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## Appeal and Error—Right of Appeal from Involuntary Nonsuit

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## COMMENT ON RECENT DECISIONS

**APPEAL AND ERROR—RIGHT OF APPEAL FROM INVOLUNTARY NONSUIT—**[Missouri].—In two recent Missouri cases, the court marked the word "given" on a peremptory instruction requested by the defendant at the close of the plaintiff's case. Before this instruction was read to the jury, the plaintiff excepted to this ruling and took a nonsuit. The Supreme Court held that this nonsuit was involuntary and that an appeal would lie therefrom.<sup>1</sup>

This decision authoritatively settles a point disputed by the Missouri appellate courts. In the only other cases having the same factual set-up as the instant cases, the Kansas City Court of Appeals had held the nonsuit to be involuntary,<sup>2</sup> whereas the St. Louis Court of Appeals had held it to be voluntary.<sup>3</sup>

The plaintiff can take an involuntary nonsuit only when he is constrained by an adverse ruling of the court such as would preclude recovery in the case.<sup>4</sup> The St. Louis Court of Appeals seems to have thought that the marking of the word "given" on the instruction was not such an adverse ruling, and that the formality of reading the instruction to the jury must have occurred before the plaintiff may take an involuntary nonsuit.<sup>5</sup> The conclusion of the St. Louis Court of Appeals was based upon a series of cases which had held that a mere expression or intimation of the court's intent to give a peremptory instruction for the defendant was insufficient to constitute the record basis for an involuntary nonsuit and that such instruction must actually be read to the jury.<sup>6</sup> The facts of these cases, however, distinguish them from the instant cases because the Supreme Court deemed that the trial court had done more than merely manifest an intent to give the instruction. It was ruled that the marking of the instruction as "given" by the trial court was equivalent to an actual reading to the jury.<sup>7</sup>

1. *Boonville Nat. Bank v. Thompson*, 99 S. W. (2d) 93 (Mo., 1936); *Arp v. Rogers*, 99 S. W. (2d) 103 (Mo. 1936). See R. S. Mo. 1929, sec. 967.

2. *Craven v. Midland Milling Co.*, 241 S. W. 658 (Mo. 1922); *Poynter v. Fogel Const. Co.*, 289 S. W. 30 (Mo. 1926).

3. *Owens v. Washington Fidelity Nat. Ins. Co.*, 85 S. W. (2d) 193 (Mo. 1935); *Kane v. Kaysing Iron Works*, 89 S. W. (2d) 532 (Mo. 1936).

4. *Greene County Bank v. Gray*, 146 Mo. 568, 48 S. W. 447 (1898); *Diamond Rubber Co. v. Wernicke*, 148 S. W. 160 (Mo. 1912); 1 *Houts, Missouri Pleading and Practice* (1936) sec. 330.

5. *Supra*, note 3.

6. The St. Louis Court of Appeals cited the following cases: *Greene County Bank v. Gray*, 146 Mo. 568, 48 S. W. 447 (1898); *McClure v. Campbell*, 148 Mo. 96, 49 S. W. 881 (1899); *Carter v. O'Neill*, 102 Mo. App. 391, 76 S. W. 717 (1903); *Lewis v. Center Creek Mining*, 97 S. W. 938 (Mo. 1906); *Gray v. Ward*, 234 Mo. 291, 136 S. W. 405 (1911); *National Live Stock Commission Co. v. Thero*, 154 Mo. App. 508, 135 S. W. 961 (1911); *Segall v. Garlich*, 313 Mo. 406, 281 S. W. 693 (1926); *Hogan-Sunkel Heating Co. v. Bradley*, 320 Mo. 185, 7 S. W. (2d) 255 (1928).

7. *Supra*, note 1.

The decisions of the Supreme Court are heightened in significance particularly in those situations where, unless the appealing parties were entitled to review as on an involuntary nonsuit, the filing of a new suit would be barred by the Statute of Limitations.<sup>8</sup>

This decisive declaration by the Supreme Court not only clarifies a matter of technical procedure, but also removes the injustice of denying the right to appellate review, because of non-conformance to what was at best an arbitrary and fictional requirement, *i. e.*, the actual reading of the peremptory instruction to the jury which had no more than a ministerial function to perform.<sup>9</sup>

J. K.

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ATTORNEYS—PRACTICE OF LAYMEN BEFORE ADMINISTRATIVE TRIBUNALS—CONCURRENT REGULATORY POWERS OF JUDICIAL AND LEGISLATIVE DEPARTMENTS.—[Missouri].—The Missouri Supreme Court, in a recent decision,<sup>1</sup> was confronted with the question whether statutes regulating the practice of law constitute an encroachment upon the power of the courts to define and regulate the practice of law. The three unlicensed lay respondents admitted that they had appeared before the Public Service Commission, a statutory tribunal, representing parties litigant for a valuable consideration. The court en banc decided unanimously that the respondents were in contempt of court. Two judges reached this conclusion without applying a statute which made the respondents' behavior a crime.<sup>2</sup> The majority, in a well written opinion by Chief Justice Ellison, held that the statute was a valid manifestation of the legislative police power, and also that it furnished a norm by which the court could judge persons accused of contempt for practicing law illegally. The majority also stated that if a statute should frustrate the administration of justice, the statute would be ignored.

*In Re Richards*<sup>3</sup> recognized that the Supreme Court has inherent power to define and regulate the practice of law, and has original jurisdiction to disbar attorneys. This involves the correlative power to prevent unauthorized persons from practicing law. The respondents in the instant case apparently contended that this judicial power was *exclusive* and therefore that the General Assembly could not by legislation enter any field reached by the court in the exercise of its inherent powers.

This theory of the respondents was accepted in 1909 in the *Gildersleeve* case,<sup>4</sup> which held that the courts have *unlimited* power to punish for con-

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8. R. S. Mo. 1929, secs. 850, 860-864.

9. State ex rel. Witte Hardware Co. v. McElhinney, 100 S. W. (2d) 36 (Mo. App. 1937).

1. Clark v. Austin; Same v. Coon; Same v. Hull, 101 S. W. (2d) 977 (1937) (original proceedings in the Missouri Supreme Court).

2. R. S. Mo. 1929, sec. 11693.

3. 333 Mo. 907, 63 S. W. (2d) 672 (1933).

4. C., E. & O. Ry. Co. v. Gildersleeve, 219 Mo. 170, 181, 118 S. W. 86, 16 Ann. Cas. 749 (1909).