COMMENT ON RECENT DECISIONS

APPELLATE PRACTICE—NOTICE OF APPEAL—APPEALS FROM JUSTICE OF THE PEACE COURT—[Missouri].—Suit originated in Justice of Peace Court where judgment was given for the plaintiff. From this judgment the defendant appealed to the circuit court. Notice of appeal was served on plaintiff's attorneys but the record did not show that they were the attorneys who had appeared for the plaintiff in the justice's court. Plaintiff filed a motion to affirm the judgment which motion the circuit court sustained. *Held*, on appeal, that the statute relating to notice of appeal[1] was not complied with as it did not appear that the notice of the appeal was served on plaintiff or the attorneys who appeared for the plaintiff in the justice's court. Judgment affirmed. *Carsten v. Coon.*[2]

This case expressly states that the rule of strict construction should be followed with regard to statutory provisions for appeals from judgments of the justices of peace. However one of the cases, *Ellis v. Kyes*,[3] cited as a basis of strict construction on this point, was decided on a more substantial basis than the principal case. It was there held that the notice was not good as the proper person was not served, but the evidence heard on the motion to dismiss established the fact that the attorneys served had not appeared in the justice's court. Yet in the principal case it was not definitely established that the attorneys served did not appear in the justice's court.

That the notice should contain certain particulars has been pointed out in various cases.[4] The case of *Comstock v. Packing Co.*[5] laid down four essentials which are:

> "(1) designate names of parties to the suit; (2) give correct date of judgment of the justice of peace appealed from; (3) correctly designate and describe what judgment was appealed from; (4) must be signed by the party appealing or his agent or attorney."[6]

The notice in the principal case was valid in these particulars for it contained the judgment, date, parties, and appellant's signature. The purpose of the statute is to convey information to the adverse party that the appeal is being taken.[7] There was in the instant case the actual admission that these attorneys were at the time of notice the plaintiff's attorneys, and that

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1. R. S. Mo. 1939 §2741.
2. (Mo. App. 1942) 163 S. W. (2d) 1052.
3. (1891) 47 Mo. App. 155.
4. Tiffin v. Millington (1834) 3 Mo. 418; McGinniss & Ingels Co. v. Taylor (1886) 22 Mo. App. 513.
5. (1913) 171 Mo. App. 410, 156 S. W. 815.
6. Comstock v. Packing Co. (1913) 171 Mo. App. 410, 420, 156 S. W. 815, 818; State v. Hammond (1902) 92 Mo. App. 231; Clay v. Turner (1909) 135 Mo. App. 596, 116 S. W. 480; Smith Drug Co. v. Hill (1895) 61 Mo. App. 680; Igo v. Bradford (1905) 110 Mo. App. 670, 85 S. W. 618.
7. In Schuchart v. Brasler (Mo. App. 1923) 249 S. W. 164, 167, the court said: "The purpose of the notice is to notify; that is, to inform the appellee of the fact that an appeal has been taken in the case."

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.