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Charles V. Garnett

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APPELLATE PRACTICE IN MISSOURI—1957*

CHARLES V. GARNETT**

THE JURISDICTION OF THE SUPREME COURT

The 1957 decisions of the court again emphasize the necessity for careful consideration, at the trial court level, of the ever present question of appellate jurisdiction. The court found it necessary, during the year under review, to transfer nine cases to the courts of appeals, retaining jurisdiction in only one other case where jurisdictional questions were raised. The rules of the supreme court require appellant, at the beginning of his brief, to make "a concise statement of the grounds on which the jurisdiction of the review court is invoked,"¹ and that rule contemplates a statement of the jurisdictional facts. In *State ex rel. State Highway Comm'n v. Hudspeth*,² however, where the jurisdictional statement challenged certain acts of the state highway department and argued that the appeal involved a construction and clarification of the powers of the commission, the court condemned that jurisdictional statement as a mere argument, bearing no resemblance to the kind of jurisdictional treatise called for by the rule. The court then made its own examination of the questions involved and, holding that the highway department is not a state officer, that title to real estate was not involved, and that the fact that appellant is a municipal corporation does not lodge jurisdiction in the supreme court, the case was transferred to the court of appeals.

In another case, *City of Marshfield v. Haggard*³ the appellate issues involved the proper boundary line of a city street and it was the contention of appellant that the decree granted the city an easement over a part of defendant's land by its determination of the boundary dispute. However, since defendant did not deny that the city is entitled to an easement for street purposes, title to the fee was not involved in the jurisdictional

*This Article contains a discussion of selected 1957 Missouri court decisions.

**Attorney, Kansas City; LL.B., Kansas City School of Law, 1912.

1. Rule 1.08(a)(1), RSMo 1957 Supp., at 1334.
2. 297 S.W.2d 510 (Mo. 1957).
3. 300 S.W.2d 419 (Mo. 1957).

sense and the case was transferred to the court of appeals. In *Grimes v. Armstrong*⁴ the court points out that ordinarily title is not involved where there is merely a dispute over the location of a boundary line, but, where the real controversy involves a specific strip of ground adjudicated in the trial court by a specific finding on the issue of adverse possession, the court reached the conclusion that title to real estate is actually involved in the jurisdictional sense and retained jurisdiction of the appeal.

In *White v. Huffman*⁵ where the proceeding was a petition for redemption of real estate which had been foreclosed under the sale powers of a deed of trust, and the issue was whether or not the owner had the right to redeem because the sale was made to a straw party to cut off the right of redemption, the court held that the judgment would not directly affect the title to real estate and that the issue was merely whether or not a statutory right of redemption exists. Pointing out that, if the right does exist, title to real estate may or may not be affected, depending upon whether appellants elect to exercise the right to redemption, the court held that it was without jurisdiction of the appeal and transferred it to the court of appeals.

In *City of St. Charles v. De Sherlia*⁶ the court held that, although ordinarily an ejectment suit involves only the right of possession and not title to real estate in the jurisdictional sense, under the state of the pleadings and after judgment proceedings in that case the recognized exception to the general rule as to jurisdiction of ejectment actions where the defendant puts the title in issue was not available to vest jurisdiction in the supreme court. In that case plaintiff's suit was in ejectment and defendants filed their answer denying plaintiff's right of possession and alleging that they had been in adverse possession of the land for more than ten years. By the prayer of their answer they only asked that they be dismissed with their costs. They also filed what was termed a "cross action"⁷ but which was in fact a counterclaim in which they again asserted title by adverse possession and asked that the court by its decree determine that title and quiet defendant's title as against the claim of plaintiff. The trial on the issues of ejectment was before a jury and on the issues presented by the counterclaim was to the court. The jury

4. 304 S.W.2d 793 (Mo. 1957).

5. 301 S.W.2d 824 (Mo. 1957).

6. 303 S.W.2d 32 (Mo. 1957).

7. *Id.* at 33.

returned a verdict against the plaintiff and in favor of the defendants in the ejectment suit. The court, in entering judgment on the verdict, also included in the judgment a finding of the issues on the counterclaim against defendants. Defendants filed no after-trial motions and took no appeal from the judgment on the counterclaim. However, on plaintiff's motion for new trial the judgment on the suit in ejectment was set aside by the action of the court in sustaining plaintiff's motion for new trial on the ground that the verdict was against the weight of the evidence and that instructions given at the request of defendants were erroneous. Defendants then appealed from the judgment and order granting a new trial. The court held that by the adjudication of the counterclaim from which no appeal was taken, the issues and the relief sought by the counterclaim are no longer in the case; and, because the judgment in the ejectment action was limited to the right of possession, title to real estate was not involved in the appeal and the case was transferred to the court of appeals.

The monetary limitations upon appellate jurisdiction have not been too troublesome during the year under review. In *Powers v. Johnson*⁸ the case was transferred to the court of appeals because the appeal involved only the issue of control of certain perpetual care funds of a cemetery rather than permanent divestiture of title of those funds and the value of that control was not affirmatively shown.

In *Engel Sheet Metal Equip. Inc. v. Shewman*,⁹ the suit was for an injunction and an accounting in a trademark infringement matter. The court entered a decree enjoining defendants from infringing and appointed a master to hold hearings on the accounting feature of the case. From an order overruling motions for new trial the appeal was taken even though there had been no accounting by the master or judgment entered upon an accounting for damages. The court held that there was no affirmative showing of a jurisdictional amount to vest jurisdiction in the supreme court and, because of that fact it could not determine whether or not the appeal was premature. Transfer to the court of appeals followed.

In *Hemphill v. Jackson*¹⁰ it is again emphasized that the jurisdictional amount must be affirmatively shown by competent evidence in the record.

8. 302 S.W.2d 899 (Mo. 1957).

9. 298 S.W.2d 434 (Mo. 1957).

10. 304 S.W.2d 7 (Mo. 1957).

That case was one for the discovery of assets consisting of certain corporate stock. Although a large amount of preferred stock of a corporation was involved, the court held that "the fact that the shares were redeemable by the corporation at a certain price has no tendency whatever to show the value of such shares of stock at any particular time."¹¹ Accordingly, the case was transferred to the court of appeals.

Two other cases were transferred to the courts of appeals. In *State ex rel. Kugler v. Tillatson*¹² the transfer was because, as the court had repeatedly held, the directors of school district were not state officers within the jurisdictional sense; and in *Jones Motor Co. v. Industrial Comm'n*¹³ jurisdiction was denied because the industrial commission is not a state officer and the employment security law is not a revenue law in the constitutional sense.

THE RIGHT OF APPEAL

The right of appeal is, by statute, accorded to a party "aggrieved by any judgment" in several instances including "any order granting a new trial."¹⁴ In *Gier v. Clark*¹⁵ the trial resulted in a mistrial because the jury was unable to agree. Within ten days after the mistrial was declared defendant filed motion for judgment in accordance with his prior motion for directed verdict. That motion was overruled and he appealed. His notice of appeal stated that he had appealed "from the Order and Final Judgment Overruling Defendant's 'Motion for Judgment in Accordance with Defendant's Motion for Directed Verdict Made at the Close of All of the Evidence', the jury not having returned a verdict."¹⁶ The court, by its opinion, points out that the provisions of section 510.290¹⁷ providing for motion for judgment notwithstanding the verdict or, if a verdict is not returned, for judgment in accordance with a prior motion for directed verdict, are not sufficient to create a right of appeal. The court points out that there was no trial court order granting a new trial and therefore defendant did not appeal from any order granting a new trial; that the overruling of the motion for judgment in accordance with the prior

11. *Id.* at 8.

12. 300 S.W.2d 517 (Mo. 1957).

13. 298 S.W.2d 407 (Mo. 1957).

14. § 512.020, RSMo 1949.

15. 300 S.W.2d 519 (Mo. 1957).

16. *Id.* at 520.

17. RSMo 1949.

motion for directed verdict did not constitute a final judgment; that, even if there should be merit to the contention that the action of the court had the effect of granting a new trial to the plaintiff, that action was the result of defendant's motion for judgment and thus at defendant's request; and that defendant was not a party aggrieved by the action and could not appeal. The appeal was dismissed as premature.

In *State ex rel. State Highway Comm'n v. Smith*¹⁸ a condemnation proceeding resulted in the taking of lands of defendant. Machinery and equipment were in a building erected thereon. An order was entered by the court finding the machinery and equipment to be personal property, not subject to condemnation and it was from that order that the appeal was prosecuted. The court held that the motion raising the issue as to the machinery and equipment was not an original and independent proceeding but was only an incidental step in the condemnation proceeding and that the decision thereof did not dispose of the entire claim. Holding that claims are not reviewable on a piecemeal basis the appeal was dismissed as premature.

Similarly in *Anderson v. Metcalf*,¹⁹ a suit to have a certain deed set aside and for an accounting for the rental value of the property involved, the court held that a finding that the deed should be set aside and that plaintiffs were entitled to the accounting for the rents and referring the case to a master for an accounting was interlocutory in character and did not dispose of all of the parties and all of the issues in the case. The court regarded the issue as similar to and controlled by its decision in *Adams v. Adams*²⁰ which was reviewed last year²¹ and dismissed the appeal as premature.

In *Hahn v. Hahn*,²² plaintiff brought a partition suit against his former wife involving residence property formerly owned by them while they were married. By cross-petition the wife sought to have an equitable lien imposed upon her former husband's interest in the property on the theory that she had made payments of principal and interest on a deed of trust. The issues in the partition suit were not contested and the hearing

18. 303 S.W.2d 120 (Mo. 1957).

19. 300 S.W.2d 377 (Mo. 1957).

20. 294 S.W.2d 18 (Mo. 1956).

21. Garnett, *The Work of the Supreme Court for the year 1956—Appellate Practice*, 22 Mo. L. Rev. 339, 341 (1957).

22. 297 S.W.2d 559 (Mo. 1957) (en banc).

was on the cross-action only resulting in a judgment adverse to the defendant. Her appeal was dismissed by the Kansas City Court of Appeals as premature²³ and, because of that holding, the supreme court granted the defendant's application to transfer the appeal to the latter court. The court of appeals had raised and decided the prematurity of the appeal on its own motion. The supreme court comments that courts should avoid the disposition of appellate cases on procedural grounds, and analyses the question of whether or not a separate judgment as to a part of the case is interlocutory and to be stayed until all other final judgments have been entered or is an order for a separate judgment within the meaning of supreme court rule 3.29.²⁴ Pointing to the fact that, since the right of partition was not contested, the cross-petition involving the wife's equitable lien on the husband's interest was the only live issue in the case, the court held the decision of that issue constituted a final judgment for the purposes of appeal.

RECORDS AND BRIEFS

In *Taney County v. Addington*²⁵ the appellant filed a transcript which had not been signed or consented to by the attorneys for plaintiff or for defendant, nor presented to, signed, settled or approved in any manner by the trial court. Pointing to the fact that if the parties have agreed the transcript is correct it need not be approved by the trial court but if there is no such agreement the statute requires its approval by the trial court, it was held that where neither of these two methods of verification of the transcript have been followed, the appeal must be dismissed. The court did, however, review the record and determine *ex gratia* that there was no merit in the appeal.

In *Jacobs v. Stone*²⁶ the appeal was dismissed for insufficiency of appellant's brief. Its insufficiencies were numerous. It contained no statement of facts actually relevant to any question or questions for determination, its statement of the points relied upon consisted of allegations of error of the trial court in sustaining the motion for directed verdict and instructing the jury that the verdict should be for the defendants without any concise statement of why it was contended that the trial

23. 287 S.W.2d 337 (K.C. Ct. App. 1956).

24. RSMo 1957 Supp., at 1340.

25. 304 S.W.2d 842 (Mo. 1957).

26. 299 S.W.2d 439 (Mo. 1957).

court was wrong in so ruling. In the section of the brief devoted to argument these abstract statements of the law were merely repeated and there was no effort to show the court in what way any particular fact was overlooked or misconstrued by the trial court. In addition, the statement of facts was devoid of any specific page reference to the transcript. Pointing to the fact that the rule with respect to the contents of appellant's brief is not observed by a mere show of surface routine but requires a painstaking analysis of meritorious contentions and is for the benefit of both the appellate court and counsel, the court held that the brief really presented nothing for review and dismissed the appeal on that ground.