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BAR NOTE

"AND THE COURT HEARD THE ARGUMENT OF COUNSEL"

JAMES R. MORELAND*

It is an old adage, trite but true, that familiarity breeds contempt. How frequently active lawyers, having become so accustomed to certain legal expressions and phrases, constantly use them from force of habit, without realizing their active meaning or true significance.

Those who respect the ancient usages have long been aware of the fact that the "old-timers" generally had some good reason for every expression, — for lacking the opportunity of dictating to a stenographer, they were not accustomed to the use of idle expressions or useless words. Those practitioners of a past generation of legal giants never thought of preparing a decree without having it recite that "the court heard the argument of counsel." The present generation of lawyers, however, are not so particular about doing so, deeming it a useless formality, — something which modern superiority has made wholly obsolete.

Having been trained by a practitioner of the old school, and having been advised on more than one occasion of the importance of having every decree show that counsel had been heard, the omission of the phrase has always been repugnant to the writer. With the confidence of youth in old age, (which was more prevalent then than now), the statement that it was an inclusion necessary in order to make the decree binding on the parties, was accepted without question. Being then of an age when curiosity was not so well developed, that positive assurance was accepted without question; and no inquiry made as to its basis in reason.

However, after more than thirty years, such a curiosity was aroused, and investigation of the matter begun. That there was a very good and sufficient reason for the old practice now seems

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manifest, — for without an opportunity for the parties to be heard in opposition to the entry of the decree, as it is expressed, how could the decree be binding in its effect on the parties? And, therefore, how could it be *res judicata* in its findings?

CONCLUSIVENESS OF RECITALS IN A DECREE

Professor Carlin, in discussing the recitals of the decree as to the maturity of a cause for hearing, has said:

> " . . . . also *upon what the cause was heard,* as it will be considered that the cause was heard upon the papers and evidence upon which the decree declares it was heard."[1]

He then continues to show that the recitals will be conclusively presumed to be true if so stated in the decree, — observing:

> "It is well settled by the decisions of the courts that only those papers and depositions can be treated as a part of the record in a chancery cause that are mentioned or referred to in some order or decree entered in the suit. Therefore, as already stated, every paper or deposition upon which the cause is to be heard should be mentioned in the decree."[2]

The extent of the rule as to the finality of such recitals is illustrated by *Shields v. Bank,*[3] in which it was held that a plea, not set out fully in the record, was filed by *all* of the defendants, unless the contrary appeared, even though one of the parties had not been served with process. There the record showed that the parties appeared by counsel, and the defendants pleaded the statute of limitations, *etc.* Since the party who had not been served could have appeared and pleaded without waiting for service of process on him, the decree was considered a verity when it said that the *defendants* pleaded; and since the unserved party was a defendant it was held to be his plea also.

In *Sims v. Bank of Charleston,*[4] the cause was heard on depositions insufficient to support the decree; and the contention was raised that the court had also heard some oral testimony at the bar of the court. Yet the recitals of the decree said nothing about such oral testimony. Hence the court decided that when a decree does not show upon its face that the court heard parol evidence, given at the bar of the court, but declares that the cause was heard upon

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1 1 HOGG, EQUITY PROCEDURE (Carlin's ed. 1921) 784.
2 *Id.* at 786.
3 5 W. Va. 259 (1872).
4 8 W. Va. 274 (1875).

the papers in the cause, and "the depositions of witnesses," the appellate court will consider that the cause was heard as declared by the decree, — and that no oral evidence was heard by the court in connection with the cause. Judge Haymond, speaking for the court, said:

> "According to the declaration of the decree, the court did not hear the cause upon parol or verbal evidence, given at the bar of the court, but upon the papers in the cause and the 'depositions of witnesses'. This Court must take the declaration of the decree as being true in this respect."[5]

The particular matter in which we are interested is, however, the presumption that nothing was done or considered by the court which is not so recited. And such being the rule the court refused to consider any evidence other than the depositions.

That rule seems to be well-established by our decisions, — with one exception only. That exception is well shown in the case of *Turnbull v. Clifton Coal Company,*[6] where it was held that depositions filed in the cause, (but not so referred to in the recitals of the decree), might be considered as a part of the record, and the omission might be treated as a clerical error, if there was something else in the decree to show positively that the depositions had been so considered by the court below. The opinion goes on to say that no fixed rule can be laid down for all cases, but it must reasonably appear that it was such an error; and the decree must reasonably show that it was an omission. In other words, the decree in that case showed that the depositions had been considered by the court in arriving at the findings thereof, as certain adjudicated facts could not otherwise appear: therefore, under the facts of that case, the recital in the decree manifestly was a clerical error.

To stress further this exception to the rule, let one suppose the instance of a decree adjudicating certain exceptions to the depositions and then decreeing on the merits of the cause, without reciting that the cause came on to be heard on the depositions. In such case, the court could not do otherwise than consider the omission in the recital to be a mere clerical error, as the exceptions could not be passed upon unless the depositions were before the court.

All of the earlier decisions refer back to *Shumate v. Dunbar.*[7]

[5] *Id.* at 278.
[6] 19 W. Va. 299 (1882).
[7] 6 Munf. 430 (Va. 1819).

Although the case is not fully reported, it is apparent from the language of the decree that the court would have considered the depositions, if it had appeared that there was notice of the time and place of taking them. The syllabi (as prepared by the reporter) read:

> "1. If it be stated, in the transcript of a decree in Chancery, that 'the cause came on to be heard on the bill, answer *and exhibits*;' such hearing must be understood to have been in *exclusion of the depositions* contained in the record; no proof appearing of *notice* of the time and place of taking those depositions.
>
> "2. In such case, if the answer deny the Equity in the bill, and be not impugned by the *exhibits*, a decree in favor of the plaintiff should be reversed, and the bill dismissed."

Those syllabi might imply that the basis of the ruling was the absence of notice of the time and place of taking the depositions; but such a theory is not definitely supported by the short report of the case, as the basis of the decision seems to be the absence of the depositions in the recital of what the cause was heard upon. This seems to be the construction placed on the decision by judges and courts when it was subsequently cited and referred to. That depositions were taken appears definitely; and it may be that absence of a showing of notice caused the court to omit the depositions from the hearing as shown by the transcript of the decree, bringing the cause on to be heard on all of the other papers of the cause, but omitting the depositions.

In the case of *Nelson's Administrator v. Cornwell,*[8] Judge Moncure, when delivering the opinion of the court, held:

> "The decree recites that the cause came on to be heard on the bills, answers, exhibits and award; saying nothing of the commissioner's report and depositions; which seem therefore to be no part of the record according to the case of *Shumate v. Dunbar,* 6 Munf. 430."

Again in *Day v. Hale,* and *Hale v. Hare,*[9] the first paragraph of the syllabus states:

> "When depositions are taken and filed in a cause, both parties having been present when they were taken, and the decree is obviously based upon them, the omission to refer to them in the decree will be considered a clerical mistake. . . ."

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[8] 11 Gratt. 724 (Va. 1854).

[9] 22 Gratt. 146 (Va. 1872).

Judge Anderson says:

> "The next assignment of error we shall notice is, that the decree not stating that the cause was heard upon depositions, they should be excluded from consideration; and the answers being responsive to the bill, and denying its material allegations, it should have been dismissed. The record shows that depositions were taken by both parties, and that both parties were present at the taking of the depositions, and cross-examined each others witnesses; and it appearing from the entry of the clerk, that the depositions were filed in the cause before the hearing, and the decree being evidently founded upon the evidence, it is fair to presume that it was a clerical omission in drawing the decree, and that the cause was heard upon the depositions."[10]

In *Turnbull v. Clifton Coal Co.*,[11] Judge Haymond quoted from *Minor's Institutes*, as follows:

> "The decree ought to show on its face, *upon what the cause was heard, e.g.*, the bill, answer, replication thereto, and exhibits, or as many of them as constituted the foundation of the decree. . . ."[12]

That text goes on to discuss the English rule requiring a recital of the contents of each paper, the *Shumate* case, and, finally, the Statute of Jeofails,— providing that no decree shall be reversed for want of a replication to the answer, where the defendants have taken depositions as if there had been a replication. But for that statute, a decree was reversible unless the record affirmatively showed that issue had been joined by a replication.

The case of *Stepp v. State Road Commission*,[13] was a suit to set aside a decree entered in an injunction proceeding, upon the ground that no process had been issued in such suit. Since the process itself was missing, yet the decree recited that process and notice of the injunction had been served on all of the defendants, the court held that there was a presumption in favor of the decree, and that such presumption had not been successfully rebutted. The court observed:

> "The presumption is that the recitals in the decree are true; that the court had before it the process duly issued and served on all defendants, or other sufficient basis for the recitals. Some of our decisions say that the recitals are a verity

10 *Id.* at 159.
11 19 W. Va. 299 (1882).
12 *Id.* at 307.
13 108 W. Va. 346, 151 S. E. 180 (1929).

and cannot be attacked by evidence extraneous to the record, notably that of *Central Dist., etc., Co. v. Parkersburg etc., Ry. Co.,* 76 W. Va. 120, wherein a default decree had been entered against the railway company, which appeared in the suit about one month after the entry of the decree, and sought to have it vacated on the ground that it had not been served with process. Upon the question of service, both parties submitted affidavits. (In this present case they submit depositions.) The decree in that case, as here, recited that process had been served on 'all of the defendants', except Jack Hamilton. The court said: 'The foregoing recitals are the solemn declarations of a domestic court of general jurisdiction upon a matter pertaining to its jurisdiction, and constitute a part of the record which is generally accepted as a verity. Unless contradicted by some other portion of the record itself, the recitals are final and conclusive on defendant. For reasons of public policy, the law will not permit the record to be overthrown by extrinsic evidence, except for fraud or collusion. 1 Black on Judgments, sec. 273; *White* v. *White,* 66 W. Va. 82; *Jones* v. *Crim,* 66 W. Va. 301; and *Darnall v. Flynn,* 69 W. Va. 146. 'A recital in a decree that all the defendants had been duly summoned, is conclusive on appeal in the absence from the record of anything to the contrary.' *Moore* v. *Green,* 90 Va. 181; *Ferguson's Admr.* v. *Teel et al.,* 82 W. Va. 690; and *Hill* v. *Woodward,* 78 Va. 765.' See *State* v. *Bailey,* 85 W. Va. 165.''[14]

In the case of *Renick v. Ludington,*[15] the court held that if an amended bill be filed, making new parties and additional allegations, — and after it is ready for hearing on this amended bill, a decree is entered reciting that the cause was heard on the papers formerly read, but not reciting that it was heard on the amended bill, — and the decree is such as might have been rendered on the original bill, (nothing being decided with reference to the new allegations of fact stated in the amended bill), the failure to recite in the decree that the cause was heard also on the amended bill cannot be regarded as a clerical error; and the new parties are not bound by the decree as *res judicata.*

Many other citations and quotations might be given to show the varied extent to which the rule is followed that the recitals of a decree as to what was considered by the court are conclusively correct. But sufficient has been given for the present purpose. Only enough has been submitted to establish the basis for the contention that if the decree is silent as to any argument by counsel, it may be conclusively presumed that there was no such argument,

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[14] *Id.* at 351, 151 S. E. 182.
[15] 20 W. Va. 511 (1882).

— and that the litigants had no opportunity to present the case either as to the facts or the law. If such were the case, is the decision of the court binding as *res judicata* on the parties so adversely affected?

NECESSITY OF HEARING IN THE CAUSE

Judge Snyder has held, in *Haymond v. Camden*:

> "A sentence of a Court, pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."[16]

To the same effect is *Windsor v. McVeigh*,[17] stating the same proposition in exactly the same words. In fact, the syllabus in *Haymond v. Camden* is taken from the United States Supreme Court decision, *verbatim*.

Both of these were cases arising out of the Civil War and involving confiscation of the property of persons in rebellion against the United States. A notice of publication had been executed, but the parties were within the Confederate lines and could not respond or appear because of the war. The court held, in the former case:

> "By the court process he is commanded to appear and at the same time he is by the law forbidden to see the process or enter the territory over which the court exercises its jurisdiction. If a valid decree can be entered upon a notice which the defendant can neither see nor obey, then notice must be immaterial and an equally valid decree could be rendered without any notice or process whatever."[18]

In the case of *McCoy v. McCoy*,[19] the last clause of the first paragraph of the syllabus was:

> "No party can be estopped by any judgment or decree, if the record of the first suit shows, that he had no opportunity to be heard in opposition to such judgment or decree."[20]

Those cases, it is true, may refer to "hearing" in the sense

[16] 22 W. Va. 180, 182 (1883) (syl. 9).
[17] 93 U. S. 274, 23 L. Ed. 914 (1876).
[18] Haymond v. Camden, 22 W. Va. 181, 198 (1883).
[19] 29 W. Va. 794, 2 S. E. 809 (1887).
[20] See *id.* at 807. Cited in the case and to the same effect are: Poole v. Dilworth, 26 W. Va. 583 (1885); Corrothers v. Sargent, 20 W. Va. 35 (1882); Beckwith v. Thompson, 18 W. Va. 103 (1881); Coville & Garber v. Gilman, 13 W. Va. 327 (1878); Western M. & M. Co. v. Virginia C. C. Co., 10 W. Va. 250 (1877); Tracey v. Shumate, 22 W. Va. 474 (1883); Renick v. Ludington, 20 W. Va. 511 (1882); Haymond v. Camden, 22 W. Va. 180 (1883); Stephens v. Brown, 24 W. Va. 234 (1884); Underwood v. McVeigh, 23 Gratt. 409 (Va. 1873).

of trial or an opportunity to plead, rather than in the sense of hearing an oral argument. But surely in all cases an oral argument is an essential part of any hearing. As Judge Green quoted, in *Renick v. Ludington*: ". . . . [He] should have an opportunity of being heard in his defense, *both in repelling the matters of fact and upon matters of law.*"[21] In equity, one can conceive of no way for advancing "matters of law" other than by oral argument on the facts pleaded.

Corpus Juris defines a hearing as "The *receiving of* facts and *arguments* thereon for the sake of deciding correctly."[22]

> "By a hearing is meant a chance to present such arguments and authority as the nature of the case may, in counsel's opinion, warrant; not merely the privilege of hearing a judgment pronounced which has already been formed by the court."[23]

But assuming that an oral argument is a part, and an essential part of a hearing, (for there is no West Virginia case in point), the discussion of Judge Green in *McCoy v. McCoy* may be of further help:

> "It matters not, that, when such decree was rendered, such person was a party to the suit, if for any reason he had no opportunity to be heard. This is illustrated by *Haymond* v. *Camden* and *Stephens* v. *Brown* above cited and still better by *Underwood* v. *McVeigh,* 23 Gratt. 409. In that case Underwood was a party to the suit at the time, when the decree relied upon in a subsequent suit as an estoppel was pronounced; but the court had in the first suit improperly stricken out his answer and refused to let him defend the suit, because he was a rebel; and for that reason he did not have an opportunity when the decree was entered, to be heard. The court held in another subsequent suit, that he could not be estopped by the decree as *res adjudicata.*
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> "Enough has been said to show, that however firmly the principles of *res adjudicata* as stated above are incorporated in our jurisprudence, and however pertinaciously they may have been upheld in spite of the wrong occasionally inflicted on individuals, they must yield to the still more fundamental principle, that no one can be bound by any judgment or decree, if the record shows, that, when it was rendered, he had had no opportunity to be heard on the questions of law and

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[21] 20 W. Va. 511, 555 (1882). Italics supplied.
[22] 29 C. J. 284. Italics supplied.
[23] Crucia v. Behrman, 147 La. 137, 142, 84 So. 523 (1920), cited in 29 C. J. 285.

facts, involved, whether the decision was prejudicial to his rights in the cause, in which it was rendered or be prejudicial to his rights only in a subsequent suit arising from another cause of action with other parties to the suit or their privies. . . ."[24]

As to the right to argue by counsel any question submitted to a jury, the numerous authorities are collected by Mr. Justice Brewer, while on the Supreme Court of Kansas, prior to his appointment to the United States Supreme Court. In *Douglass v. Hill,* he said:

"A party to a law suit has a right to be heard, not merely in the testimony of his witnesses, but also in the arguments of his counsel. It matters not how weak and inconclusive his testimony may be, if it is enough to present a disputed question of fact upon which he is entitled to a verdict of the jury, he has a right to present in the arguments of his counsel his view of the case. This is no matter of discretion on the part of the court, but an absolute right of the party. Courts doubtless may prevent their time from being unnecessarily occupied by prolix arguments, and so may limit the time which counsel shall occupy. . . . But limiting the time of an argument and refusing to permit any argument at all, are entirely different matters. The one is the exercise of a discretion, the other is a denial of a right.[25]

Equity cases are no different from jury trials. In equity cases, courts have decided the order of arguments, under each and every state of the pleadings, — as to who has the right to open and close, and other questions of a similar nature.[26] It has been decided that the matter of re-argument is within the discretion of the court. Argument may also be legally waived, and the cause submitted without it.[27]

No case can be found exactly in point sustaining the main contention here. Whether or not the proposition (that the recital in a decree in chancery that the court heard the argument of counsel is necessary to make the decree binding on the parties as *res judicata*) is accepted by the bar, strict adherence of the older lawyers to the practice of inserting such a clause in the recitals of their decrees would seem to be more than an idle custom or formality.

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[24] 29 W. Va. 794, 809 (1887).

[25] 29 Kan. 527 (1883).

[26] This and the supporting decisions will be found in 21 C. J. 583, and notes to § 719.

[27] "The right to be heard by counsel is no more generally recognized or sustained by authority than the power of the Courts to prevent abuse by limiting arguments within reasonable bounds both in criminal as well as civil case." 2 ENC. PLDG. & PRAC. (1895) 701.

Surely it may be stated as a fact that any omission from the recitals creates a presumption that the omitted paper, pleading or occurence was not before the court or did not occur. Parties to equity causes have a clear legal right to be heard by the argument of their counsel in opposition to the entry of the decree; and unless given that legal right, the decree is not binding on them. If they had no opportunity to be heard by counsel then they were denied their legal rights, and the decree, — as expressed by Judge Snyder, in *Haymond v. Camden,* — will not be entitled to respect in any other tribunal.

If the party to an equity cause had no right allowed to him or was denied the right to be heard on the questions of law and fact adjudicated, — and such right is a legal right which may not be denied him, — then barring any property right as *res judicata* would logically be a deprivation of such rights without due process of law. In other words, it would be not only contrary to his common law rights but as well violative of his constitutional rights under the Fourteenth Amendment. Judge Hatcher has said in a recent case: "Notice and hearing — 'a day in court' — are matters of right in judicial proceedings. . . ."[28]

Possibly the weakest link in this chain of argument is the assumption that because there was no mention of argument of counsel, the right to argue was denied. Unless there was a denial of the right of argument, there would be no denial of due process. But can one assume that the court's silence as to argument presupposes a voluntary waiver of the right, any more than a denial of the right? The court had it in its power to make it clear from the decree that such right was not denied but voluntarily waived. Is not the party against whom the harsh rule of former adjudication is invoked entitled to the benefit of the doubt? If there is a question of the violation of a constitutional right, must it not appear by more than an *inference* that there was no denial of that right?

Judge Brannon has suggested, in *Evans v. Johnson,*[29] that the definition of due process is the one given by Mr. Webster in the *Dartmouth College* case. "It hears before it condemns." Judge Brannon held:

> "A sentence of the court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to any respect in any other tribunal."[30]

[28] Nulter v. State Road Com'n, 193 S. E. 549, 550 (W. Va. 1937).
[29] 39 W. Va. 299, 305, 19 S. E. 623, 625 (1894).
[30] *Id.* at 304.