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## Masthead and Recent Cases

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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Recent Cases

EVIDENCE—DISCOVERY—SCOPE OF INTERROGATORIES TO PARTY OPPONENT  
UNDER MISSOURI CODE

*State ex rel. Williams v. Buzard*<sup>1</sup>

This was a proceeding by the state, at the relation of Frances Williams, for a writ of mandamus requiring Paul A. Buzard, Judge of Division No. 8 of the Circuit

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1. 190 S. W. (2d) 907 (Mo. 1945).

Court of Jackson County, to enter an order compelling the Kansas City Public Service Company to answer relator's interrogatories in her suit against said company for personal injuries.

The interrogatories in question on appeal were: (1) Please state the names and addresses of any other of your employees (aside from the operator of the streetcar) who were on the streetcar at the time and place of the casualty referred to in plaintiff's petition. (2) In what capacity are the employees mentioned in your answer to Interrogatory No. 1 employed? (8) Please state the names and addresses of all persons whose names and addresses were taken by any employe of your corporation at the scene of the casualty.

That the scope of interrogatories is the same as the scope of depositions was the major issue settled by the court.<sup>2</sup> Previous judicial construction of Missouri deposition statutes<sup>3</sup> was that only questions which would be admissible upon trial were within the scope of depositions.<sup>4</sup> The court therefore held Interrogatory No. 8 too broad because an answer to it would call for hearsay. Interrogatories Nos. 1 and 2 were held correct since they involved nothing that would not be the proper subject of inquiry at trial.<sup>5</sup>

Relator contended that since Section 85 of the new Missouri Code of Civil Procedure<sup>6</sup> relating to interrogatories is substantially the same as Rule 33 of the new Federal Rules,<sup>7</sup> the Missouri court should hold the Missouri practice to be as broad as the federal practice, *i.e.*, anything relevant to the facts or issues of the case is a proper subject of interrogation.<sup>8</sup> This contention rests on the basis of Rule 33 being complete in itself, and, since it imposes no limitations, anything relevant may be the subject of interrogation.

The Missouri Supreme Court correctly rejected this contention, and held that the interrogatory provision of the Federal Rules is dependent on the federal deposition practice, and co-extensive therewith. Since Missouri has a provision equivalent to Rule 33, the scope of depositions in Missouri is the basis for the scope of interrogatories.

While there has been some contention as to the breadth of Federal Rule 33,<sup>9</sup>

2. *Id.* at 910.

3. MO. REV. STAT. (1939) §§ 1917-1948.

4. *Ex parte* Krieger, 7 Mo. App. 367 (1879); *Tyson et ux. v. Farm and Home Savings and Loan Ass'n*, 156 Mo. 588, 57 S. W. 740 (1900); *Ex parte* Brockman, 233 Mo. 135, 134 S. W. 977 (1911); *State ex rel. Bressman v. Theisen*, 142 S. W. 1088 (Mo. App. 1912); *State ex rel. Evans v. Broadus*, 245 Mo. 123, 149 S. W. 473, Ann. Cas. 1914A 823 (1912); *State ex rel. Mo. Pac. R. Co. v. Hall*, 325 Mo. 102, 27 S. W. (2d) 1027 (1930).

5. 190 S. W. (2d) 907, 910 (Mo. 1945).

6. Laws of Mo. 1943, p. 378, General Code for Civil Procedure, § 85, MO. REV. STAT. ANN. 847.1.

7. Rule 33, FED. RULES CIV. PROC., 28 U.S.C. foll. § 723c.

8. *Fleming v. Bernardi*, 1 F.R.D. 624 (N.D. Ohio 1941).

9. Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, p. 46 (May 1944). The advisory committee proposes to add a specific provision to Rule 33, making its scope the same as that of Rule 26b. This will assure uniformity in all Federal courts.

there has been no attempt to make it any broader than the deposition practice. Some federal courts, soon after the birth of the new rules, limited the application of the rule, although there were no limitations set forth in it.<sup>10</sup> However, the great majority of the federal courts have stated that Rule 33 is dependent on Federal Rule 26b,<sup>11</sup> relating to scope of depositions, and that the scope of interrogatories and depositions are co-extensive.<sup>12</sup> Since under Rule 26b, any question relevant to the case may be asked on depositions, this is also the breadth of interrogatories.

Section 85 of the Missouri Code is equivalent to Rule 33, but there is no broadening of the scope of depositions in the new code, for the advisory committee during the formulation of the new rules, being satisfied with the present deposition statutes, rejected the equivalent of Federal Rule 26b which was submitted to them by a subcommittee.<sup>13</sup> There is little question that the framers of the Missouri code had before them the decisions construing Rule 33 as dependent on Rule 26b. If they had desired to make the interrogatory provisions broader than those of depositions, a rule to that effect would have been formulated.

Next the court pointed out that questions propounded at deposition hearings must be such as would be admissible if asked upon examination at trial. Interrogatory No. 8 was held too broad,

“because it goes beyond what the operator actually immediately found out himself then and there about who were on the car at the time and place of the casualty; and calls for those whom any employee of defendant may have found there later or identified with it by hearsay only.”<sup>14</sup>

Under the existing deposition practice in Missouri it is submitted that the court reached a correct decision.<sup>15</sup> While there is no doubt that the interrogatory propounded here is too broad because it calls for a reply involving hearsay, the court's statement that the interrogatory was invalid because “. . . it goes beyond what the operator actually immediately found out himself then and there about *who were on the car*<sup>16</sup> at the time and place of the casualty; . . .”<sup>17</sup> bears closer

10. *Auer v. Hershey Creamery Co.* 1 F.R.D. 14 (D. N.J. 1939); *Schweinert v. Ins. Co. of North America*, 1 F.R.D. 247 (S.D. N.Y. 1940); *Chandler v. Cutler-Hammer, Inc.*, 31 F. Supp. 453 (E.D. Wisc. 1940); *Tudor v. Leslie*, 4 Fed Rules Serv. 33.324, Case 1 (D.C. Mass. 1940).

11. Rule 26b, FED. RULES CIV. PROC., 28 U.S.C. foll. § 723c.

12. *Nichols v. Sanborn Co.*, 24 F. Supp. 908 (D.C. Mass. 1938); *Landry v. O'Hara Vessels, Inc.*, 29 F. Supp. 423 (D.C. Mass. 1939); *Kingsway Press, Inc. v. Farrell Pub. Corp.*, 30 F. Supp. 775 (S.D. N.Y. 1939); *Dixon v. Phifer*, 30 F. Supp. 627 (W.D. S.C. 1939); *J. Shoeneman, Inc. v. Brauer*, 1 F.R.D. 292 (W.D. Mo. 1940); *Byers Theaters, Inc. v. Murphy*, 1 F.R.D. 286 (W.D. Va. 1940); *Munzer v. Swedish American Line*, 35 F. Supp. 493 (S.D. N.Y. 1940); *Connors Marine Co., Inc. v. Peter F. Connally Co., Inc.*, 35 F. Supp. 775 (S.D. N.Y. 1940); *American Lecithin Co. v. W. A. Cleary Corp.*, 1 F.R.D. 603 D.C. N.J. 1941).

13. *Atkinson, Missouri's New Civil Procedure: A Critique of the Process of Procedural Improvement* (1944) 9 Mo. L. REV. 47, 55.

14. 190 S. W. (2d) 907, 910 (Mo. 1945).

15. See n. 4, *supra*.

16. Italics added.

17. See n. 14, *supra*.

scrutiny. It was dictum because the interrogatory would admit evidence later garnered from mere late comers to the scene of the casualty. If the court merely meant to infer that it did not think the operator would be able to accurately tell whether names he garnered from those outside the car were names of eye-witnesses, no criticism can be made, for the determination of that would have to rest on the facts of the case, and here the court may possibly have made its statement in light of facts which were not disclosed in the opinion. However, if this is meant to be a general statement, it is submitted that the court, although by dictum, is placing too narrow an interpretation on discovery practice in Missouri. This ruling would prevent the operator from being asked who eye-witnesses outside the car were. Thus it would seem to be contradicting the case of *State ex rel. Evans v. Broaddus*,<sup>18</sup> which the court cites as authority for its decision in the instant case.

While the immediate result of this case is to give an interpretation to Section 85 of the new code, and will eliminate much of the guess work lawyers have been forced to rely upon in this field, in a broader sense, it serves to corroborate Professor Atkinson's statement:

"Then too there are many cases where the Missouri rule will be stated in the terms of the Federal Rules but many of the advantages of uniformity were taken away by capricious and needless tinkering in the course of the committee-court-legislative hurdles."<sup>19</sup>

This case should serve to impress the bar when dealing with provisions of the new code as yet not passed upon by the appellate courts of the state, that although the section is couched in the same terms as the Federal Rule, the result on a given set of facts may be entirely different due to a background rule only possessed by one of the codes.

W. R. KEGEL

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18. 245 Mo. 123, 149 S. W. 473, Ann. Cas. 1914A 823 (1912). There the court said that if relator was an eye-witness he could be held in contempt for refusing to give names of other eye-witnesses.

19. Atkinson, *op. cit.* at 68.

