PRACTICE IN MISSOURI ON MOTIONS IN ARREST OF JUDGMENT IN CIVIL CASES.

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In the opinion of Stid v. Railroad,[1] the remark is made that, under our practice, the technical office of a motion in arrest of judgment has become obscure in certain phases, and that cases might be cited where matter proper to such a motion had been considered on appeal, although only a motion for a new trial had been filed below. This statement was renewed in Warren v. Lead, etc., Co.[2] A careful reading of the cases cited at the foot of the paragraph in the Stid case containing those dicta, and other Missouri decisions, has failed to show that our Courts of Review have not distinguished clearly between the respective functions of a motion in arrest of judgment and a motion for a new trial, in every decision touching the matter, unless Funkhouser v. Mallen[3] confuses the uses of the two. In that case, which was one in ejectment, the plaintiff moved verbally for a judgment on the pleadings, on the ground that the answer admitted the plaintiff's title, while the affirmative matter plead in defense did not state facts sufficient to constitute a defense. The motion was sustained below, whereupon defendant moved to arrest the judgment, but not for a new trial. On appeal, it was held the answer was good and that the ruling of the trial court could have been reviewed on a motion for new trial, but, as it was patent of record, could be reviewed too on a motion in arrest. It is difficult to perceive how the error was patent of record, or could be in the record without being preserved in a bill of exceptions. The objection that the answer stated no defense was raised by a motion, and a verbal one at that, during the progress of the case, and upon the verbal objection the answer was held insufficient. It is true the answer was part of the record; but it would not be clear on the face of the record that judgment went against the defendant upon a motion attacking the answer for insufficiency, as motions are not part of the record proper.

In numerous decisions, both early and recent, the purpose of mo-

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1. 211 Mo. 411, 414.
2. 255 Mo. 138.
3. 62 Mo. 555.

Note—The motion in arrest in criminal cases has been abolished. See Session Laws 1925, page 198.

tions in arrest has been declared and distinguished from the purpose of motions for new trial.

In Welch v. Bryan,[4] where the question was whether the judgment for the plaintiff would have been arrested because the petition stated no cause of action, the Court said that in determining such motions the decision must be upon the record only, and not from what took place at the trial; which was equivalent to saying that a motion in arrest goes only to error shown in the record proper, the technical record, and not to those shown in the bill of exceptions, which is no part of the record proper and is used to carry into the record the rulings in the progress of a case, of which, otherwise, no record would be kept. Examples of such matters are rulings on evidence, instructions, motions, etc.

In State v. Larew[5], the bill of exceptions had been filed, but after the trial term and too late to preserve exceptions taken during the trial. It was contended on appeal that nothing was before the Supreme Court but the record proper, and the Court had to decide whether any exceptions ought to be considered, or only such errors as were patent on the record, and had been pointed out in a motion in arrest. The Court said it was "essential to keep in view the respective offices of a motion for a new trial and one in arrest of judgment. The function of a motion for a new trial is to call the attention of the trial court to rulings which constitute matters of exception taken during the trial, whereas the motion in arrest reaches only those defects which are apparent on the record, and does not reach such as are required to be brought to the attention of the Court by exceptions, such for instance, as the giving or refusing of instructions, admitting or rejecting evidence, and like matters." It was further held that no assignments of error could be considered except those appearing in the record proper and which were reached by the motion to arrest the judgment. To the same effect are McGannon v. Ins. Co.[6]; McCarty v. O'Bryan[7]; Southern Missouri, etc. Ry. Co. v. Wyatt[8]; Kansas City Masonic Temple Co. v. Young[9], and numerous other cases.

In declaring that the function of a motion in arrest is to point out errors in the record proper, the Review Courts of the State have defined what constitutes the record proper. In State v. Bonner[10] it is said to consist of the writ (namely, the process by which the Court acquires jurisdiction over the person of the defendant, or his property),

4. 28 Mo. 30.
5. 191 Mo. 192, 196.
6. 171 Mo. 173.
7. 137 Mo. 584, 589.
8. 223 Mo. 347.
9. 179 Mo. App. 278.
10. 5 Mo. App. 15, 16.

pleadings, verdict and judgment. This enumeration accords with the current of authority here and elsewhere.

Process: But one Missouri decision[11] has been found wherein it was held the motion may be used to arrest the judgment because of bad process, and such cases are rare. In the one cited, the writ of prohibition was asked to prevent the respondent, as judge of the Circuit Court of the City of St. Louis, from exercising jurisdiction in a cause brought against the relator upon a judgment given against him as a surety on a guardian's bond, which judgment had been rendered by a Chancery Court of the State of Tennessee. The Supreme Court of Missouri held the motion in arrest would lie, not only because the judgment of the Circuit Court in this State was not responsive to the issues framed in the action on the Tennessee judgment, but also because the Chancery Court of Tennessee had no jurisdiction over the relator, the service upon him, as shown by the return of the writ of summons, being void. It seems the records of the Tennessee Court contained a recital that the relator (defendant in said Court) had been duly served with process, but the Court held this recital was impeached by the return of the officer on the writ of summons, which showed the relator had not been lawfully served; that the writ was part of the record proper and no judgment could be rendered on such a service by the Tennessee Court, nor could any judgment be rendered by the Missouri Court on the void Tennessee judgment.

In Neal v. Gordon[12] the action was by attachment based on an affidavit held to be insufficient to support the writ, and it was further held that a judgment against the defendant and his surety on a bond to replevy the attached property, would be arrested upon the motion of the surety. In Hartridge v. McDaniel[13] it was said that a fatal defect in process was sufficient cause to arrest the judgment, but the decision did not turn on that point.

As to Verdict: Cases dealing with the use of the motion to stay judgments when the verdicts were bad, are more frequent. In Nichols and Shepard Co. v. Stokes[14], the Court said the way to make the objection that the verdict is irresponsive to the pleadings, is by a motion in arrest and if not thus raised, the point is waived. The like ruling was made where the verdict failed to dispose of the defendant's counter claim[15]. And where the jury omitted to find either for or

11. State ex rel. v. Fisher, 230 Mo. 325.
12. 60 Ga. 112.
13. 20 Ga. 398.
14. 196 S. W. 1075.
15. Lindsay v. Nagel, 157 Mo. App. 128.

against one of the defendants in the case, this was held to be ground for the motion by the other defendants.[16] So where the verdict was conditional upon the plaintiff's performing some act and the action was for money had and received by the defendant to the plaintiff's use, motion in arrest was sustained (Butcher v. Metz[17], not a Missouri case, but a well-reasoned one). If the verdict is for the entire amount demanded by the plaintiff and his petition contains several causes of action, if any count happens to be defective the judgment will be arrested.[18] And this is true even where several causes of action are set forth in the petition, and no count is bad, but a general verdict is rendered.[19]. Such is not the rule when the petition declares on the same cause in two or more counts.[20] In an action on an administrator's bond, there was an allegation that money received by the administrator had not been paid over and a finding by the jury that the administrator had failed to pay, but no finding of non-payment since his death, and for this imperfect verdict it was held that judgment be arrested.[21] Neglect to find on all the issues is ground for arrest.[22] And it has been declared that the proper and only way to reach an improper verdict and avoid waiving the fault, is by such a motion and not by one for a new trial.[23]

Pleadings: Though judgments for defendants have been arrested when the answer stated no defense,[24] most of the motions are directed to the failure of the petition to state facts constituting a cause of action. In Rogers v. Fire Insurance Co.,[25] the Supreme Court went so far as to say that "a motion for a new trial cannot reach the sufficiency of a pleading. This is the office and function of a motion in arrest of judgment." Of course, the Court had in mind an attack on the petition because of failure to set forth a cause of action, and not minor objections; for example, to strike out surplus matter, or to make the statement more definite. This is so, because judgments

16. Winkleman v. Maddox, 119 Mo. App. 658.
17. I. Miles, 153 Phila. Dist. Ct.
18. Clark's Admrx. v. Railway, 36 Mo. 202.
19. Pitch v. Fugate, 41 Mo. 405.
State ex rel v. Dulle, 45 Mo. 269.
Owens v. Railway, 58 Mo. 356.
20. Moffitt v. Turner, 23 Mo. App. 194.
21. Finney v. State, 9 Mo. 632.
22. Wells v. Adams, 88 Mo. App. 215.
23. Erdbrugger v. Meier, 14 Mo. App. 258.
Wells v. Adams supra.
24. Carven v. Hanley Com. Pleas, Burnes Notes, 1842.
Fitch v. Scott, I Root (Conn.), 351.
Buckingham v. McCracken, 20 Mo. 287.
25. 186 Mo. 248, 257.

can only be arrested for fatal defects in the record proper.[26] It is at least certain that "the proper method of calling the court's attention after verdict to the insufficiency of the petition to state a cause of action which will support the judgment for the plaintiff is by motion in arrest."[27]

The usual rule as to nonjoinder or misjoinder of parties is that the defect must be raised by demurrer if it appears on the face of the petition, or by answer if it does not, and unless thus raised it is waived, and unavailable by motion in arrest. It was so held where the motion pointed out that the plaintiff was one of several obligees in an instrument sued on who should have been joined as plaintiffs.[28] The like ruling was made where the action was in the firm name, instead of the individual names of the members.[29]

In Jones v. Ry.,[30] the objection to joinder of an alleged unnecessary and improper plaintiff was made by demurrer and answer, and again by motion in arrest. The Court said such a fault was waived by pleading to the merits "unless it was a defect which affected the validity of the cause of action, rendering the petition insufficient to support a judgment, in which case the defect could neither be waived nor cured, but could be brought up on motion in arrest, or during the trial." The misjoinder complained of in that case was ruled to be one that could be waived, hence the remarks quoted are dicta.

But in Farmer's Bank v. Bayliss et al.,[31] the petition stated a case against some of the defendants for money lent, and against others as makers and indorsers of a promissory note, and for this misjoinder of defendants the Court decided that a judgment against all of them should have been arrested. The point had been made by a demurrer which the record did not show had been passed upon; moreover causes of action to be unitable must affect all the parties alike.[32] But that requirement was not adverted to in the opinion.

In Hutchings to use v. Weems,[33] the action was in the name of the assignor of a note instead of in that of the assignee. The ruling was that, as the statute requires actions to be brought in the name of the real party in interest, the judgment should have been arrested

26. La Crosse Lumber Co. v. Ry., 197 Mo. App. 546.
27. King v. Grocer Co., 188 Mo. App. 235, 238.
28. Garrett v. Cramer, 14 Mo. App. 401.
29. Fowler et al. v. Williams, 62 Mo. 403.
30. 178 Mo. 528.
31. 41 Mo. 274.
32. 1 R. S. 1919, Sec. 1221.
33. 35 Mo. 285.

on motion—a very questionable decision. In Stampe v. Ringhauser,[34] it was held the objection to a petition on an indemnity bond, that it was in the name of the claimant instead of the sheriff's name, came too late after judgment and would not then be considered on motion. The Supreme Court has held that where a minor sued but not by next friend, the petition was demurrable, or the point could have been made in the answer, but that error occurred in sustaining a motion in arrest.[35]

In Farmer's Bank v. Bayliss et al., *supra,* the misjoinder of defendants having been raised first by an undisposed of demurrer, the case is not in conflict with a later one holding that the improper joinder of parties cannot be taken advantage of by first raising the objection by the motion.[36] In Garrett v. Cramer,[37] the decision was that nonjoinder as plaintiffs of persons who were co-obligees with the named plaintiffs, could not be availed of by motion in arrest after the defendants had gone to trial on the merits without objection. The like ruling was made in Rickey v. Tenbroeck[38] and in State to use v. Berning.[39]

Suppose a petition states facts sufficient to constitute a cause of action, questions may and do occur concerning its sufficiency in other respects: for example, the violation of some statutory rule, like joining causes not falling within either of the classes authorized by the code to be joined,[40] or joining causes that are unitable but blending them in one paragraph contrary to the code's command that they be stated separately. In Farmer's Bank v. Bayliss et al., supra, the latter fault was held to be no ground for the motion, inasmuch as it was not ground even for a demurrer, but only for a motion to have the fault corrected.

In State to use v. Bonner,[41] it was held the motion lies for the mingling of distinct causes in one count, but there was in that case a general verdict on two causes thus mingled, instead of a verdict on each one; so the fatal fault was in the verdict.

The question was decided by the Supreme Court in Bank v. Dillon,[42] wherein it was ruled that joining in the same count causes of action on separate contracts, which the code permits to be joined but requires to be set forth in separate paragraphs, could not be urged by

34. 9 Mo. App. 600.
35. Jones v. Steele, 36 Mo. 324.
36. Pacific Railroad v. Watson, 61 Mo. 57.
37. See Note 28.
38. 63 Mo. 563.
39. 74 Mo. 87, 99.
40. See Note 32.
41. 5 Mo. App. 13.
42. 75 Mo. 350.

the motion in arrest. This decision is sound but is in conflict, in principle, with that of Peyton v. Rose,[43] it being declared in the latter case that the motion lies for uniting in one count different causes arising out of the same transaction, although the code permits such joinder.

Misjoinder of causes is ground for a demurrer[44] and in Fadley v. Smith,[45] the ruling was against the right to raise this objection by the motion instead of by demurrer, and it was said earlier decisions to the contrary were no longer law.

Where matters of equitable and others of legal cognizance were united, the petition was held vulnerable to the motion. Presumably these separate causes did not arise out of the same transaction.[46]

That case, and Hoagland v. Rd.,[47] wherein it was decided that a misjoinder of causes was fatal to a plaintiff on motion in arrest, although supported by some outside authorities, have been discarded as unsound in other Missouri decisions. Judge Bliss discussed the subject and examined prior decisions in House v. Lowell,[48] and while admitting that at common law the misjoinder of causes was ground to arrest, because such joinder would lead to incongruous judgments, he concluded that would not be so under the code. The reason of the decision is that ample opportunity is afforded defendants to object to the misjoinder by demurrer,[49] and that if this is not done, the defect is waived.

Fatal Omissions in Petition: Examples of allegations omitted from the petition which have been ruled fatal on motion in arrest, are the following:

Where a petition for rent did not state from when the defendant leased, or who was his landlord, it was held the motion lay.[50] In a mechanic's lien action where the petition did not show when the account accrued, or where the lien was filed, the same ruling was made,[51] and so for the like omissions in such an action;[52] or if notice of his

43. 41 Mo. 257.
44. I R. S. 1919, Sec. 1226.
45. 23 Mo. App. 87.
46. Myers v. Field, 37 Mo. 434.
47. 39 Mo. 451.
48. 45 Mo. 381.
49. See Note 44.
50. Evans v. Mullen, 25 Mo. 195.
51. Heitzell v. Langford, 33 Mo. 396.
52. Gault v. Soldini, 34 Mo. 150.

claim was not shown to have been given in time by a subcontractor.[53] It will not lie for surplusage in a pleading.[54]

The Supreme Court held the motion unavailable to attack a statute as unconstitutional when the record proper did not show the action was based on the statute.[55] Nor will the Supreme Court examine that question, if it was first raised below by the motion.[56] In Howell v. Sherwood, the precise point ruled was that the unconstitutionality of the statute which created the trial court, could not be *first* raised by the motion, because if it could be, the losing party would be permitted to take the chance of winning in the trial court, and if he lost attack the judgment as void because given by a court not in existence. Nowithstanding those rulings, if the point of unconstitutionality was made in time and the pleadings showed the action was on the statute, it is likely that the point might be raised by the motion, for there would be no cause of action.

Omission in Petition of an Essential Fact: What is the criterion by which to determine whether the facts alleged constitute a cause of action, although defectively stated, or whether they are insufficient for that purpose, because some essential fact is not expressly averred? The answer to this question is given correctly in Welch v. Bryan, supra, in considering the effect of the clause of the Statute of Jeofails which provides that a judgmnet shall not be stayed "for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict."[57] The construction put on this section has always been, to use the language of Welch v. Bryan, "that if a material fact, though not expressly stated, be necessarily implied from what is stated, the cause of action must be considered as only defectively stated and the defect will be cured by verdict; but if an essential fact to the plaintiff's cause is neither expressly stated, nor necessarily implied from facts which are stated, the declaration must be considered as defective and the judgment will be arrested." To the same effect are Tidd's Practice, p. 919 et seq., and the cases generally.

In the cited case, the consideration for a promise was neither alleged in the petition, nor was anything alleged from which it could be implied, so the Supreme Court held that the judgment ought to

53. Heltzell v. Hynes, 35 Mo. 482.
54. Hornblower v. Crandag, 7 Mo. App. 220.
Id. 78 Mo. 581.
55. McCarty v. O'Bryan, 137 Mo. 584.
56. Browning v. Powers, 142 Mo. 322.
57. 1 R. S. Mo. 1919, Sec. 1550.

have been arrested on motion. The reason of the rule is that if a fact is neither expressly nor impliedly stated, it cannot be supposed to have been in issue or found by the jury. But the test leaves room for divergent opinions as to whether the existence of the omitted fact can be gleaned from the averments that are made, and inconsistencies can be found in the cases.[58]

As to Necessity of Motion to Appeal or Writ of Error: The Supreme Court has held that an appeal or writ of error will lie although a motion in arrest was filed and, at the time the appeal was taken or writ of error sued out, was still awaiting disposition; that the motion is no essential element in an appeal.[59] Undoubtedly it is not essential to have reviewed exceptions taken during the progress of the case, that right being preserved by motion for new trial. And because the Statute[60] declares that all the seven grounds of demurrer to the plaintiff's case, enumerated in section 1226, except the failure of the petition to state a cause of action, or lack of jurisdiction of the court over the subject matter of the action, are waived unless objection is raised by demurrer or answer, the motion is not a condition of passing upon the two matters not thus waived. But what about lack of jurisdiction over the defendant or his property, or a bad verdict, or an answer which states no defense, or perhaps other fatal faults in the record proper? Has the motion no function as to those matters? It had one at common law, and that law yet governs this motion except where its rules have been changed by statute, as was decided in Warren v. Lead & Zinc Co.[61] In that case the Court ruled that the one year allowed for taking out a writ of error after rendition of a final judgment, had expired within a year from the date of the judgment, notwithstanding the fact that the writ was brought within a year from the date the motion in arrest was overruled. The point in question was whether the motion was essential in order to have examined an assignment of error in sustaining a demurrer to plaintiff's petition for not stating a cause of action. Of course, that matter was open to review without such motion, as it could not be waived; and so the Supreme Court decided that, though filed, the motion was superfluous and, therefore, the judgment given when the plaintiff declined to plead further, was final. The opinion does not say the motion is always unnecessary for review purposes, but only that it is so "perhaps under most circumstances." And in the Stid case, the

58. See on this subject Munchow v. Munchow, 96 Mo. App. 553.
59. Staid v. Rd., 211 Mo. L. C. 415.
60. 1 R. S. Mo. 1919, Sec. 1230.
61. 255 Mo., L. C. 146.

Court said "the most to be said of such motion is that, if one be not filed and passed upon by the trial court, an appellate court will not consider matters of error to which the trial court's attention could not be called by motion in arrest.' In view of those observations it may be concluded that the motion is not yet useless even for appellate purposes, where errors in the record proper are assigned, which are not waived by omitting to raise objection by demurrer or answer; namely, those which do not go to the jurisdiction over the subject matter or failure to state a cause of action.

Time of Filing: Like the motion for new trial, the motion in arrest must be filed within four days after trial[62] and, in other respects, it follows the construction put on the statute regarding the period for filing the motion for new trial. It must be filed at all events during the judgment term, whether or not the term continues four days after trial,[63] and the days are calendar only, not judicial, intervening Sundays being excluded.[64].

The motion was not known to chancery practice, but as our code system blends law and chancery pleadings and practice, and as there is usually no verdict in equity cases, the motion necessarily would be filed after judgment in such cases. The common practice is to file both motions after judgment, and in Robertson v. Grand,[65] it was said the motion in arrest should have been filed within four days of the rendition of the judgment "according to the provisions of the statute."

In Rohrer v. Brockhage,[66] the Court held a motion for new trial filed in a partition suit within four days of the order for partition and sale, preserved exceptions for review without filing same after the first judgment confirming the sale, including within the principle of that ruling a motion in arrest.

At common law, if the motion in arrest was filed before one for a new trial, the latter came too late, and this rule was followed in McComas v. State.[67] But in Bank v. Bayliss[68] the Supreme Court decided that, while moving for a new trial after a motion in arrest has been filed *and overruled,* would be futile, if both motions were

62. 1 R. S. Mo., 1919, Sec. 1456.
63. Robertson v. Leathers, 61 Mo. 381.
64. Young v. Donney, 150 Mo. 317 .
Long v. Hawkins, 178 Mo. 103.
State v. St. Louis, 121 Mo. 445.
65. 61 Mo. 381.
66. 15 Mo. App. 16.
67. 11 Mo. 116.
68. 41 Mo. 274.

"filed together and disposed of in their logical order" the objection was not tenable.

In State v. Griffin,[69] the Court went a step further in holding that when both motions were filed and overrruled on the same day, it will be presumed the one "for new trial was filed and disposed of first." The usual practice is to file and pass on them at the same time, but, of course, they might be filed or ruled on at different times, and the record so show.

Effect of Arrest: What is the effect of sustaining a motion in arrest? The Statute provides that if, after verdict for the plaintiff, the judgment be arrested, etc., the plaintiff may commence a new action within one year.[70] Another section provides that "when the judgment shall be arrested the Court shall allow the proceeding in which the error was, to be amended in all cases where the same amendment might have been made before trial, and the case shall again proceed according to the practice of the Court.[71] By the first section the plaintiff, if he chooses, is allowed to begin a new action within a year; but he is not always compelled to do so, because the error may be cured by amendment of the record in which it occurs, if such an amendment could have been made before trial. Every arrest of judgment does not therefore result in a new trial being directed. If the order for the arrest is unconditional, it puts an end to the case unless set aside during the term, but leaves the plaintiff the right to sue again.[72] Whether the arrest should be conditional, or unconditional, depends upon whether the fatal fault for which the motion is sustained can be corrected by an amendment,—namely, whether it could have been thus corrected before trial. If it is apparent from the facts that the plaintiff has no cause of action to plead, the order ought to be unconditional: as, for example, when the petition declared on a special tax bill which was void on its face and shown by the petition to be void, as it was in Cameron v. Pixlee.[73] The same would be true if the action was for specific performance of a verbal contract to convey land, or if the cause of action was one of which the Court had no jurisdiction. In these cases, an amendment would do no good, whether made before trial or after arrest. This matter was considered in State ex rel v. Fisher, supra, and in Butcher v. Metz,[74]

69. 118 Mo. 188.
70. Sec. 1329.
71. Sec. 1457.
72. State ex rel v. Fisher, 230 Mo. 325.
73. 207 S. W. 96.
74. 1 Miles (Pa.) 233.

(cited in the Fisher case,) in which these rules were stated: that the Court, after an arrest of judgment, may award a repleader if there is a curable defect in the pleading, in which case, of course, a new trial will follow; or if there be a bad verdict the Court may award a *venire de novo* and then, too, a new trial will follow. But if it appears from the record that the plaintiff has no cause of action, the Court will not only arrest the judgment but order that the plaintiff take nothing by his writ and the defendant go without day.

A very important question upon which the authorities differ widely and which ought to be definitely settled in this jurisdiction, may be thus stated: Suppose a fact essential to a cause of action was not alleged in the petition, and there were no other facts alleged from which the omitted one could be implied, but the cause was tried by both parties on the theory that said fact was in issue, can a court of review look into the bill of exceptions, if there is one, to ascertain whether or not there was a trial of such issue, and if there was, uphold the judgment against the motion in arrest? In fact this point arises whether such motion was filed or not, because the adequacy of the petition is always open to attack. That the Court can affirm the judgment when the record is in that state was decided by the Supreme Court of Vermont in Chaffee v. Railroad,[75] but was as pointedly decided the other way by the same Court, despite an attempt to distinguish the two cases, in Baker v. Sherman and Miller.[76] And there are conflicting authorities dealing with the question in other jurisdictions, and in this one. In the recent case of Twentieth Century Machinery Co. v. Bottling Co.,[77] the matter was presented, the case having been certified by the Kansas City Court of Appeals to the Supreme Court, because of the conflict between the decision of the Kansas City Court of Appeals and that of the St. Louis Court of Appeals in O'Toole v. Lowenstein.[78] The Machinery Company action was for the conversion of personal property, as was the action of O'Toole v. Lowenstein, the fact omitted from the petitions in both cases being that the plaintiff was entitled to the possession of the property in controversy at the time of the conversion. This was held in the O'Toole case to be a fatal omission and not cured by verdict, and was conceded in the Machinery Company opinion to render the petition inadequate to state a cause of action. But the Kansas City Court of Appeals held that, as the Bill of exceptions showed the issue of the

75. 71 Vt. 364.
76. 73 Vt. 25.
77. 273 Mo. 142.
78. 177 Mo. App. 662.

plaintiff's ownership and right of possession had been tried out, the judgment ought not to be arrested or reversed; whereas the St. Louis Court of Appeals held to the contrary, and it appears from the briefs in the O'Toole case that the issue had been tried. The opinion of the Supreme Court was written by Railey, C., the gist of the opinion being that the defect in the petition should not cause a reversal of the judgment of the trial court "where no instruction was asked and where the case was tried and disposed of just as it would have been had the petition contained the foregoing averment;" namely, an averment that the plaintiff was entitled to possession of the converted property. In support of that proposition the following cases were cited: Sawyer v. Wabash Ry Co.,[79] Winn v. Ry.,[80] Tebeau v. Ridge,[81] Shimmin v. C. & S. Mining Co.,[82] and Cook v. Kerr.[83] Those cases, or some of them, do support it. It was squarely so ruled in Sawyer v. Wabash Railroad, and the ruling was followed in Tebeau v. Ridge,[84] but there are decisions the other way. Unfortunately only three judges of the Supreme Court in banc concurred in the Commissioner's opinion in the Machinery Co. case. Two concurred in the result, holding that the question was not presented by the record, and one Judge dissented, saying that he agreed with the view expressed in O'Toole v. Lowenstein. The other Judge was not marked and presumably did not sit. Perhaps it would be better if the law were in accord with the opinion of the Commissioner; for parties having tried a case without objection as though a certain material issue of fact was involved, may well be held to be bound by the verdict given, even if the pleadings did not raise such an issue. But for time out of mind, it has been ruled that the Statute of Jeofails does not cause such a defect to be cured by verdict. Furthermore, if we consider the technical function of a motion in arrest, it is obvious that only the record proper ought to be regarded in passing on such a motion, and not matters occurring during the trial. This is the doctrine of Welch v. Bryan, supra, and of the weight of authority. Moreover, the question may be raised in an appellate court when there is no bill of exceptions which shows what matters of fact were tried or conceded. To say we may determine from a bill of exceptions whether a fatal error of record occurred, accords neither

79. 156 Mo., L. C. 476-77.
80. 245 Mo. 406.
81. 261 Mo., L. C. 549-60-61.
82. 187 S. W. (Mo. App.) L. C. 77.
83. 192 S. W. (Mo. App.) L. C. 468.
84. 261 Mo. L. C. 547, 559.

with the use of the motion in arrest, the practice followed in passing on such motions, nor with our Statute leaving the petition always open to an attack for failure to state a cause of action. The opinion in O'Toole v. Lowenstein is in harmony with the precedents; but if there *is a bill of exceptions which shows the omitted fact was tried as though it were in issue,* then in the interest of justice and the speedier disposition of cases, the logical procedure might well be ignored.

On the whole, it appears that the motion in arrest is still useful to direct the attention of the trial court to errors in the record proper which might be otherwise overlooked, to prevent parties from obtaining reversals of judgments by intentionally refraining from calling the attention of their adversaries, or the court, to such defects, and by enabling the appellate courts to pass on assignment of error in the record proper which are of a kind not waived by failing to demur, or answer.