LEGISLATION

THE ROLE OF THE COMMON LAW IN INTERPRETATION OF STATUTES IN MISSOURI

One of the fundamental principles of statutory construction is that all legislation is to be considered in the light of the common law. The reason for this rule is succinctly stated by Sutherland as follows:

> Where the language of the statute is subject to reasonable doubt, reference to common-law principles may provide a valuable clue as to whether a particular situation is controlled by the statute, and so all legislation must be interpreted in the light of the common law and scheme of jurisprudence existing at the time of its enactment. The common law, which has been moulded into a logical classification of subject matter provides one of the most reliable backgrounds upon which an analysis of the purpose and objectives of the statute can be determined.[1]

Thus recourse to the common law is constantly being had when the problem of applying a statute to a particular set of facts is before the courts. In this respect, the decisions in Missouri constitute no exception.[2]

One of the most important functions of the common law in the interpretation of statutes is its serving as a source of definition of words used in a statute, particularly words of art, when the statute does not supply its own definition.[3] An excellent example of the rule that words undefined in the statute are to be interpreted and applied according to their common law meaning is found in a recent case decided by the Missouri Supreme Court. The statute in question provided that ". . . neither the injured party nor any person of kin to him shall be a competent juror on the trial . . ." , but the act did not indicate who was to be considered the injured party's kin. Therefore, the court employed the common law rule, which provided that a prospective juror

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1. 3 SUTHERLAND, STATUTORY CONSTRUCTION 3 (3rd ed., Horack, 1943).
2. See, for example, Howlett v. State Soc. Sec. Comm., 347 Mo. 784, 149 S.W.2d 806 (1941); Johnson v. Fleutsch, 176 Mo. 452, 75 S.W. 1005 (1903).
3. 3 SUTHERLAND, *op cit. supra* note 1, at 9.

was disqualified if related to either the injured party or the defendant within the ninth degree of consanguinity or affinity.[4]

That such a procedure has the approval of the Missouri General Assembly is evidenced by the following statutory provision:

> Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.[5]

The above provision is a part of a section of the Missouri Revised Statutes which attempts to solve some of the problems of defining words contained in statutes in advance by specifically defining particular words, the general statutory definition to be applied unless ". . . otherwise specifically provided or unless plainly repugnant to the intent of the legislature or to the context thereof."[6] Thus, for example, this section provides that when the word property is used it shall be taken to mean both real and personal property.[7] But the legislature can anticipate only a few of such semantic problems in advance, and therefore, although the difficulty of interpretation may be obviated in a slight degree, the importance and usefulness of the rule that words otherwise undefined should be construed according to their common law meaning remains largely undiminished in Missouri.

The Canon That Statutes in Derogation of the Common Law Should Be Strictly Construed

The most significant role of the common law, and the aspect with which this note will be largely concerned is not, however, one in which it functions as an aid in finding the true purpose and meaning of the legislation but rather as merely a rule of construction which, at least in the past, has served more to hinder rather than aid in achieving satisfactory construction of statutes. This hindering effect of the common law stems from the canon of statutory construction that "statutes in derogation of the common law are to be strictly construed." The origins of this rule of construction are not entirely clear,[8] and it has been contended

4. State v. Thomas, 351 Mo. 804, 174 S.W.2d 337 (1943). See also Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000, 82 S.W.2d 909 (1934); State *ex rel.* Williams v. Purl, 228 Mo. 1, 128 S.W. 196 (1910).

5. Mo. Rev. Stat. § 1.090 (1949).

6. Mo. Rev. Stat. § 1.020(1) (1949).

7. Mo. Rev. Stat. § 1.020 (11) (1949).

8. See the following somewhat varying versions of the origin of the

that originally the canon was not intended to have the very stringent effect upon statutes that the courts later gave it. One writer, for example, says:

> In this abstract form, the maxim is hardly an accurate statement of the law as laid down by the early decisions. An early and more precise enunciation is found in a case arising as long ago as the time of Queen Anne: 'Statutes are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare.'[9]

Regardless of the correctness of such contentions, however, it is amply clear that the American courts, in the nineteenth century particularly, adopted the rule in a much more emphatic and vigorous form, namely, that a statute in derogation of the common law should be given a strict construction.[10] As a matter of practical application, this verbalization frequently meant that the words of such statutes were to be twisted and tortured so as to produce as little change in the existing law as possible.

It should be noted that this is not one of the conventional intrinsic or extrinsic aids to interpretation (such as recourse to the legislative history of the act), in which there is a true seeking after the legislative intent, in accordance with the "cardinal rule of construction,"[11] but rather that this is a rule calling for a presumption on the part of the interpreter, a requirement that he approach the legislation with hostility.[12] Be-

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canon: Bruncken, *The Common Law and Statutes*, 29 YALE L.J. 516, 519 (1919); Fordham and Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 440 (1950); Pound, *The Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908).

9. Bruncken, *supra* note 8, at 519.

10. 3 SUTHERLAND, *op. cit. supra* note 1, at 164. A corollary or, as it is frequently called, sub-canon of this rule is that statutes in derogation of common or natural right are likewise to be strictly construed. It was most frequently asserted where a statute was designed to interfere with long vested property or contract rights, or a well-recognized personal freedom. Its importance has, however, steadily declined.

> The violation of a common or natural right was regarded in early English and American jurisprudence as an 'extra-constitutional,' ground for declaring a statute invalid, but in both countries the doctrine has quite generally been rejected. The rule that statutes in derogation of common or natural right are to be strictly interpreted is now generally recognized as being a component of the rule that statutes in derogation of the common law are to be interpreted strictly.

Id. at 180. See also Fordham and Leach, *supra* note 8, at 446.

11. BLACK, HANDBOOK ON INTERPRETATION AND CONSTRUCTION OF THE LAW 46 (2d ed. 1911).

12. Fordham and Leach, *supra* note 8 at 439; Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 342 (1949).

cause it serves more to hinder than to aid in the accomplishment of the legislative purpose, the canon has been repeatedly adversely criticized.[13] As has been frequently observed:

> In a sense every statute, with the exception of declaratory statutes, alters the common law—either directly or by entering fields previously free of common law regulation. Thus all statutes potentially may be strictly construed because they are in derogation of the common law. But to presume that the legislature did not intend to change the common law usually is directly contrary to the fact. . . .[14]

The fact that the canon is of absolutely no assistance in finding legislative intent has been the chief ground upon which its critics have based their opposition.[15]

It has been recognized that there is some justification (when discriminatingly applied) for the sub-canon regarding statutes in derogation of common right in England, which has no written constitution, but it has simultaneously been pointed out that there is no basis for even this sub-canon in the United States.[16] Moreover, there are a few instances in which legal writers have indicated that the canon, if understood in its milder form, to the effect that if the legislature wishes to effect a change in the common law it must do so in clear terms, has some merit. Sutherland states that it may be considered a useful method of securing more certainty in statutory law by resolving doubts as to the applicability of the statute against it.[17] He also states that it may be helpful if used merely to bolster up an interpretation arrived at on other grounds where the result avoids absurdity, retroactivity or unconstitutionality or achieves the purpose of the legislation,[18] although why the result could not be placed upon one of these specific grounds alone is not considered.

It is also pointed out that the canon is useful in restricting

13. For a particularly scathing denunication of the rule see Black, *op. cit. supra* note 11, at 371. See also Fordham and Leach, *supra* note 8, at 438; Freund, *Interpretation of Statutes*, 65 U. OF PA. L. REV. 207, 216 (1917); Pound, *supra* note 8, at 388.

14. Horack, supra note 12, at 344.

15. Either a statute does, or it does not alter the common law. Why, then, a presumption either way? The assumption that it does either, even before the statute is enacted, does not offer much help in finding legislative intent.
3 SUTHERLAND, *op. cit.* supra note 1, at 175.

16. Fordham and Leach, *supra* note 8, at 446; Pound, *supra* note 8, at 387.

17. 3 SUTHERLAND, *op. cit. supra* note 1, at 164.

18. *Id.* at 166.

the effect of unwise, pressure-group legislation, when a judge sincerely feels that it is out of harmony with the wishes of the bulk of the people.[19] It would seem well to ask, however, whether it is the proper function of the judge to enter such a political area.

Aside from these few isolated instances of some merit in the canon's being urged, it has, as is pointed out above, been quite generally agreed by legal commentators that the canon is entirely unsatisfactory and should be abolished. Most of the state legislatures, seeing many of the purposes of their legislation frustrated by the application of the doctrine, have likewise found it something to be deprecated, and accordingly have attempted to legislate it out of existence. The most recent information available indicates that forty-one states and three territories have adopted statutory provisions designed to abrogate the maxim as applied to all or a part of their legislation.[20] Although Sutherland is of the opinion that the statutes have for the most part substantially accomplished their objective,[21] other writers are not so sure that this legislation has been very effective.[22]

Missouri adopted such a provision in 1917. It was added as an amendment to the statute, typical of provisions to be found in many states, declaring that the common law and statutes of Parliament in effect during the fourth year of the reign of James the First should be the rule of decision in Missouri. Immediately following this part of the section, the statute continues:

> . . . but no act of the general assembly or law of the state shall be held invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such common law, or with the statutes or acts of parliament; but all such acts of the

19. Often when the phrase, 'statutes in derogation of the common law are to be strictly construed,' is used, the court is seeking a convenient way to make some policy of the common law which is reflected in basic notions of the people still operative in spite of some special interest legislation. This is the type of policy which would be reflected in the case if it were left to the jury.
Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 463 (1950).

20. Fordham and Leach, *supra* note 8, at 449.

21. 3 SUTHERLAND, *op. cit. supra* note 1, at 177.

22. Fordham and Leach, *supra* note 8, at 449-452; Note, 12 U. OF PITT. L. REV. 283 (1950) (a study of the effectiveness of the Pennsylvania provision abolishing the derogation canon).

> general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.[23]

Therefore, it will largely be our purpose in this note to seek to determine with what success this provision has met in liberalizing the treatment statutes in derogation of the common law have received at the hands of the courts in Missouri. Before this may be accomplished, however, it is necessary to investigate the treatment accorded such legislation in Missouri prior to 1917.

DECISIONS BEFORE THE 1917 ENACTMENT

In the period preceding the legislative attempt to abolish the derogation canon in Missouri, one encounters no difficulty in finding cases which recited this rule of construction as a basis for strictly construing the statute involved.[24] Moreover, the doctrine concerning statutes in derogation of common right was sometimes enunciated in this era.[25]

An example of the sort of construction to be found during the period now under consideration, not only in Missouri but probably almost every other jurisdiction, is contained in an 1885 case. A wrongful death statute before the Missouri Supreme Court for interpretation provided:

> Whenever the death of a person shall be caused by a wrongful act, neglect or default . . . such as would, if death had not ensued, have entitled the injured party to maintain an action and recover damages in respect thereof, then . . . the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.[26]

The defendant in the case was a railroad which had wrongfully received on board its train a fatally wounded man for transportation, thereby hastening his death. The court denied a recovery to the man's widow on the ground that recovery was permitted

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23. MO. REV. STAT. § 1.010 (1949).

24. Clark v. K.C., St. L. & C. Ry., 219 Mo. 524, 118 S.W. 40 (1909); Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908); Thompson v. Union Elevator Co., 77 Mo. 520 (1883); Gibbons v. Epperson, 40 Mo. 253 (1867); Raper v. Lusk, 112 Mo. App. 378, 181 S.W. 1032 (1915); Cox v. Tipton, 18 Mo. App. 450 (1885).

25. There is no canon of construction more rigidly and universally followed than that which requires statutes prescribing summary remedies in derogation of common law and common rights to be strictly or literally construed.
Judson v. Smith, 104 Mo. 61, 73, 15 S.W. 956, 959 (1890).

26. MO. REV. STAT. § 2122 (1879).

only against the one who caused the death and that the defendant had done no more than hasten it. Although under the ordinary principles of tort law, and even the more stringent requirements of the criminal law, the defendant's conduct would have been considered a "cause" of death, the court said this result was not to be reached here because the statute was in derogation of the common law.[27] Thus we see what Mr. Justice Stone called "the ancient shibboleth"[28] at work thwarting the obvious intent of the authors of the legislation.

One of the early cases affirmed the doctrine of strict construction even though in doing so the court arrived at a result unfavorable to the accused in a criminal case. Thus the court felt that the derogation canon overrode the rule of construction that criminal statutes are to be construed in favor of the accused. The statute involved had set out a number of bases upon which one could be convicted of a conspiracy. The defendant's act fell within none of the categories named, but it did constitute a crime at common law. In holding that the statute before them did not operate to repeal the non-statutory law of conspiracy, a result which might easily have been reached, the St. Louis Court of Appeals said, ". . . the new law is treated as replacing the old only in so far as it is directly and irreconcilably opposed thereto in terms."[29]

On the other hand, although the Missouri courts felt no hesitancy about applying the derogation canon when they thought it appropriate, they by no means applied it indiscriminately to every statute conflicting with the common law that came before them. There seems to have been no basic criterion for differentiating between those cases in which the canon was applied and those in which it was rejected, although a hazardous generalization might be made that the Missouri courts were more likely to apply the canon to a penal statute than one which was purely remedial.

For example, the case of *Rozelle v. Harmon*[30] involved considerations very similar to the conspiracy case cited above, and yet an opposite result was reached. In the *Rozelle* case, the issue

27. Jackson v. St. L., I.M. & S. Ry., 87 Mo. 422 (1885).
28. *The Common Law in the United States*, 50 HARV. L. REV. 4, 18 (1936).
29. State v. Dalton & Fay, 134 Mo. App. 517, 527, 114 S.W. 1132, 1136 (1908). *Cf.* Yost v. Union Pac. R.R., 245 Mo. 219, 149 S.W. 577 (1912).
30. 103 Mo. 339, 15 S.W. 432 (1891).

was whether the Missouri statutes governing the administration of estates operated to bar a suit against the defendant as an *executor de son tort.* Clearly at common law such a suit would have been possible, but the statute did not discuss such a situation. Nevertheless, the Missouri Supreme Court in this instance held that the system of administration provided by statute was intended to be the exclusive law on the subject, having impliedly repealed any common law principles not mentioned in the statute. To the argument of counsel that the statute was in derogation of the common law and therefore should be strictly construed, the court replied:

> That rule of construction is not of universal application. It depends much on the character of the law to be affected. In cases of statutes, penal in character, or in derogation of common right, a strict construction is required, but, in regard to statutes merely remedial in character, a fair if not a liberal, construction should be given.[31]

As has been seen from the cases cited *supra,* such a rationalization does not explain all the cases, however.

There are other cases decided prior to 1917 which also accorded statutes quite clearly in derogation of the common law a liberal treatment,[32] and it would be very difficult to classify all the statutes involved as purely remedial. It should be noted that in those cases which did apply a liberal interpretation the court paid at least lip-service to the "ancient shibboleth," but found some reason for not being guided by it. Moreover, the instances in which the court found the canon inapplicable are decidedly fewer than those in which it accorded the statute conventional treatment.

Interestingly enough, however, in one early case[33] the St. Louis Court of Appeals found itself speaking in terms directly contrary to the rule of construction now under consideration. In answering counsel's contention that because the statute was in derogation of the common law, and that therefore it should be construed so as to amount to no more than a restatement of the law on the point prior to the statute, that court said:

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31. *Id.* at 343, 15 S.W. at 432.

32. See, for example, *Ex parte* Welborn, 237 Mo. 297, 141 S.W. 31 (1911); State v. Clinton, 67 Mo. 380 (1878).

33. Reed v. Goldneck, 112 Mo. App. 310, 86 S.W. 1194 (1905).

> . . . we must presume that the Legislature knew the law as it existed, and sought to make some change by statutory innovation. We are to understand then, that the Legislature intended to change the rules. . . . To hold that the above statute did no more than reassert the common law on the subject, would be equivalent to holding that its provisions accomplish no purpose whatever.[34]

Thus we see that there were some instances in the period before 1917 in which the Missouri courts did deal with particular statutes in a fairly liberal manner, but these instances were on the whole isolated cases, and when the courts did depart from the rule of strict construction they usually did so begrudgingly and only after reaffirming their belief in the soundness of the canon as a general proposition of law.[35] Thus, this period may be summarized as one in which the courts of Missouri were certainly on the whole committed to the derogation canon in name, and in most instances followed it in fact, although there were a few occasions when the courts deviated from this rule when other considerations were deemed to be more significant. It is against this background that the legislation of 1917 was projected into the picture.

The Period After 1917

The interpretation provision of 1917 by no means immediately eliminated the derogation canon from the minds of the judges as a factor to be considered in the construction of statutes. Several cases decided in the courts of appeals flatly stated that since the statutes before them were in derogation of the common law they were to be strictly construed, without indicating that they were at all cognizant of the 1917 act.[36] And the Missouri Supreme Court on one occasion very shortly after the passage of the act recited the derogation canon, and although it alluded to the 1917 statute was ". . . of the opinion that the above act has no application to the construction . . ." of the statute then before them.[37]

34. *Id.* at 313, 86 S.W. at 1105. See Thomas v. Maloney, 142 Mo. App. 193, 126 S.W. 522 (1910) where the court, obviously desirous of achieving a liberal result and yet hesitant to denounce the derogation maxim, said that although it was true that adoption was unknown to the common law, and that statutes providing therefor must be strictly construed, ". . . the rule of strict construction is not extended to the act of adoption itself."

35. For a particularly good example of this attitude on the part of the courts, see Wyckoff v. Southern Hotel Co., 24 Mo. App. 382 (1887).

36. Bostic v. Workman, 224 Mo. App. 645, 31 S.W.2d 218 (1930); Balter & Miller v. Crum, 199 Mo. App. 380, 203 S.W. 506 (1918).

37. Taff v. Tallman, 277 Mo. 157, 166, 209 S.W. 868, 870 (1918).

And there have been other instances after 1917 where the Missouri Supreme Court applied a rather strict construction to the statute involved. In these cases, however, the court has been somewhat more discreet in its rationalization of the result. Instead of patently basing the result on the derogation rule, the opinions have employed such language as: the fact that the rights conferred and procedure established for their enforcement were wholly creatures of statute made it necessary that the party asserting such rights bring himself squarely within the statutory requirements,[38] or merely that the statute was to be construed in the light of the common law.[39]

Although it is thus evident that the 1917 statute did not by its very enactment abolish the canon in Missouri, it should be noted that those cases in which the Supreme Court continued to follow the policy of construing statutes strictly were decided relatively shortly after 1917, and that there remain only a few court of appeals decisions to perpetuate traces of the canon in recent years.[40]

On the other hand, most of the cases decided after 1917 which have at all noted that the statute was in conflict with common law principles have gone on to construe the statute liberally. Some of these cases were decided shortly after passage of the 1917 statute. For example, *Turner v. Drees Hdw. & Furn. Co.*,[41] decided in 1920, expressly rejected a 1918 decision[42] which had said that the Bulk Sales Act, being in derogation of the common law, should be strictly construed. The court cited the 1917 statute (apparently overlooked in the prior decision) as its reason for the changed result.[43]

There are a number of cases decided after 1917 which indicate that the Missouri courts have, for the most part, abandoned the

38. Betz v. K.C. South. Ry., 314 Mo. 390, 284 S.W. 455 (1926); Sarazin v. Union R. R., 153 Mo. 479, 55 S.W. 92 (1919). See also Young Women's Christ. Ass'n. v. Lapresto, 169 S.W.2d 78 (Mo. App. 1943).

39. State v. Wolfner, 318 Mo. 1068, 2 S.W.2d 589 (1928). See also Continental Bank Supply Co. v. International Brotherhood of Bookbinders, 239 Mo. App. 1247, 201 S.W.2d 531 (1947); State *ex rel.* Kenney v. Johnson, 229 Mo. App. 16, 68 S.W.2d 278 (1934).

40. Orrick v. Orrick, 233 S.W.2d 826 (Mo. App. 1950). See also notes 36, 38, 39 *supra*.

41. 207 Mo. App. 567, 227 S.W. 1085 (1920).

42. Balter v. Miller & Crum, 199 Mo. App. 380, 203 S.W. 506 (1918).

43. But see Rothenheber v. Pulitzer Pub. Co., 262 S.W. 48 (Mo. App. 1924).

canons both as to common law and common right as rules of construction. In many instances where one of these maxims almost certainly would have been applied according to the conventional thinking of the nineteenth century, the courts make no mention of either the canon or the statute abolishing it, but rather proceed to accord the statute before them a liberal interpretation on some other ground.[44]

The most significant factor is that no very recent Missouri Supreme Court decision enunciates the derogation canon or (so far as can be discerned) applies it without specifically stating that fact. On the contrary, the Missouri Supreme Court has served notice that it no longer considers this rule of construction of any consequence at all in Missouri, this statement having been made in cases involving statutes traditionally subject to strict interpretation because of their conflict with the common law.[45] There have been no such recent emphatic announcements from the courts of appeals, who as indicated, were chiefly responsible for the continuation of the canon after 1917, but they too at times have displayed a quite liberal attitude toward legislation clearly in derogation of the common law,[46] and it may be expected that they will, at least on the whole, follow the pronouncements of the Missouri Supreme Court.[47] Thus it appears that although a substantial period of time after 1917 was required for the Missouri courts to reach a position of cooperation with the 1917 interpretation provision, that position has now about been effected.

The problem involved in determining whether a statute should be construed strictly is ordinarily one of whether the words of the statute should be limited so as to restrict the language of the

44. Stamm Electric Co. v. Hamilton-Brown Shoe Co., 350 Mo. 1178, 171 S.W.2d 580 (1943); Wentz v. Price Candy Co., 352 Mo. 1, 175 S.W.2d 852 (1943); Robertson v. Jones, 345 Mo. 828, 136 S.W.2d 278 (1940); Cummins v. K.C. Pub. Serv. Co., 334 Mo. 672, 66 S.W.2d 920 (1933); Hannibal Trust Co. v. Elizea, 315 Mo. 485, 286 S.W. 371 (1926); Martin v. Claxton, 308 Mo. 314, 274 S.W. 77 (1925); Grier v. K.C., C.C. & St. J. R.R., 286 Mo. 523, 228 S.W. 454 (1921); McManus v. Park 287 Mo. 109, 229 S.W. 211 (1921); Moore & Co. v. McConkey, 240 Mo. App. 198, 203 S.W.2d 512 (1947).

45. Cooper v. K.C. Pub. Serv., 356 Mo. 482, 202 S.W.2d 42 (1947) (wrongful death act); *In re* Duren 355 Mo. 1222, 200 S.W.2d 343 (1947) (adoption statute); Women's Christ. Ass'n. of K.C. v. Brown, 354 Mo. 700, 190 S.W.2d 900 (1945) (zoning ordinance).

46. Town of Carrollton *ex rel.* Barrie v. Thomas, 24 S.W.2d 218 (Mo. App. 1930); Betz v. K.C. South. Ry., 253 S.W. 1089 (Mo. App. 1923).

47. See, however, Orrick v. Orrick, 233 S.W.2d 826 (Mo. App. 1950).

statute itself on a specific point in order to effect as small a change as possible in the common law previously existing on the subject. As has been pointed out, the Missouri courts have in recent years become quite liberal in this respect, despite the fact that the derogation canon had, before 1917, gained a rather solid foothold in Missouri.

An example of the problem as it normally arises and of the manner in which the Missouri Supreme Court would dispose of it today is to be found in *Cape Girardeau v. Hunze.*[48] One of the issues there involved was whether the tax paying citizens of a municipality were disqualified as jurors in litigation involving the municipality. It had been a well established rule at common law that they were so disqualified. The Missouri Supreme Court said:

> A number of early decisions of this court recognized and adhered to the common-law rule. . . . Since these early decisions, the Legislature has enacted a statute . . . which provides: 'In all actions by or against any county or city, the inhabitants of the county or city so suing or being sued may be jurors if otherwise competent and qualified.' Appellants insist that the foregoing statute is in derogation of the common law and hence must be strictly construed. The Legislature, however, in 1917 . . . repealed our former statute enacting the common law and enacted a new section in lieu thereof. . . .[49]

Thus in this sort of case, where one of the parties flagrantly seeks to have the court limit the language of the statute in order to thwart what is the quite obvious purpose of the legislature, his contentions will be brushed aside with little hesitancy.

A somewhat more specific problem involved under the general issue of whether the words of the statute are to be liberally or strictly construed is that arising in the situation where there existed at common law several distinct rights or causes of action in a particular area of the law, and there was then enacted legislation in this area which does not expressly deal with all aspects of the problem. The issue is then how far the statute or statutes involved "occupy the field." Do they impliedly repeal all of the common law on the subject, or at least that part of the common law which would clearly govern the factual situation

48. 314 Mo. 438, 284 S.W. 471 (1926).
49. *Id.* at 456, 284 S.W. at 476.

before the court in the absence of the legislation? In the past, this problem of statutory construction was one in which the courts of most jurisdictions were quite wont to apply the derogation canon.[50]

In this limited area, the courts in Missouri, on the whole, appear even prior to 1917 to have approached the question with a fairly open mind. They considered all the circumstances involved and, although somewhat hesitantly, sometimes arrived at a decision that the scope of the statute was such as to impliedly change the common rules a good deal more than the actual wording of the statute seemed to make absolutely necessary.[51] On the other hand, it could hardly be said that the Missouri courts approached this legislation with a liberal attitude before 1917, and just as often as not they found that the common law rights and causes of action were not impliedly repealed, verbalizing this result by means of the derogation canon.[52]

An example of the type of case now under consideration involved a statute which abolished the common law defenses of contributory negligence and assumption of the risk in negligence actions by trainmen against their employers, and which imposed a special two year statute of limitations on suits under the act. The issue was whether this statute impliedly abolished the common law action of negligence for this class of employees when they could show a cause of action under common law principles alone and had not brought suit within two years after the injury occurred. The Missouri Supreme Court in this instance held the common law action of negligence still existent, attributing the result in part to the fact that the statute was in derogation of the common law.[53] However, it appears from the opinion that the statute played only a minor role in the determination of the case; other factors rather clearly were the primary determinants of the result.

In the period after 1917, there have been few cases involving this particular sort of problem before the courts. This situation is perhaps largely attributable to the fact that there are today

50. 3 SUTHERLAND, *op. cit. supra* note 1, at 164.
51. Rozelle v. Harmon, 103 Mo. 339, 15 S.W. 432 (1891); Wyckoff v. Southern Hotel Co., 24 Mo. App. 382 (1887).
52. State v. Dalton & Fay, 134 Mo. App. 517, 114 S.W. 1132 (1908). *Cf.* Raper v. Lusk, 192 Mo. App. 378, 181 S.W. 1032 (1915).
53. Yost v. Union Pac. R.R., 245 Mo. 219, 149 S.W. 577 (1912).

relatively few areas of the law governed solely by common law principles, so that most modern legislation does not enter areas theretofore unregulated by statute. Of the few courts of appeals opinions which have dealt with this problem since 1917, several have displayed reluctance to find that the statute before them impliedly repealed the common law on the subject,[54] and one, decided in 1930, flatly stated that it would not extend the statute beyond its literal terms because it was in derogation of the common law.[55] However, the Missouri Supreme Court has indicated that it intends to construe such statutes liberally in accordance with the purpose of the 1917 statute, even when such a course involves a finding that a particular area of the law is now wholly regulated by legislation. Thus the latest pronouncement of the Missouri Supreme Court on this aspect of the subject indicates that so far as it is concerned the ancient rule that statutes in derogation of the common law should be strictly construed is no longer of any consequence in Missouri.[56]

Perhaps the success of the 1917 interpretation provision can best be illustrated by examining the treatment accorded several types of statutes traditionally viewed as in derogation of the common law after the 1917 act. The wrongful death act and the statutes relating to adoption serve as the best examples.

The wrongful death statutes, being patently in derogation of the common law, were accordingly under the older jurisprudence quite strictly construed by the Missouri Supreme Court.[57] But with one exception (in which the Supreme Court[58] overruled a liberal interpretation by the Springfield Court of Appeals[59]) the wrongful death statutes in Missouri have been liberally interpreted since 1917.[60]

Similarly, in one of the latest cases construing an adoption statute, a type of legislation also traditionally construed strictly

54. Continental Bank Supply Co. v. International Brotherhood of Bookbinders, 239 Mo. App. 1247, 201 S.W.2d 531 (1947); State *ex rel.* Kenney v. Johnson, 229 Mo. App. 16, 68 S.W.2d 278 (1934).

55. Bostic v. Workman, 224 Mo. App. 645, 31 S.W.2d 218 (1930).

56. Robertson v. Jones, 345 Mo. 328, 136 S.W.2d 278 (1940).

57. Clark v. K.C., St. L. & C. Ry., 219 Mo. 524, 118 S.W. 40 (1909); Jackson v. St. L., I.M. & South. Ry., 87 Mo. 422 (1885).

58. Betz v. K.C. South. Ry., 314 Mo. 390, 284 S.W. 455 (1926).

59. Betz v. K.C. South. Ry., 253 S.W. 1089 (Mo. App. 1923).

60. Cooper v. K.C. Pub. Serv. Co., 356 Mo. 482, 202 S.W.2d 42 (1947); Cummins v. K.C. Pub. Serv. Co., 334 Mo. 672, 66 S.W.2d 920 (1933); Grier v. K.C., C.C. & St. J. Ry., 286 Mo. 523, 228 S.W. 454 (1921).

at common law, the Supreme Court emphatically indicated that it considered the derogation canon abolished in Missouri. The court said:

> [The Act of 1917] . . . forbids a construction of statutes limiting their scope or effect merely because they are in derogation of the common law. And aside from that, our courts are not wedded to the doctrine of 'strict' and 'liberal' construction of statutes. They seek to arrive at the intention of the legislature as disclosed, in part at least, by the objectives of the legislation.[61]

CONCLUSION

Although it is now clear that the Missouri Supreme Court has divorced itself from the doctrine of strict construction of statutes in derogation of the common law,[62] it is not so clear that it has yet achieved the very liberal attitude which Dean Pound had in mind when he said:

> Strict or liberal construction of statutes is by no means the whole question. Even when statutes are not avowedly given a strict construction, as being in derogation of the common law, courts refuse to treat the rules established by legislation as parts of the law. They are conceded to be applicable to certain cases because the legislature clearly said so, but they are not conceived of as entering into the legal system as an organic whole. They are not regarded as coordinate with the common law rules *in pari materia*.[63]

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61. *In re* Duren, 355 Mo. 1222, 1235, 200 S.W.2d 343, 352 (1947). It should also be noted that the workmen's compensation act has been construed quite liberally in behalf of the workman by the courts. Wentz v. Price Candy Co., 352 Mo. 1, 175 S.W.2d 852 (1943); Decker v. Raymond Concrete Pile Co., 336 Mo. 1116, 82 S.W.2d 267 (1935); Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000, 82 S.W.2d 909 (1934); Evarard v. Women's Home Companion Reading Club, 235 Mo. App. 760, 122 S.W.2d 51 (1938); Drecksmith v. Universal Carloading Co., 18 S.W.2d (Mo. App. 1929). How great a part the specific statutory provision that the act be liberally construed contained in the act has played is uncertain, but the same result would probably have been achieved without it because practically all courts have in recent years displayed a marked tendency to extend very liberally social legislation "substituting modern and humane social duties" for the rigorous rules of the common law. 3 SUTHERLAND, *op. cit. supra* note 1, at 171.

62. It should be pointed out, however, that research for this note was conducted upon a limited scale, being confined for the most part to instances in which the courts have in their opinions noted the fact that the statute involved was in derogation of the common law. Thus there may possibly be a number of instances in which the courts have been influenced by the factors underlying the derogation canon without indicating this in their opinion.

63. Pound, *supra* note 8, at 386.

There have, to be sure, been instances when the Missouri Supreme Court appeared to have been utilizing the Missouri statutes as Dean Pound would have desired,[64] but it appears that the time when legislation achieves this status completely will not arrive in the near future.

Nevertheless, the Missouri Supreme Court has, in the space of about thirty-five years, achieved one great step forward by very nearly eradicating the ancient canon that statutes in derogation of the common law are to be strictly construed.

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64. See Martin v. Claxton, 308 Mo. 314, 274 S.W. 77 (1925).