry out their commands. Such a government is founded on the willingness and the right of the people to take care of their own affairs, and an indisposition on their part to look to the government for everything. The citizen is the unit. It is his province to support the government, and not the government to support him. Under self-government, we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. *Paternalism is a plant that should receive no nourishment upon the soil of Missouri.* While the exigencies of this case may require the operation of such a principle, we are sure its germ is not to be found in the constitution of this state, nor in the spirit of its people. Whatever other fault the constitution of 1875 may have, it is certain that its framers sought most sedulously to curb the power of those clothed with authority to legislate in behalf of favored classes, and to leave the people the largest possible control over their own affairs. Especially has the power of taxation been jealously hedged about and limited . . . It is one thing to provide for the establishment and maintenance of a state university and a system of free public schools,—the state, through its own officers, agencies, and municipalities, constructing and owning the buildings and apparatus, and employing the teachers as public functionaries, responsible under her own laws for the discharge of their duties,—and a wholly different thing to support private individuals who attend the university and public schools, by public taxation. But it is said that nothing is more common than the endowment of free scholarships as a part of the endowment of a university. This may be true of the universities of Europe, and individual instances are to be found in this country where some great benefactor of the race has, out of his own bounty, provided such scholarships; but these examples furnish no guide to the free states of this Union, clearly not to the legislature of Missouri under its organic law.

Id. (emphasis added).

98. 538 S.W.2d 711, 718-19 (1976) (holding that a student financial assistance program is constitutional). See MO. REV. STAT. §§ 173.200-230 (1994).

99. Laws 1925, pp. 375-407 C.S.H.B. 112, 53rd Leg., 1925 Mo. Laws 375; 1927 Mo. Laws 490 (referred to a vote of the people on Nov. 2, 1926, approved by a vote of 561,898 against 251,822).

social change and awareness, the Act was officially adopted in the election on November 2, 1926 - but not without a struggle, since the legislature had been debating this issue as early as 1909.¹⁰⁰ When it finally was adopted, the law was “founded on the principle of insurance and is not to be deemed a pension, a bounty or a gratuity. . . .The theory [dealt with] the loss of earning capacity resulting from injuries received in the course of and as a result of employment.”¹⁰¹ Therefore, the industry could absorb the cost of industrial accidents and justify them as costs of production.¹⁰² This law was the first piece of social legislation enacted in the history of Missouri.¹⁰³

After the enactment of this law, the first case the Court considered was *Elsas v. Missouri Workmen’s Compensation Commission*.¹⁰⁴ It was a writ of mandamus to compel the Workmen’s Compensation Commission to assume jurisdiction of a worker’s claim.¹⁰⁵ The Court held that the law became effective on the day it was voted on, November 2, 1926, so that a workman who was injured on November 4, 1926 could make a claim for compensation.¹⁰⁶

While there were several laws passed relating to social legislation at the state level during the period 1920s through the 1950s, the Supreme Court did not stray from the traditional, common-law path when it answered questions such as: (1) could the State of Missouri be subjected to a suit for personal injuries? (2) was a charity immune from suit? (3) could a consumer recover against a manufacturer of goods, when the product was purchased through a retailer? (4) could one spouse sue another for negligence? (5) could an injured person recover for emotional distress? (6) should the law of strict contributory negligence be abolished? and (7) could a wife (not the husband) recover damages for the loss of love and affection?

Until 1969,¹⁰⁷ charitable institutions were absolutely immune from a lawsuit seeking to recover damages for personal injury, due to the doctrine of charitable immunity, which was adopted in Missouri in 1907.¹⁰⁸ In adopting this policy, the Court reasoned that it is in the best interest of every member of the public that charitable institutions, designed for the alleviation of human suffering or for the moral well-being of mankind, be built and maintained by

100. R. Robert Cohn, (*History of Workmen’s Compensation Law*), 15 V.A.M.S. at 17, 19 (1965).

101. *Id.* at 25.

102. *Id.*

103. *See generally id.* at 24-25.

104. 2 S.W.2d 796 (Mo. 1928).

105. *Id.*

106. *Elsas*, 2 S.W.2d at 798-99, 801.

107. *See Abernathy v. Sisters of St. Mary’s*, 446 S.W.2d 599 (Mo. banc 1969).

108. *See Adams v. University Hosp.*, 99 S.W. 453 (1907).

the friends of the benevolent institutions.¹⁰⁹ Further, these institutions should be protected from any action that might tend to close any donors' purses or deplete the institution's funds.¹¹⁰ The Court, in effect, said that it is better for a particular individual to suffer, than to risk the probability that the public be deprived of the benefits provided by the institution.

Similarly, the Missouri appellate courts clung to the doctrine that the State of Missouri, viewed as the sovereign, was immune from tort liability. For years, the courts held that there were many legal and policy justifications for the doctrine; therefore, the state could not be sued for personal injury. The prevailing court viewpoint was that it is better for the individual to suffer a particular loss than for the people to suffer financial instability, which would disrupt the normal functions of government.¹¹¹ Also, the Court reasoned that it was not the function of the courts to legislate public policy; instead, that task should be the function of the legislature.¹¹²

The court addressed spousal immunity issues with striking similarity.¹¹³ According to interpretations, a wife could not sue her husband, and the husband could not sue his wife.¹¹⁴ To permit one spouse to sue the other would, according to the Court, greatly disrupt the foundation of society - the family. It was not until 1986 that this doctrine changed.¹¹⁵

Another area of law that was slow to change was the law of products liability. For the manufacture of defective products, the doctrine of "strict liability" was not recognized in Missouri because the consumer was not in "privity" with the manufacturer.¹¹⁶ This was not changed in Missouri until the late Sixties.¹¹⁷

Similarly, an individual could not recover damages for purely an emotional injury. Instead, there had to be a physical touching before recovery was allowed.¹¹⁸ The underlying principle was based upon (1) the difficulty of proof

109. *See generally* MO. REV. STAT. § 537.600 (1999).

110. *Id.* at 453-54.

111. *O'Dell v. School Dist. of Independence*, 521 S.W.2d 403, 407-08 (Mo. banc 1975).

112. *Id.*

113. *Rogers v. Rogers*, 177 S.W. 382 (Mo. 1915).

114. *Id.* at 384.

115. *See Townsend v. Townsend*, 708 S.W.2d 647, 649 (Mo. banc 1986) (holding that common law doctrine of interspousal immunity is not a bar to claims for personal injuries inflicted by one spouse against the other during marriage); *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 (Mo. banc 1986) (holding that the doctrine of spousal immunity is no longer available to bar claims for negligence by one spouse against the other during marriage).

116. *See Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 364 (Mo. banc 1969) (construing *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (1963)).

117. *Id.*

118. *Trigg v. The St. Louis Kansas City & Northern Ry. Co.*, 74 Mo. 147 (1891).

and (2) the possibility that recovery would give rise to and encourage imaginary and fraudulent claims.¹¹⁹

These are only a few examples of the conservative traditional principles that existed until the late 1950s. It was an era that adhered to precedent and an era of conservatism. According to the prevailing thought, it was better for an individual to bear a loss rather than require that all of the members of society pay.

VI. THE ERA OF LEGAL REVOLUTION – 1960S - PRESENT

In the 1960s, a legal revolution took place in both civil and criminal jurisprudence. The decisions relating to criminal justice are generally well-known today. For example, changes took place in the law of search and seizure, regarding both the right of an indigent to have a free lawyer and motions to vacate sentences. Moreover, statutory changes were also made in the field of substantive criminal law, in divorce cases, “fault” was no longer an element in the burden of proof. The revolution in the civil law area is also vast, and the revolution is so extensive that only a selection of the highlights can be reviewed.

This quiet revolution, beginning in the late 1960s, was expressed in numerous, precedent-breaking decisions of the Supreme Court as well as in the enactments of the General Assembly. The laws dealt with a host of environmental and consumer protection issues, while other laws changed the rules relating to the infirm and the mentally ill. These significant changes pervaded every field of law: negligence,¹²⁰ products liability, the judicial system, worker’s compensation,¹²¹ sovereign immunity,¹²² health care,

119. *Bass v. Nooney*, 646 S.W.2d 765 (Mo. banc 1983):

Instead of the old impact rule, a plaintiff will be permitted to recover for emotional distress provided (1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress, and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be moderately significant.

Id. at 772-73.

120. *See generally Townsend*, 708 S.W.2d at 649; *S.A.V.*, 708 S.W.2d at 652 (abolishing the doctrine of “interspousal immunity,” overruling all the past precedent and making it possible for one spouse to sue the other for negligence and tort).

121. *See generally Wolfgeher v. Wagner Cartage Service*, 646 S.W.2d 781, 785 (Mo. banc 1983). The law of Worker’s Compensation was made more liberal and the definition of an “on the job accident” was changed. The court said that the time has come to join the majority of the states in liberally construing the term “accident.”

122. As to the old law relating to sovereign immunity, the Court, too, changed this in 1977. The General Assembly disagreed with this decision, however, and quickly reinstated the doctrine, with certain limitations. *See Jones v. State Highway Comm’n.*, 557 S.W.2d 225, 230 (Mo. banc 1977); *see MO. REV. STAT. § 537.600* (1994).

emotional distress,¹²³ and the right to die.¹²⁴ There were great changes in the law of evidence and procedure, as well as in the law relating to privileged communications.¹²⁵ Anyone who glances at the statutes and judicial decisions can only conclude that the face of justice dramatically changed in Missouri during this era.

One of the great changes in the law of negligence took place in the case of *Gustafson v. Benda* where the Court abolished the law of contributory negligence as well as the humanitarian doctrine and adopted the principle of “comparative fault.”¹²⁶ The *Gustafson* decision substituted the principle that a jury may assign a percentage of fault individually to the plaintiff and to the defendant,¹²⁷ whereby the plaintiff’s recovery is then reduced by his percentage of fault.¹²⁸ This was a novel concept in the law, causing Judge Gunn to comment that *Gustafson* is an example of “intru[sion] into an area belong[ing] to the legislature,” and of “judicial fiat.”¹²⁹

As to the law of products liability, the old precedents were overruled, and the consumer was allowed to maintain a claim against manufacturers of products used in daily life.¹³⁰ The *Keener* decision abolished the privity doctrine and held that, henceforth, a person who sells a product in a defective condition that is reasonably dangerous to the consumer is subject to liability if two conditions are met: (1) the seller is engaged in the business of selling such a product, and (2) the product reaches the consumer without substantial change in the condition in which it was sold.¹³¹ This principle of strict liability may apply even if the seller has exercised all possible care in the manufacture and sale of the product and even if the consumer has not entered into any contractual relation with the manufacturer.¹³² The policy underlying this new tort, strict liability, is that it ensures that the manufacture will bear the costs of injuries resulting from defective products, rather than forcing the injured

123. See *Bass*, 646 S.W.2d at 769; see also *Virginia D. v. Madesco*, 648 S.W.2d 881 (Mo. banc 1984).

124. See generally *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) *aff’g* *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988).

125. See *Rowe v. Farmers Ins. Co. Inc.*, 699 S.W.2d 423 (Mo. banc 1985) (evidence); *Chandra v. Sprinkle*, 678 S.W.2d 804 (Mo. banc 1984) (physicians); *Friedman v. Provoznik*, 668 S.W.2d 76 (Mo. banc 1984).

126. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo 1983) (en banc). The doctrine of comparative fault allows a plaintiff to recover damages for injuries if he is *less* at fault than the defendant. *Id.* at 15-16.

127. *Id.* at 20-21.

128. *Id.*

129. *Id.* at 29 (Gunn, J., dissenting).

130. *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 366 (Mo. 1969) (en banc).

131. *Id.* at 364.

132. *Id.*

persons, who are powerless to protect themselves, to bear such a steep financial burden.¹³³

From these and many other decisions it can readily be seen that there has been a recent tendency to extend liability in injury cases; to overrule long-established precedent; to reach conclusions more consistent with current society; and to develop principles which modernize the law.

VII. THE JUDICIAL SYSTEM AND SOME GREAT MISSOURI JUDGES

Throughout the history of Missouri, there has been a whole host of different types and kinds of courts.¹³⁴ Originally, the Supreme Court consisted of only three, elected judges who sat in session around the State.¹³⁵ Under the present judicial article, however, we have a unified, modern system of courts. In some areas, we have the Missouri non-partisan court plan which permits the Governor to select judges from a panel of names submitted by the Judicial Commission.

One of the most fascinating cases involving the judges of the Supreme Court of Missouri is the case of *Thomas v. Mead*.¹³⁶ The case was decided soon after the Civil War and it reflected the services that existed in that era.¹³⁷ In 1865, the people of Missouri voted for an "Ousting Ordinance" which ousted all judges and certain other political officers of the state and gave the Governor the power to appoint new ones.¹³⁸ When the Supreme Court sat in St. Louis on June 12, 1865, two of the judges were William V.N. Bay and John D.S. Dryden.¹³⁹ The Governor had appointed two new judges, David Wagner and William Lovelace, to replace Bay and Dryden.¹⁴⁰ However, Bay and Dryden refused to leave the bench and recognize these new appointments.¹⁴¹ Therefore, Governor Fletcher issued an order from the "Headquarters of the State of Missouri," stating that the new judges, Wagner and Lovelace, "shall" be put on the Supreme Court.¹⁴² The order further stated that if, after receiving

133. *Id.*

134. There have been courts such as the following: municipal, police, justice of the peace, county, the St. Louis Court of Criminal Corrections, the Court of Common Pleas, the Court of Appeal and, of course, the Supreme Court.

135. Prior to 1851, the office was an elected one and, in most areas of the state has remained so. Prior to 1875, there were three judges on the Supreme Court, but in 1890, the number was increased to seven.

136. 36 Mo. 232 (1865).

137. D.A. Divilbiss, *The Ousting of Judges*, 1 THE MISSOURI SUPREME COURT HISTORICAL JOURNAL 1 (1996).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See *Thomas v. Mead*, 36 Mo. 232, 253 (Mo. 1865); see also DIVILBISS, *supra* note 137, at 4.

the note, Bay and Dryden refused to vacate their seats on the Court, “you will direct policemen to arrest them,” and “as far as convenient avoid the use of violent means, but if in your judgment, you believe it necessary, do not hesitate to employ all the force it may require.”¹⁴³ On June 14, General Coleman and the police bodily removed Judges Bay and Dryden and placed Judges Wagner and Lovelace on the bench.¹⁴⁴

Missouri has been very fortunate in having many great and good judges serving on the bench at all levels of courts.¹⁴⁵ One of the greatest and most famous judges was Judge Thomas A. Sherwood of Springfield, Missouri, who was first elected in 1872. But perhaps the most prolific, entertaining, and scholarly writer to ever serve on the Supreme Court was Judge Henry Lamm of Sedalia, who was elected in 1904 and stayed on the bench until 1914. Judge Lamm was of Pennsylvania German parentage, and his ancestors immigrated to Pennsylvania before the Revolutionary War. He was born in a little village in Wayne County, Ohio on December 3, 1846. He was educated in Ohio and graduated from the “Academic Department” of Michigan University in 1869. In that year he came to Sedalia, Missouri where he taught school, read law and was admitted to the bar in 1871. For thirty years he was in general practice as the junior member of the firm of Sangree and Lamm in Sedalia. He was prosecuting attorney of Pettis County and steadily refused nomination for other political office. In 1902, he was nominated by the Republican party for the office of judge of the Supreme Court but was defeated. In 1904, he was again nominated and won.

During his term, he wrote (reportedly) 500 opinions, spiced with a style of language unequalled before or since. It has been said that Judge Lamm instituted an innovation in writing. While he followed the staid and established order of construction so manifest in legal opinions, he invigorated the bone-dry, orthodox, legal, literary production by an odd and decidedly blunt way of saying things, that is rather startling to the sticklers for the parched and barren specimens of writings with which the tons of buckram abound. In many instances his pointed passages were directed to the legal profession, and he often injected humor in his writings. He felt, even in his day, that there was too much resort to the courts and that much litigation could be avoided. He said, “a lean compromise is better than a fat lawsuit.”¹⁴⁶

As to the function of law, courts, judges and justice, Judge Lamm had a few words of wisdom:

143. *Thomas*, 36 Mo. at 253; see also *DIVILBLISS*, *supra* note 137, at 4.

144. *DIVILBLISS*, *supra* note 54, at 4.

145. The first judges of the first court were Mathias McGirk, John D. Cook, and John R. Jones, appointed by Governor Alexander McNair.

146. *Whitecotton v. St. L & H. Ry. Co.*, 157 S.W. 776, 777 (Mo. 1913).

As if it was our judicial duty to turn a flexible and receptive ear to catch an assumed groundswell of popular or partisan clamor, or become a weather vane to point the way the wind sits; as if we [courts] sit to administer revenge and not justice.¹⁴⁷

'A judge should have two salts - the salt of wisdom, lest he be insipid; and the salt of conscience, lest he be devilish.'¹⁴⁸

As the furnace proveth the potter's vessels, so the trial of a judge is his reasoning.¹⁴⁹

Justice is not to be entangled and strangled in and by the refinements of bookkeeping.¹⁵⁰

Judge Lamm's sayings often resemble Poor Richard's Almanac. Here are some:

The mule don't kick according to no rule.¹⁵¹

Sin and debts are always more than we think them to be.¹⁵²

Fond of lawsuits, little wealth; fond of doctors, little health.¹⁵³

Some of his opinions also show the depth of his knowledge and the strength of his character.¹⁵⁴ Judge Lamm represents the grand style of writing decisions.

147. *Cook v. Globe Printing Co.*, 127 S.W. 332, 371 (Mo. 1910) (en banc).

148. *Lackawanna Coal & Iron Co. v. Long*, 133 S.W. 35, 38 (Mo. 1910) (quoting 3 Coke's Inst: 147).

149. *Armor v. Lewis*, 161 S.W. 251, 253 (Mo. 1913).

150. *Mo. Pac. Ry. Co. v. Continental Nat'l. Bank*, 111 S.W. 574, 577 (Mo. 1908).

151. *Lyman v. Dale*, 171 S.W. 352, 355 (Mo. 1914).

152. *Keeney v. McVoy*, 103 S.W. 946, 948 (Mo. 1907).

153. *Whitecotton v. St. Louis & H. Ry. Co.*, 157 S.W.2d 776, 777 (Mo. 1913).

154. *See generally Lyman*, 171 S.W. at 352. The defendant's mule kicked a buggy belonging to the plaintiff, which resulted in \$5 in damages. The question was whether the defendant was negligent in leading the mule on a city street. The court held that there was no negligence. Judge Lamm wrote the concurring opinion:

As I see it, the case is this: Dale, a man of substance, a farmer, owned a brown and a gray mule, both young and of fine growth; one saddlewise, the other otherwise. Both, used to the plow and wagon, were entitled to the designation 'well broke and gentle.' One Parker was Dale's manservant, and in the usual course of his employment had charge of these mules. On a day certain he had driven them to a water wagon in the humble office of supplying water to a clover huller in the Ozark region hard by its metropolis, to wit, Springfield. *Eventide had fallen; i.e., the poetical time of day had come when the beetle wheels his droning flight, drowsy tinkling lulls the distant folds, and all the air a solemn stillness holds. In other words, dipping into the vernacular, it was time to 'take out.'* . . . As the [witnesses] saw it, Parker was leading to the mule. As will be seen a bit further on, at this point a grave question arises, to wit: Is it negligence to lead a mule by hand, or should he be fastened 'neck and neck' to his fellow? . . .

Another great judge was Justin Ruark. He served for many years during the Fifties and Sixties as a judge of the Southern District of the Court of Appeals. Judge Ruark was from Neosho, Missouri, and was admitted to the bar in 1923. While he was on the Court of Appeals, Judge Ruark wrote hundreds of opinions in a painstaking and careful manner. Like Judge Lamm, Judge Ruark had a real sense of humor. Among the hundreds of his opinions is a divorce case in which the husband sought a divorce on the grounds of general indignities.¹⁵⁵ The wife often referred to her husband, Lowell, and his relatives as “hillbillies,”¹⁵⁶ which was alleged as an indignity.¹⁵⁷ The trial court granted the divorce,¹⁵⁸ but the Court of Appeals reversed.¹⁵⁹ For other interesting

There being no evidence tending to show the mule was ‘wild and unruly’ as charged, is such a mule per se a nuisance, a vicious animal, has he a heart devoid of social duty and fatally bend on mischief when led by a halter on the street of a town, and must his owner answer for his acts on that theory? . . .

There are sporadic instances of mules behaving badly. . . . In Spanish folk lore it is said: He who wants a mule without fault must walk. So, at the French chimney corner the adage runs: The mule long keeps a kick in reserve for his master. ‘The mule don’t kick according to no rule,’ saith the American Negro. His voice has been a matter of derision, and there be those who put their tongue in their cheek when speaking of it. Witness the German proverb: Mules make a great fuss about their ancestors having been asses. And so on, and so on. . .

Furthermore, the very word ‘jackass’ is a term of reproach everywhere, as in the literature of the law. Do we not all know that a certain phase of the law of negligence, the humanitarian rule, first announced, it has been said, in a donkey case. . . has been called by those who deride it, the ‘jackass doctrine’? . . . Did not Sampson use the jawbone of one effectually on a thousand Phillistines? . . . Enough has been said to show that the ass is not without some rights in the courts even on sentimental grounds; ergo if his hybrid son, tracing his lineage as he does to the Jack of Kentucky and Andalusia, inherits some of his traits, he cannot be held bad per se. Q.E.D.

It is meet that a \$5 case, having its tap root in anger (and possibly in liquor), should not drag its slow lengths through the courts for more than five years, even if it has earned the soubriquet of ‘the celebrated mule case.’

155. *Moore v. Moore*, 337 S.W.2d 781 (Mo. App. 1960).

156. *Id.* at 786.

157. *Id.* at 782.

158. *Id.*

159. *Id.* at 789. Judge Ruark wrote:

In respect to the plaintiff’s evidence that Minnie (wife) once referred to relatives of the plaintiff as hillbillies: We suggest that to refer to a person as a ‘hillbilly,’ or any other name, for that matter, might or might not be an insult, depending upon the meaning intended to be conveyed, the manner of utterance, and the place where the words are spoken. Webster’s New International Dictionary says that a hillbilly is ‘a backwoodsman or a mountaineer of the southern United States;—often used contemptuously.’ But without the added implication or inflection which indicates an intention to belittle, we would say that, here in Southern Missouri, the term is often given and accepted as a complimentary expression. An Ozark hillbilly is an individual who has learned the real luxury of doing without the entangling complications of things which the dependent and

decisions written by Judge Ruark, see *State ex rel. Sageser v. Ledbetter*,¹⁶⁰ high school student entitled to diploma by writ of mandamus *Daniel v. Childress*,¹⁶¹ and *Mills v. Yount*.¹⁶²

One other great judge was Aytchmonde P. Stone, Jr. of the Springfield Court of Appeals. The son of a Baptist minister, he was born in Oklahoma and received his law degree from Washington University. Before he was appointed by Governor Donnelly, Judge Stone practiced in Springfield. His 541 opinions covered almost every field of law. Specifically, in *MLB v. WRB*,¹⁶³ the Court decided whether a father, who was confined in the penitentiary, was entitled to visitation rights to his two sons. The trial court denied the father such visitation rights,¹⁶⁴ but Judge Stone reversed.¹⁶⁵ Judge Stone, in the course of the opinion said:

The effect of the father's sentence to imprisonment for a term less than life was to suspend all of his civil rights during such term. But civil rights are to be distinguished from natural rights, which 'are such as appertain originally and essentially to man - such as are inherent in his nature, and which he enjoys as a man, independent of any particular act on his side.'¹⁶⁶ . . .

Although there was no such contention in the trial court, the mother here asserts that '(the father) has rendered himself unfit by virtue of his being convicted and sentenced to imprisonment for a crime involving moral turpitude.' This prompts the observation that '(n)otwithstanding defendant's present incarceration, as the result of a criminal conviction, the law does not preclude repentance, reformation, and forgiveness.' The cause is remanded.¹⁶⁷

over-pressured city dweller is required to consider as necessities. The hillbilly foregoes the hard grandeur of high buildings and canyon streets in exchange for wooded hills and verdant valleys. In place of creeping traffic he accepts the rippling flow of the wandering stream. He does not hear the snarl of exhaust, the raucous braying of horns, and the sharp, strident babble of many tense voices. For him instead is the measured beat of the katydid, the lonesome, far-off complaining of the whippoorwill, perhaps even the sound of a falling acorn in the infinite peace of the quiet woods. The hillbilly is often not familiar with new models, soirees, and office politics. But he does have the time and surroundings conducive to sober reflection and honest thought, the opportunity to get closer to his God. No, in Southern Missouri the appellation 'hillbilly' is not generally an insult or an indignity; it is an expression of envy.

Id. at 788-89.

160. 559 S.W.2d 230 (Mo. App. 1977).

161. 381 S.W.2d 539 (Mo. App. 1964) (discussing dehorning an animal).

162. 393 S.W.2d 96 (Mo. App. 1965) (discussing trouble in Plainview Church).

163. 457 S.W.2d 465 (Mo. App. 1970).

164. *Id.* at 465.

165. *Id.* at 467.

166. *Id.* at 466.

167. *Id.* at 467. For other interesting opinions of Judge Stone, see *Reeves v. Reeves*, 399 S.W.2d 641 (Mo. App. 1966) (discussing the meaning of "truth"); *Gaddy v. State Bd. of Registration for Healing Acts*, 397 S.W.2d 347 (Mo. App. 1965) (discussing the meaning of drug

In a later, famous case of *State ex rel. Kroger Co. v. Craig*, a dog bite case, Judge Stone took the occasion to write about the great qualities of “man’s best friend - the dog.”¹⁶⁸ Judge Stone referred to Senator Vest, who in representing a defendant in a dog bite case, stated in his argument before the jury:¹⁶⁹

The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or

“addiction”); *Chapman v. King*, 396 S.W.2d 29 (Mo. App. 1965) (discussing newly discovered evidence); and *Stanziale v. Musick*, 370 S.W.2d 261 (Mo. 1963) (discussing the ultimate purpose of jury trials).

168. 329 S.W.2d 804 (Mo. App. 1959). Judge Stone wrote:

We observe preliminarily that, although plaintiff Joan’s petition depreciatingly and disparagingly refers to the animal alleged to have bitten her as ‘a tan mongrel dog,’ the canine (as a class) has a proud heritage rooted in antiquity. To the ancients, the dog was more than a pet in the household, a servant in the field, and an assistant in the hunt. He was an object of ceremony, reverence and veneration as well. The Egyptians regarded him as a symbolic guide and protector of the dead, crowned their god Anubis with a doglike head, fashioned images of the dog on the walls of their burial chambers and temples, ceremoniously embalmed his body and entombed it in the special burial ground set aside for dogs in every town, and even built a city, Cynopolis, in his honor. The dog was scarcely less important to the Greeks, where Socrates’ favorite pledge was by the dog, Plato called the dog a philosopher, Pythagoras taught that a dog should be held to the mouth of a dying man as the animal most worthy of receiving the departing spirit and perpetuating its virtues, and in Greek mythology the dog of the hunter Orion was transformed into Sirius, the brightest star in the heavens, whose rise marked the Athenian New Year. Ethiopian tribesmen once crowned a dog as their king; and, with the ancient Persians, it was a less grievous offense to kill a man than to destroy a dog. In Rome, dogs became so popular that Julius Caesar is said to have mused aloud that Roman ladies of luxury had decided to have dogs instead of children; and, Cicero said, in tribute to dogs, that ‘such fidelity of dogs in protecting what is committed to their charge, such affectionate attachment to their masters, such jealousy of strangers, such incredible acuteness of nose in following a track, such keenness in hunting—what else do they evince but that these animals were created for the use of man.’ Centuries later, Olway the poet wrote of dogs as ‘honest creatures (who) ne’er betray their masters, never fawn on any they love not.’ And, in his classic encomium to the dog triumphantly climaxing the celebrated suit for the loss of ‘Old Drum,’ Missouri’s Senator George Graham Vest eulogized the fierce loyalty, unswerving devotion and unwavering steadfastness of the dog—noble qualities perhaps the more highly esteemed by man because he is so often found wanting in them himself.

Since, down through the ages, the dog has earned and has merited acceptance as man’s best friend, small wonder then that the law long ago recognized dogs as ordinarily harmless and classified them as animals *domitae naturae*, i.e., domestic animals, rather than as animals *ferae naturae*, i.e., wild animals, and that, in an action against the owner or harbinger of a dog for injury inflicted by such animal, defendant’s *scienter* (i.e., actual or constructive knowledge) of the vicious or dangerous propensities of the dog became and still is (except where removed by statute) an essential element of the cause of action and a necessary prerequisite to recovery.

Id. at 808-09; see also *The True Story of Old Drum*, 19 MO. HIST. REV. 313 (1925).

169. *Burden v. Hornsby*, 50 Mo. 238 (1872).

treacherous, is his dog. Gentlemen of the jury, a man's dog stands by him in prosperity and in poverty, in health and in sickness. He will sleep on the cold ground, where the wintry winds blow and the snow drives fierce, if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert he remains. When all riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens. If fortune drives the master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying to guard against danger, to fight against his enemies, and when the last scene of all comes, and death takes the master in his embrace and his body is laid away in the cold ground, no matter if all other friends pursue their way, there by his graveside will the noble dog be found, his head between his paws, his eyes sad but open in alert watchfulness, faithful and true even in death.

VIII. THE FUTURE AND CONCLUSION

What the future holds is anyone's guess. But, after reading a number of the decisions, since 1990, and after examining legislation relating to the law, I believe there is now a hint of a trend toward restrictions, less-generous, and more conservatism in the law. For example, the Missouri General Assembly passed the "Tort Reform Act" which places limitations on punitive damages, and reinstates the power of the judge to decrease the amount of damages a plaintiff may recover. We have seen the Congress struggle with product-liability reform in an attempt to establish uniform guidelines in this field. Recently, we have witnessed Congress struggle with a crime bill, which imposes the death penalty for a whole host of offenses.

In short, the tendency of the future appears to be of restriction, which is consistent with the cyclical nature of the law. Such cycles in the law have ever been present. The law shifts from harshness and strictness, to moderation and liberality, which reflects the law's natural growth and progression.

Since Missouri was admitted to the Union, the laws and judicial decisions have changed dramatically, mirroring the changes in our society. Having altered our strict moral values to adjust to more liberal principles, we have transformed from an agricultural and industrial society to a highly-technological, global community. It is a vastly different world today than in 1821 - and whether these changes are for better or for worse is for the reader to decide.