ROBERT E. ROSENWALD, who writes on *Exemptions From Jury Service and Challenges for Cause in Missouri,* in this issue, contributed a related article to the LAW REVIEW last year, on *The Right of Judicial Comment on the Evidence in Missouri.* He is a graduate student in the Department of Political Science of Washington University and a Senior in the School of Law.

SAMUEL BRECKENRIDGE LAW REVIEW NOTE PRIZES

Announcement of the awarding of the Samuel Breckenridge prizes for LAW REVIEW notes is made as follows: Sam Elson has been awarded forty dollars for the best notes in numbers 3 and 4 of Volume XIV and for the best note in that volume. The prizes were given for *Recent Developments in the Right of Privacy,* 14 ST. LOUIS L. REV. 306, which was adjudged best for the year as well as in the issue in which it appeared, and *Habitual Criminal Acts and the Ex Post Facto Clause,* 14 *ibid.* 414. The committee which made the awards for Volume XIV consisted of Messrs. Israel Treiman, Robert H. McRoberts, and Milton R. Stahl. The committee which is judging the notes in Volume XV is composed of Adolph M. Hoenny, Maurice R. Stewart, and Monroe Oppenheimer.

Notes

A SURVEY OF APPEALED CASES IN MISSOURI IN 1923-24*

The primary purpose of this study of the final disposition of cases in the Supreme and Appellate Courts in Missouri is to reveal the extent to which alleged errors in the admission or exclusion of evidence have been made the basis in whole or in part of appeals and of reversals. Wigmore[1] in discussing the effect to be given to erroneous rulings by a trial court in the admission or rejection of evidence declares that the issue is whether the law of evidence "shall be a mere means to an end,—the end being a just settlement of particular controversies,—or whether it shall be an end in itself—an end so independent of justice, and so superior thereto, that it must be attained even at the cost of

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* Prepared by Ruth E. Bates, Research Assistant in the School of Law, 1928-1929.

[1] I Wigmore, EVIDENCE (2d ed.) sec. 21; Chamberlayne, THE MODERN LAW OF EVIDENCE, sec. 320, but compare 4 C. J. 963 and 969.

justice,—this depends practically upon whether it can be conceded an erroneous ruling on evidence is 'ipso facto' a ground for a new trial."

The original English rule was that an erroneous admission or rejection of evidence did not justify the court in setting aside the verdict unless it appeared that the truth had not been reached. Later the Court of Exchequer declared that an error in *ruling* upon an evidence point was *per se* a ground for a new trial. This rule was adopted by the other courts of England and was brought to America. It has since been abolished in England but it remains the law in the majority of American states.[2]

In discussing the Exchequer rule Mr. Wigmore says:

> "As to the practical working of the Exchequer rule, the results are lamentable. Whether in civil or criminal cases, it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling . . . . Just so long as an erroneous ruling on evidence, however trifling, is described by the highest judges (and in many courts it habitually is) as 'working a reversal,' just so long will the reproach of technicality and futility mark our litigation. Until the rules of Evidence cease to be assimilated to the play of a hand at whist or the operation of an automatic cash-register, they must remain, as often as not, the instruments of injustice."

Chamberlayne[3] says the rule gives the criminal an implied right to outwit the law. "It has proved easy to overlook the fact that indulgence to the guilty may be, and often is, inhuman cruelty to the innocent. Setting aside a just verdict on a technicality is a clemency extended, it will be observed, not to the person accused of crime—for which there might, indeed, be a pseudo justification; but to one shown guilty of the crime charged. Society is placed in the anomalous position of waging war with its enemies, while imposing a heavy handicap upon itself." He says further that the rule "involves a requirement of absolute inerrancy on the part of a trial judge. He must, at the peril of justice, comply absolutely with every technical requirement of the law of evidence—working out, in the hurry and other embarrassments of a nisi prius trial, a result to which the

[2] Judicature Act of 1875; Rules of the Supreme Court (1875) order 39, rule 6.

[3] *Op. cit.* n. 1 above, secs. 312-331.

greater calm and leisure of an appellate court will not enable them to find any possible exception. When the number of administrative problems, accentuated by the desire of counsel to 'get error into the record,' is considered, the unfairness of this to a trial judge is obvious. A practically impossible standard is erected. Penalty, reversal. Result, delay and expense to litigants; disrespect for law."

Chamberlayne also points out that England is not dissatisfied with the results of its modern rule and quotes Mr. Justice Amidon,[4] as follows: "For the purpose of comparison, and of seeing whether this condition [in the United States[5]] is a necessary evil, I have examined the law reports of England for the period extending from 1890 to 1900, and I find that of all the causes that were brought under review on appeal in that country, new trials were granted in less than three and one-half per cent."

A recent investigation of criminal cases before the Supreme Court of California revealed that "From 1850 to 1899, 215 cases were reversed because of errors committed in admitting or refusing certain evidence. This number represents 35.5 per cent of the cases reversed for procedural errors and 29.5 per cent of the total number of cases reversed." The investigator points out a decline in reversals in the past 16 years which he attributes to the constitutional amendment that precludes reversal unless error is substantial—affecting the case on its merits.[6]

Missouri has a statutory provision guarding against a reversal merely because of an erroneous ruling on evidence when the decision on the merits is for the right party.[7] The following quotation will indicate the attitude of the Missouri courts toward the statutory provision: "In view of the fact that we cannot perceive there was any harm done, we believe that to reverse the judgment and remand the cause for this irregularity would be to violate the spirit as well as the letter of section 1513, R. S.

[4] N. Y. Outlook, July 1906, at p. 601.

[5] According to American statistics as quoted by Mr. Justice Amidon, 46 per cent of all verdicts are reversed and 60 per cent of the new trials granted are based on alleged error in procedural matters.

[6] Vernier, *Reversal of Criminal Cases in the Supreme Court of California.* 2 So. CAL. L. REV. 21, 27.

[7] R. S. Mo. (1919) sec. 1513: "The Supreme Court or Court of Appeals shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action." The history of this law is as follows: originally passed, Laws 1871, p. 49, sec. 33, naming only the Supreme Court, amended, Laws 1889, sec. 2303, to include the Appellate Courts.

1919, forbidding the reversal of a judgment unless the court shall believe that error 'materially affecting the merits of the action' was committed."[8]

The statistical report in Table I which follows will show that during the two-year period considered, only 6.6 per cent of the 668 cases reversed[9] were reversed on evidence grounds alone, and that 11 per cent were reversed on evidence grounds plus other grounds. This surprisingly low percentage of reversals on evidential grounds would seem to place Missouri among the minority group of states in which legislative action giving a special place to the merits of the case has proved successful. This attitude of the Missouri court is further emphasized by the fact that in 86 of the cases affirmed during the two-year period, non-prejudicial error in the admission or exclusion of evidence was found.

Table II is not pertinent to the purpose of this investigation but the material was incidentally available and is appended for its general informational value. In comparing the amount of business handled in the Appellate Courts it is fair to note that the St. Louis Court of Appeals and the Kansas City Court of Appeals have, while the Springfield Court of Appeals does not have, the aid of commissioners.

TABLE I.[10] DISPOSITION OF CASES IN THE SUPREME AND APPELLATE COURTS

	CIVIL CASES				CRIMINAL CASES			
	Affirmed		*Reversed*		*Affirmed*		*Reversed*	
	1923	1924	1923	1924	1923	1924	1923	1924
Evidence Grounds	131	136	14	13	31	30	3	14
Evidence and other grounds ...	...	...	35	17	..	..	16	6
Other grounds	422	334	242	206	59	42	42	59
Totals	553	470	291	236	90	72	61	79

[8] Slaughter v. Sweet & Piper Horse & Mule Co. (Mo. A. 1924) 259 S. W. 131, 135.

[9] The cases reversed represent 31.4 per cent of the total number of cases appealed. During 1924 16.4 per cent of the cases reversed were reversed solely upon the ground of erroneous instructions and 25.6 per cent of the reversals were partially upon erroneous instructions. 21.1 per cent of the cases reversed were criminal cases. Of these 12.1 per cent were reversed on evidence grounds and 15.6 per cent were reversed on evidence plus other grounds.

[10] This table does not take account of original proceedings and cases transferred. Such cases numbered 62 in 1923 and 152 in 1924, bringing the total of cases disposed of for the year 1923 to 1115 and for the year 1924 to 1009.

TABLE II. A COMPARISON OF BUSINESS IN THE SUPREME AND APPELLATE COURTS OF MISSOURI

Supreme Court

Civil Cases and Writs	1923	1924	Criminal Cases	1923	1924
Affirmed	174	130	Affirmed	50	48
Reversed	86	72	Reversed	40	48
Transferred	6	10	Transferred	13	5
Otherwise disposed of	2	8			
Writs	50	76			
Disbarment		2			
Total	318	298	Total	103	101

St. Louis Court of Appeals

Civil Cases and Writs	1923	1924	Criminal Cases	1923	1924
Affirmed	183	174	Affirmed	8	11
Reversed	88	72	Reversed	6	9
Transferred	3				
Otherwise disposed of	2	1			
Writs	5	2			
Total	281	249	Total	14	20

Kansas City Court of Appeals

Civil Cases and Writs	1923	1924	Criminal Cases	1923	1924
Affirmed	140	107	Affirmed	16	2
Reversed	76	54	Reversed	3	7
Transferred	4				
Otherwise disposed of	2				
Writs	1	8			
Total	223	169	Total	19	9

Springfield Court of Appeals

Civil Cases and Writs	1923	1924	Criminal Cases	1923	1924
Affirmed	80	83	Affirmed	15	10
Reversed	40	39	Reversed	12	16
Transferred	6	5	Transferred	1	2
Otherwise disposed of	1	3	Otherwise disposed of		2
Writs	2	4			
Total	129	134	Total	28	24