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Appeal and Error--Affidavits of Council Not Par of Record

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RECENT CASE COMMENTS

APPEAL AND ERROR — AFFIDAVITS OF COUNCIL NOT PART OF RECORD. — While counsel for plaintiff in a tort case was presenting his closing argument to the jury in the absence of the trial judge who had retired to his chambers out of hearing of what was occurring in the courtroom, controversy arose between counsel as to the propriety of portions of the argument, the substance of which was set out in affidavits of counsel incorporated in a bill of exceptions for a review by writ of error in the appellate court. *Held*: "Affidavits of counsel as to what occurred in a jury trial while the judge was absent from the courtroom do not constitute part of the record of the case." *Snodgrass v. Charleston Nugrape Co., Inc.*[1]

The appellate court looks only to the record as submitted by the trial court.[2] Only matters certified by the trial court may be considered as parts of the record.[3] Errors appearing on the face of the record may be availed of in the appellate court if the record shows objection was made.[4]

Supposed errors of the trial court, not otherwise certified, may be made a part of the record by a bill or a certificate of exceptions.[5] The contents of a bill of exceptions must be certified by the trial judge.[6] Such a bill is made a part of the record by a certificate or order entered upon the record.[7] "As to the correctness of the facts stated in the bill of exceptions, the judge has the sole power of determining whether the bill is true or not."[8] The making of a bill or certificate of exceptions is a judicial act and

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[1] 169 S. E. 406 (W. Va. 1933).

[2] White v. Toncray, 9 Leigh 347 (Va. 1838); Mandeville v. Perry, 6 Call 78, 83 (Va. 1806); Johnson v. Norton and Co., 90 Va. 267, 269, 18 S. E. 36 (1893).

[3] Danks v. Rodeheaver, 26 W. Va. 274, 276 (1885); Park v. Petroleum Co., 25 W. Va. 108 (1884).

[4] Shank v. Ravenswood, 43 W. Va. 242, 244, 27 S. E. 223 (1897); W. VA. REV. CODE (1931) c. 56, art. 6, § 35. See also Gilmer v. Sydenstricker, 42 W. Va. 52, 24 S.E. 566 (1896).

[5] Hinton Milling Co. v. New River Milling Co., 78 W. Va. 314, 320, 88 S. E. 1079 (1916); Collar v. McMullin, 107 W. Va. 645, 150 S. E. 2 (1929); W. VA. REV. CODE, c. 56, art. 6, § 35.

[6] Coal Co. v. Cecil, 94 W. Va. 116, 120, 117 S. E. 697 (1923); Tracy v. Carver Coal Co., 57 W. Va. 587, 590, 50 S. E. 825 (1905).

[7] De Froscia v. Norfolk & Western Ry. Co., 68 W. Va. 136, 69 S. E. 1008 (1910); Furbee v. Shay, 46 W. Va. 736, 34 S. E. 746 (1899); National Valley Bank v. Houston, 66 W. Va. 336, 66 S. E. 465 (1909).

[8] KITTLE, MODERN LAW OF ASSUMPSIT (1916) 735. See also Lumber Co. v. Ward, 109 W. Va. 55, 152 S. E. 862 (1930).

the power to make it cannot be delegated.[9] Thus, the clerk of the court can add nothing to the record by his certificate.[10] Stipulations between counsel that certain matters may be taken advantage of on appeal will not be regarded by the appellate court.[11] Improper remarks by counsel in his arguments before the jury or other misconduct on his part cannot be reviewed on appeal unless shown by a bill or certificate of exceptions.[12] Accordingly, affidavits of counsel that certain remarks were made will not suffice.[13]

Since arguments of counsel before the jury are not a part of the record proper;[14] since the trial judge must certify the record from the lower court, including the contents of the bill or certificate of exception;[15] and since the trial judge was absent from the courtroom at the time the alleged improper remarks were made in the argument before the jury in the instant case[16] and hence cannot certify the statements made, it follows that the affidavits of counsel as to the contents of the alleged improper arguments incorporated in the bill of exceptions cannot be considered a part of the record certified by the trial court.[17]

Bills or certificates of exceptions are wholly statutory creatures and were unknown to the common law.[18] Matters *ore tenus* did not appear on the record at common law and if a party were aggrieved by some ruling or error, he was without remedy.[19] Legislative action was the only means of remedying this defect.[20] The initial relief and forerunner of present day enactments is

[9] Blackwood Coal and Coke Co. v. James, 107 Va. 656, 659, 60 S. E. 90 (1908). See also Hovey v. Noble, 118 Ind. 350, 363, 21 N. E. 244 (1889).

[10] Roanoke Land and Improvement Co. v. Karn and Hickson, 80 Va. 589 (1885); Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485 (1888); Little v. Commonwealth, 141 Va. 532, 127 S. E. 164 (1925).

[11] Kibler v. Commonwealth, 94 Va. 804, 26 S. E. 90 (1908); Marion Machine Works v. Craig, 18 W. Va. 559 (1881).

[12] Caryl v. Buchmann, 177 Wis. 241, 187 N. W. 993 (1922).

[13] Glasgow v. Railroad Co., 191 Mo. 347, 89 S. W. 916 (1905); Magarity v. Shipman, 82 Va. 806, 7 S. E. 381 (1887); Mulcairns, Adm'r v. Janesville, 67 Wis. 24, 35, 29 N. W. 565 (1886); Hale v. Hale, 169 Ill. App. 272 (1912). See also Stannard v. Groves, 2 Call 310 (Va. 1800).

[14] Caryl v. Buchmann, *supra* n. 12.

[15] See cases cited n. 3, *supra*.

[16] Snodgrass v. Charleston Nugrape Co., *supra* n. 1, at 407.

[17] See cases cited n. 13, *supra*.

[18] BURKE'S PLEADING AND PRACTICE (2d ed. 1920) 506; Ratliff v. Meadows, 116 Va. 975, 83 S. E. 395 (1914).

[19] KITTLE, MODERN LAW OF ASSUMPSIT (1916) 729.

[20] Carlin, *A Modern Substitute for Bills of Exception* (1917) 25 W. VA. L. Q. 198, 205.

found in the STATUTE OF WESTMINSTER II.[21] "The purpose of the bill of exceptions is to exhibit on the record the supposed mistakes of the trial court which do not appear on the record and could not otherwise be brought before the appellate court for review or correction if erroneous."[22]

Where no objection is made when the trial judge absents himself from the courtroom during a civil trial, courts are not in accord as to the effect of such absence but are unanimous in holding that it is the duty of the judge to be present at all phases of the trial.[23] If no objection be raised because of the trial judge being absent, it is presumed he is absent by consent of parties litigant.[24] Hence, they may be said to have waived the right to have the arguments certified to the appellate court.[25]

While the instant case was reversed because of excessiveness of the verdict, it is to be observed that the adjudication that affidavits of counsel are not a part of the record is not dicta. In view of decisions in other jurisdictions, the present adjudication in accord, and the reason and logic found in an analysis of the situation, the law on the point is undoubtedly settled.

—STANLEY E. DADISMAN.

BASTARDY — COMMON LAW MARRIAGE — WHAT CONSTITUTES. — Seeking to be declared the heirs of one K the petitioners averred that F agreed with K to be man and wife; that she moved with her parents and family into the home of K and lived there for seven years bearing two children, the petitioners; that F with K's consent moved to an adjoining farm owned by K; that the father visited them regularly; that after two years they moved

[21] 13 EDW. I, c. 31 (1285), cited in Dryden v. Swinburne, 20 W. Va. 89, 108 (1882).

[22] Hinton Milling Co. v. New River Milling Co., *supra* n. 5, at 320; Penix v. Grafton, 86 W. Va. 278, 100 S. E. 106 (1920).

[23] Peters Branch of International Shoe Co. v. Blake, 74 Okla. 97, 176 Pac. 892, 895 (1918).

[24] Allen v. Ames College Ry. Co., 106 Iowa 602, 76 N. W. 848 (1898); Gorman v. Sioux City Stockyards, 118 Iowa 749, 92 N. W. 698 (1902).

[25] Horne v. Rogers, 110 Ga. 362, 35 S. E. 715 (1900); State v. Hammer, 116 Iowa 284, 287, 89 N. W. 1083 (1902) (*dicta*); Smith v. Sherwood, 95 Wis. 558, 70 N. W. 682 (1897). *Contra*: Brownlee v. Hewitt, 1 Mo. App. 360, 368 (1876); O'Brien v. People, 17 Colo. 561, 31 Pac. 230 (1892). But see dissent in State v. Carnagy, 106 Iowa 483, 76 N. W. 805 (1898), where at page 491 arguments against reversal where the judge was absent are presented. See also cases cited in 17 AM. AND ENG. ENCY. OF LAW (2d ed. 1900) 720.