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Appellate Practice—Failure to Narrate the Evidence—Ground for Dismissal

Comment on Recent Decisions

APPELLATE PRACTICE—FAILURE TO NARRATE THE EVIDENCE—GROUND FOR DISMISSAL.—The plaintiff filed a motion to modify a divorce decree with reference to maintenance, alimony and custody of a minor child. On the appeal the plaintiff sent up all the evidence in question-and-answer form. Held: On motion by the defendant, appeal dismissed for failure to comply with Rule 15 of the Springfield Court of Appeals, providing in part, "The evidence of witnesses shall be stated in narrative form, except when the questions and answers are necessary to a complete understanding of the evidence."[1]

The modern trend of liberality in enforcing the rules of the appellate courts originated in Missouri after the decision of Barham v. Skelton,[2] so that now even commingling the abstract of the record proper and the bill of exceptions is not sufficient reason for dismissal.[3] This liberality of construing the rules had been adopted by the Springfield Court of Appeals.[4] Indeed the Court has consistently attempted to dispose of all cases on their merits rather than on questions of appellate practice,[5] thereby preventing injustice through technicalities. For a time, whether the point was or was not raised, the Court, even in cases of flagrant violation, waived infractions of the rules and considered cases as best it could.[6] In one such instance, however, the Court issued a warning after reading a long record in question-and-answer form that the rules had not been abandoned and should be followed as consistently as possible.[7] Shortly thereafter the Court apologetically dismissed an appeal where the appellant utterly disregarded the rules in the preparation of the abstract of the record, and was taken to task in a dissenting opinion for its about-face when the bar generally had been led to expect great liberality in regard thereto.[8] The identical question under consideration, that is, the failure to narrate the evidence, was then squarely presented to the Court in a later case. The Court admitted the violation of the rules but declined to assess the penalty of dismissal.[9] Since

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[1] Marx v. Marx (1935 Mo. App.) 88 S. W. (2d) 1018; Rule 21 of the Springfield Court of Appeals justifies dismissal, for failure to comply with Rule 15.

[2] Barham v. Skelton (1909) 221 Mo. 66, 119 S. W. 1089.

[3] Nokes v. Nokes (1928 Mo. App.) 8 S. W. (2d) 879; Moore & Farrar v. Wyatt et al. (1928 Mo. App.) 8 S. W. (2d) 1020.

[4] Nokes v. Nokes (1928 Mo. App.) 8 S. W. (2d) 879.

[5] Nokes v. Nokes (1928 Mo. App.) 8 S. W. (2d) 879; Hummell v. Field, 1923. 216 Mo. App. 136, 256 S. W. 515.

[6] Whitesell v. Pioneer Const. Co. (1928 Mo. App.) 2 S. W. (2d) 147; Savage v. Purcell (1928 Mo. App.) 9 S. W. (2d) 823.

[7] Fredericksen v. Farmers State Bank of Branson (1929 Mo. App.) 19 S. W. (2d) 303.

[8] Harrison v. Lindley, et al. (1929 Mo. App.) 20 S. W. (2d) 958.

[9] Dyer v. Brown, 1930, (1930. Mo. App.) 25 S. W. (2d) 551.

this decision the Court has reiterated both liberality[10] and strictness[11] in enforcing the rules.

The rules of the Missouri Supreme Court prior to March 22, 1924, provided in part that,[12] "the evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony." This is the identical language of that part of Rule 15 of the Springfield Court of Appeals, the infraction of which warranted dismissing the appeal in the case under consideration. Where the failure to comply with this rule has been involved, the Supreme Court has given a most liberal interpretation, expressly holding that the word "shall" was not used in a mandatory sense.[13] (The very fact that the rule leaves it to counsel to determine when they should present the evidence in narrative form and when by question-and-answer demonstrates that "shall" was not used in a mandatory sense.) It was not the intention to compel him, the lawyer, to abstract his case at his peril, and have the Court try abstracts rather than the cases of litigants.[14] That such was the intention of the Supreme Court is further demonstrated by the fact that on March 22, 1924, the rule was amended by changing the word "shall" to "may,"[15] so that even greater liberality is now permitted.[16] The instant case especially commends itself for liberal handling since it is triable de novo on appeal[17] and moreover the rights of an infant, a favorite ward of the Court, are involved.[18]

When a cause in an appellate court rides off on a question falling short of the merits it must needs be a matter of solicitude. However, the rules of appellate practice fill no office of mere red tape, but on the contrary they have substance, the obvious purpose of which is to aid in getting at the right of a cause. Present-day thought has suggested the use of the bill of exceptions as prepared by the court stenographer.[19] The reasons advanced are that such a record is practically perfect, more easily understood by the

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[10] Sechrist et al. v. Hufty Rock Asphalt Co., (1933. Mo. App.) 59 S. W. (2d) 767; Bedell v. Garton, et al., (1934. Mo. App.) 70 S. W. (2d) 373.

[11] Bollinger v. New Era Publishing Co., (1934. Mo. App.) 68 S. W. (2d) 725.

[12] See Rule 13 Missouri Supreme Court, 291 Mo., Page ii.

[13] Frohman v. Lowenstein (1924) 303 Mo. 339, 260 S. W. 460; Vaughn v. Vaughn 251 Mo. 445, 158 S. W. 345.

[14] Supra note 13.

[15] See Rule 13, Missouri Supreme Court 305 Mo., Page ii.

[16] Davoren et al. v. Kansas City (1925 Mo. Sup.) 273 S. W. 501; Sims v. Hydraulic Press Brick Co. (1925) 323 Mo. 447, 19 S. W. (2d) 294; Smith v. Lammert (1931 Mo. Sup.) 41 S. W. (2d) 791; Church et al. v. Combs et al. (1933) 332 Mo. 334, 58 S. W. (2d) 467; State ex rel and to use of Park National Bank v. Globe Indemnity Co. et al. (1933) 333 Mo. 461, 62 S. W. (2d) 1065; Werminghaus v. Eberle (1935 Mo. Sup.) 81 S. W. (2d) 607.

[17] Kistner v. Kistner (1936 Mo. App.) 89 S. W. (2d) 106.

[18] Meredith v. Krauthoff (1915) 191 Mo. App. 149, 177 S. W. 1112; Eaton v. Eaton (1922 Mo. App.) 237 S. W. 896; Hayes v. Hayes (1934 Mo. App.) 75 S. W. (2d) 614.

[19] (1933) 17 Jour. Am. Jud. Soc. 87-91.

Court, and less expensive to the litigants.[20] It is submitted that a just rule fairly interpreted and enforced, wrongs no man. Ostensibly to be obeyed, but actually not enforced, it necessarily wrongs some men, viz: those who labor to obey it—the very ones it should not injure.[21] It is well to note here that the Kansas City Court of Appeals, with similar rules, has repeatedly held in like cases, that the failure to bring up and present the evidence in haec verba forfeits the right to appellate review.[22]

J. L. A. '37.

ATTORNEYS — CONSTITUTIONAL LAW-DISBARMENT — STATUTE OF LIMITATIONS.—A Minnesota statute provided that "no proceeding for the removal or suspension of an attorney at law shall be instituted unless commenced within the period of two years from the date of the commission of the offense or misconduct or within one year after the discovery thereof."[1] In the case of *In re Ithamar Tracy* the supreme court of Minnesota on March 27, 1936, declared this statute to be unconstitutional as a projection of the legislative power into the judicial department.[2]

Certain inherent powers have been given by the state and federal constitutions to the courts as a result of the separation of powers provided for in the respective constitutions. Among these inherent powers is that of regulating the admission and disbarment of lawyers.[3] Although the former power is not universally admitted to be an inherent power of the court,[4] the power to disbar is, in almost all jurisdictions, so recognized.[5] No statute, rule, or constitutional provision is necessary to authorize the striking off the roles of attorneys in proper cases.[6] Missouri is one of the many states which follows this prevailing rule.[7]

The matter of trial by jury in disbarment cases presents a similar problem to that presented by a statute of limitations in such actions. A disbarment proceeding being summary[8] in nature, a jury trial cannot be demanded as a matter of right.[9] Only in those states in which a disbarment

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[20] Supra note 19.

[21] Sullivan v. Halbrook (1908) 211 Mo. 99.

[22] Nichols v. Nichols (1889) 39 Mo. App. 293; Hull v. Hull (1912) 168 Mo. App. 220, 153. S. W. 531; Gorka v. Gorka (1927) 221 Mo. App. 1033, 295 S. W. 515; Chronos v. Panagos (1928 Mo. App.) 7 S. W. (2d) 734; McKitterick v. McKitterick (1933) 227 Mo. App. 1002, 60 S. W. (2d) 671.

[1] Mason's Minn. St. 1927, sec. 5697-2.

[2] In re Tracy (Mar. 27, 1936) 2 Law Week 739.

[3] Ex parte Wall (1882) 107 U. S. 265; Shanfeld, "The Scope of the Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar," 19 ST L. LAW REV. 163; Weeks, *On Attorneys at Law*, sec. 80, p. 140; 2 R. C. L. 1086; 6 C. J. 580.

[4] State v. Raynolds (1916) 22 N. M. 1, 158 Pac. 413.

[5] Supra, note 3.

[6] Weeks, op. cit.

[7] In re Richards (1933) 330 Mo. 907, 63 S. W. (2) 672, 19 ST. L. LAW. REV. 146; In re Sparrow (1935) 90 S. W. (2) 401.

[8] See 6 C. J. 602.

[9] Ex p. Wall (1882) 107 U. S. 265; In re Norris (1899) 60 Kans. 649, 57 Pac. 528; State v. Fourchy (1901) 106 La. 743, 31 So. 325; In re Carver