Washington University Law Review

Volume 28 | Issue 1

January 1942

Civil Procedure—Appellate Practice—Bills of Exceptions

consequently when the notice was served on them the plaintiff had at least implied notice that an appeal was being taken. His appearance in the appellate court shows that the notice was sufficient in fact.

An opposite result in the case might be justified on another ground. Since the statute deals with notices of appeals it might be interpreted in the light of another statute[8] on notices. The latter statute states that the service of a notice on the attorney of a person constitutes service on that person. So the sentence of the statute in the principal case which reads "or by delivering a copy of the same to the appellee"[9] could be interpreted as validating the service on the appellee even though made on his attorneys.

Liberally construed the statute is remedial in its nature and there is no need for legislative action to change its harshness; a judicial decision could interpret it correctly without overstepping judicial powers.[10] Thus it seems that the principal case was decided on a technicality which by liberal construction of the statute would be removed without changing its meaning or purpose. M. A. H.

CIVIL PROCEDURE—APPELLATE PRACTICE—BILLS OF EXCEPTIONS—[Missouri].—Respondent, within ten days after the service of appellants' abstract, filed written objections questioning the failure of the abstract to show the filing of the motion for new trial and the bill of exceptions. Appellants refused to amend their original abstract. *Held:* Appeal should be dismissed on ground that the record proper was insufficient to show error. *Brown v. Reichmann.*[1]

The above failure to grant an appellate review on the merits is in accord with the strict and technical distinction now recognized in Missouri between the record proper and the bill of exceptions.[2] Prior to the development of the art of stenography and the use of official court reporters, oral proceedings were not immediately and officially preserved. The bill of exceptions made by the attorney himself, and later signed by the court, was therefore a necessary and proper method of recording that which otherwise would exist only in memory.[3] In 1825 the Missouri Legislature codified,[4] with some moderate changes, the common law and equity principles concerning the record proper and the bill of exceptions, and for 117 years our courts have given force to the distinction even though now, as provided by statute, oral proceedings are officially recorded[5] and the dependency on memory no longer provides a reason for the rule of decision.

As a consequence of the changed conditions, many states as well as the

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8. R. S. Mo. 1939 §910.
9. R. S. Mo. 1939 §2741.
10. Hender v. Ring (1895) 90 Wis. 358.

1. (Mo. App. 1942) 164 S. W. (2d) 201.
2. R. S. Mo. 1939 §§1174, 1175. Wallace v. Woods (1936) 340 Mo. 452, 102 S. W. (2d) 91.
3. Williams, Appellate Practice (1942) 7 Mo. L. Rev. 158, 161-163.
4. Mo. Laws of 1825, 631.
5. R. S. Mo. 1939 §13295.

United States have successfully abolished the distinction[6] through legislation. The Missouri Appellate Courts are well aware of the need for reform. The St. Louis Court of Appeals by its rules of court[7] has attempted to lessen the harshness of the distinction and insure a review on the merits.[8] Rule 34 states that the recital in the abstract to the effect that a motion for new trial and a bill of exceptions have been duly filed is sufficient for a review on the merits. Rule 33 requires respondent to file written objections within ten days after appellant's abstract has been served on him and in cases where respondent has failed to do so, the court has overruled a motion to dismiss the appeal.[9] In spite of the above decisions there is the class of cases similar to the instant case. In these the appellant has included all the needed information in the record proper and the bill of exceptions. However, on a motion to dismiss the appeal, the appellant is thrown out on the procedural point that a court cannot examine the bill of exceptions unless the abstract contains a statement that the bill of exceptions has been duly filed.[10] The complete abolition of the distinction by statute would be required to remedy this latter line of cases, for the courts may not, without an enabling act, override the "exception" statute.[11]

A proposed general code of civil procedure recommended by the advisory committee appointed by the Supreme Court of Missouri expressly abolishes the distinction between the record proper and the bill of exceptions.[12] Should the proposed code be adopted, appeals would no longer be dismissed on the ground of a failure to state in the record proper that the bill of exceptions had been properly filed. H. B. C.

6. Ariz. Code Ann. (1939) Vol. 2 §21-936; Federal Rule 46, 308 U. S. Appendix 60; Ill. Rev. Stat. (1937) c. 110, §204; Neb. Comp. Stat. (1929) §20-1139; N. M. Stat. Ann. (Courtright, 1929) §105-830; N. Y. C. P. A. (1927) §§583, 445, 446, all as amended by N. Y. Laws 1936 c. 915; 2 N. D. Comp. Laws Ann. (1913) §7653; Ohio Code Ann. (Throckmorton, 1936) §11560; 1 S. D. Comp. Laws (1929) §2542; Utah Rev. Stat. Ann. (1933) §§104-39-2, 104-28-18; Wis. Stat. (1941) §270-39.

7. Rule 33 and Rule 34, St. Louis Court of Appeals.

8. Gneckow v. Metropolitan Life Ins. Co. (Mo. App. 1937) 108 S. W. (2d) 621, reversing Gneckow v. Metropolitan Life Ins. Co. (Mo. App. 1936) 99 S. W. (2d) 126; after opinion quashed State ex rel. Gneckow v. Hostetter (1937) 340 Mo. 1177, 105 S. W. (2d) 928.

9. Hicks v. Gus Gillerman Iron & Metal Co. (Mo. App. 1940) 138 S. W. (2d) 749; Gneckow v. Metropolitan Life Ins. Co. (1937) 108 S. W. (2d) 621; Hemphill v. City of Morehouse (1912) 162 Mo. App. 566, 142 S. W. 817, 818.

10. Northcutt v .McKibben (Mo. App. 1942) 159 S. W. (2d) 699; Warner v. Howard (1936) 339 Mo. 923, 98 S. W. (2d) 613; Angldile Computing Scale Co. v. Carter (Mo. App. 1918) 206 S. W. 231; Walker v. Fritz (1912) 166 Mo. App. 317, 148 S. W. 991.

11. R. S. Mo. 1939 §1174.

12. Proposed General Code of Civil Procedure for the State of Missouri, Plan II, Art. 13, §1.