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Article 23

Pleading and Practice--Suppression of Deposition--Rules of Practice May Not Be Inconsistent with Any Statute (Broome County Farmers' Fire Relief Ass'n v. New York State Electric and Gas Corp., 239 App. Div. 304 (3rd Dept. 1933))

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plete the writing.[14] It is within this rule that oral warranties will be accepted.[15] However, wherever possible the courts treat the writing as the sole expression of the transaction as to warranties.[16] Yet, in certain circumstances, it has been permitted by parol to show such warranties,[17] but these cases must be held to their peculiar facts.

S. B. S.

PLEADING AND PRACTICE—SUPPRESSION OF DEPOSITION—RULES OF PRACTICE MAY NOT BE INCONSISTENT WITH ANY STATUTE. —Pursuant to §288 of the Civil Practice Act, appellant had taken by deposition, testimony of one Loomis, since it appeared, because of his illness, that he would be unable to attend the trial of the action. Loomis died before the minutes were transcribed. On respondent's motion, the deposition was suppressed solely because it had not been read over and subscribed in accordance with rule 129 of the Rules of Civil Practice. On appeal, *held,* reversed. Said rule is invalid as

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[14] Grierson v. Mason, 60 N. Y. 394 (1875); Jameston Bus. College Ass'n v. Allen, 172 N. Y. 291, 64 N. E. 952 (1902); Cooper v. Payne, 186 N. Y. 334, 78 N. E. 1076 (1906); Niles v. Sire, 186 N. Y. 573, 79 N. E. 112 (1906); Studwell v. Bush Co., 206 N. Y. 416, 100 N. E. 129 (1909); DiMenna v. Cooper & Evand Co., 220 N. Y. 391, 115 N. E. 993 (1917); Perry v. Bates, 115 App. Div. 337, 100 N. Y. Supp. 881 (1st Dept. 1906).

[15] *Supra* note 13.

[16] De Witt v. Berry, 134 U. S. 312, 10 Sup. Ct. 536 (1890); Seitz v. Refrigerator Co., 141 U. S. 510, 12 Sup. Ct. 46 (1891); Van Winkle v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18 (1892); Gardener v. McDonough, 147 Cal. 313, 81 Pac. 964 (1905); Hills v. Farmington, 70 Conn. 450, 39 Atl. 795 (1898); Maxwell v. Willingham, 101 Ga. 55, 28 S. E. 672 (1897); Barrie v. Smith, 105 Ga. 34, 31 S. E. 121 (1898); Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711 (1903); Telluride P. T. Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319 (1904); Grubb v. Milan, 249 Ill. 456, 94 N. E. 927 (1911); Conant v. Bank, 121 Ind. 324, 22 N. E. 250 (1889); Michigan Pipe Co. v. Sullivan Water Co., — Ind. —, 127 N. E. 768 (1920); Younie v. Walrod, 104 Ia. 475, 73 N. W. 1021 (1898); Ehrsam v. Brown, 64 Kan. 466, 67 Pac. 867 (1902); Neale v. American E. V. Co., 186 Mass. 303, 71 N. E. 566 (1904); Scholl v. Killorian, 190 Mass. 493, 77 N. E. 382 (1906); Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682 (1907); Glackin v. Bennett, 226 Mass. 316, 115 N. E. 490 (1917); Bennett v. Thomson, 235 Mass. 463, 126 N. E. 795 (1920); McCray R. & C. S. Co. v. Woods, 99 Mich. 269, 58 N. W. 320 (1894); Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281, 62 N. W. 339 (1895); Thompson v. Libby, 34 Minn. 374, 26 N. W. 1 (1885); Miller v. Electric Co., 133 Mo. 205, 34 S. W. 585 (1896); Gerhardt v. Tucker, 167 Mo. 46, 85 S. W. 552 (1905); Quinn v. Moss, 45 Neb. 614, 63 N. W. 931 (1895); Naumberg v. Young, 44 N. J. L. 331 (1882); Wilcox v. Cate, 65 Vt. 478, 26 Atl. 1105 (1893); Milwaukee B. Co. v. Duncan, 87 Wis. 120, 58 N. W. 232 (1894); Case Plow Works v. N. & S. Co., 90 Wis. 590, 63 N. W. 1013 (1895); Caldwell v. Perkins, 93 Wis. 89, 67 N. W. 29 (1896).

[17] Chapin v. Dobson, 78 N. Y. 74 (1879); Eighmie v. Taylor, 98 N. Y. 288 (1885); Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961 (1891).

being inconsistent with §302 of the Civil Practice Act, and, even if valid, non-compliance at most constituted mere irregularity which did not justify court's suppressing deposition. *Broome County Farmers' Fire Relief Ass'n* v. *New York State Electric and Gas Corp.*, 239 App. Div. 304, 268 N. Y. Supp. 131 (3rd Dept. 1933).

Where court rules are inconsistent [1] or tend to enlarge or abridge rights [2] conferred by statute it has been repeatedly held that such rules are invalid. Section 82 of the Judiciary Law authorizes the Appellate Division to make rules and regulations governing the practice therein but provides *"inter alia"* that they may not be inconsistent with any statute. However, even if a rule is valid, the court, in its discretion, may overlook or relieve against a violation or non-compliance especially when the rule is deemed directory.[3] It is also quite significant that the Civil Practice Act,[4] enacted as a successor to the Code of Civil Procedure, omitted the clause reading and subscription, which, under the Code provision, were formerly essential.[5]

In the instant case, it is seemingly evident that, although the court viewed the rule under consideration [6] as imposing a requirement additional to statutory requirements for depositions and therefore invalid, it primarily based its decision on its discretionary powers. Rules of practice and procedure are established with a view to the promotion of justice and should not be given strained and technical interpretation which will defeat ends of justice and prolong litigation.[7] In reversing the decision, the court remarked that at most the non-compliance constituted a mere irregularity which did not justify the lower court suppressing the deposition.[8]

A. A. M.

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[1] N. Y. JUDICIARY LAW (1909) §82, amended L. 1924, c. 172, §1; Glenney v. Stedwell, 64 N. Y. 120 (1876); Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192 (1910).

[2] Ackerman v. Ackerman, *supra* note 1; Auerbach v. Delaware, L. & W. R. Co., 66 App. Div. 201, 73 N. Y. Supp. 118 (4th Dept. 1901).

[3] Martine v. Lowenstein, 68 N. Y. 456 (1877); Evans v. Backer, 101 N. Y. 289, 4 N. E. 516 (1886); People v. Tweed, 5 Hun 353 (N. Y. 1875).

[4] N. Y. CIVIL PRACTICE ACT (1921) §302, provides *inter alia:* "Upon every oral examination, within or without the state, the person or officer before whom the testimony is taken must take down every question and answer unless the parties consent or an order directs that only the substance of the testimony be inserted."

[5] N. Y. CODE OF CIVIL PROCEDURE (1848) §808. "The deposition, when completed, must be carefully read to and subscribed by the person examined."

[6] N. Y. RULES OF CIVIL PRACTICE (1921) R. 129. "A deposition, when completed, must be read carefully to the person examined and subscribed by him."

[7] People v. Tweed, *supra* note 3; Schultze v. Huttlinger, 150 App. Div. 489, 135 N. Y. Supp. 70 (1st Dept. 1926).

[8] *Contra:* Instant case. Crapser, *J.*, in dissenting opinion, regards the rule not as inconsistent but to cover a detail omitted from §302 of the Civil Practice Act, and, when read together, they contain complete directions for the taking of testimony by deposition. He states, "The purpose of the provision is to permit the witness to make any corrections and changes as will make it conform to his more deliberate recollection of facts."