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Notes and Comments

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NOTES AND COMMENTS

CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—MORE THAN ONE APPEAL—EXERCISE OF RIGHT TO “SHORT” APPEAL, PRECLUDES USE OF “LONG” APPEAL.—In *Spivey Building Corporation v. Illinois Iowa Power Company*¹ the defendant, within the ninety-day period allowed by Section 76(1) of the Illinois Civil Practice Act,² duly perfected a “short” appeal, but the same was dismissed for failure to file a transcript of proceedings. Thereafter, and within one year, the defendant filed a petition for leave to appeal under Section 76(1) of the Illinois Civil Practice Act, stating that it could not perfect the earlier appeal for reasons beyond its control. This petition was denied by the Appellate Court,³ but a certificate of importance was granted to the Supreme Court of Illinois. The latter held that the judgment dismissing the second appeal was proper, since only one appeal may be granted to a litigant.

Under the earlier practice, the right to an appeal was statutory and strict compliance therewith was essential.⁴ Failure to comply, however, still allowed the litigant a chance to secure review if he could secure a writ of error.⁵ That writ now appears to have been abolished⁶ and the present method of appeal substituted therefor, which authorizes the litigant a “short” appeal as a matter of right, and a “long” appeal upon a showing of merit in the appeal and the absence of culpable negligence in not using the former.⁷ The several Appellate Courts in the state have been in conflict as to whether the attempted exercise of the “short” appeal prevented recourse to the “long” appeal.⁸ The decision in the instant case was foreshadowed in *People ex rel. Bender v. Davis*⁹ in which the Illinois Supreme Court granted mandamus to compel the Appellate Court of the Third District to expunge an order granting leave to appeal after the “short” appeal had been dismissed for appellant’s failure to assign error. By the decision in the instant case, the court indicates a refusal to recede from the position taken, despite the suggestion that the right to have a judgment reviewed should not be

¹ 375 Ill. 128, 30 N.E. (2d) 641 (1940).

² Ill. Rev. Stat. 1939, Ch. 110, § 200(1).

³ Ill. Rev. Stat. 1939, Ch. 110, § 200(1).

⁴ *People ex rel. v. Franklin County Building Ass’n*, 329 Ill. 582, 161 N.E. 56 (1928); *People ex rel. v. Andrus*, 299 Ill. 50, 132 N.E. 225 (1921); *Beale v. Hileman*, 115 Ill. 355, 5 N.E. 108 (1886); and *Anderson v. Steger*, 173 Ill. 112, 50 N.E. 665 (1898).

⁵ *Drummer Creek Drainage Dist. v. Roth*, 244 Ill. 68, 91 N.E. 63 (1910).

⁶ Ill. Rev. Stat. 1939, Ch. 110, § 198(1). See suggestions that it is still available. *Hinton*, Illinois Civil Practice Act 282 (1934). *Contra*, McCaskill, Illinois Civil Practice Act, Anno. 200 (1933).

⁷ Ill. Rev. Stat. 1939, Ch. 110, § 200. See also Ill. Rev. Stat. 1939, Ch. 110, § 259.29.

⁸ Granting such privilege: *Melsha v. Johns-Manville Sales Corporation*, 299 Ill. App. 157, 19 N.E. (2d) 753 (1939). *Contra*: *Schroeder v. Campbell*, 289 Ill. App. 337, 7 N.E. (2d) 329 (1937); *Moss v. Federal Life Ins. Co.*, 289 Ill. App. 379, 7 N.E. (2d) 468 (1937).

⁹ 365 Ill. 389, 6 N.E. (2d) 643 (1937).

denied through a mere technical fault, to one having a meritorious case.¹⁰ However, the court has displayed liberality in other directions.¹¹

The decision in the instant case, therefore, serves as a warning to the unsuccessful litigant that if he exercises his right to a "short" appeal under Section 76(1) of the Illinois Civil Practice Act,¹² he must be diligent in prosecuting the same, and if it is in any way defective he must correct the error therein rather than allow it to be dismissed.¹³ The remedy of the "long" appeal must hereafter be confined to one who has had no recourse, rather than a defective recourse, to the "short" appeal method of securing review.

B. GEROSS

APPEAL AND ERROR—NECESSITY OF NEW TRIAL—RIGHT OF APPELLATE COURT, ON REVERSING JUDGMENT NOTWITHSTANDING VERDICT, TO PASS ON ALTERNATIVE MOTION FOR NEW TRIAL.—In the trial of jury cases a practice has sprung up of presenting alternative motions for judgment notwithstanding the verdict or for a new trial. By reason thereof, the trial judges have been led to pass on the first alternative and, having decided to grant the same, to neglect the second, leaving action thereon to the Appellate Court should the latter reverse the ruling granting judgment notwithstanding the verdict. Such practice accorded with the provisions of Section 68 (3c) of the Illinois Civil Practice Act¹ and the power thus conferred had been exercised by the Appellate Court. The Illinois Supreme Court, however, has now declared such provision unconstitutional, as attempting to confer original jurisdiction on the Appellate Court,² and has suggested that if the problem of final settlement of litigation is to be left in the hands of the appellate tribunal, it can only be done by having the trial court indicate its alternative rulings on such motions.

In the cases producing this result, the juries had returned verdicts in favor of the several plaintiffs; defense attorneys then presented alternative motions for judgment notwithstanding the verdict or for new trial; the trial court in each instance granted the first alternative and rendered judgment for the defendant, neglecting to pass upon the other alternative as being unnecessary; on appeal the Appellate Court, both for the First and Fourth Districts, reversed the trial court, proceeded to

¹⁰ See note to *Melsha v. Johns-Manville Sales Corporation*, 299 Ill. App. 157, 19 N.E. (2d) 753 (1939), in 17 CHICAGO-KENT LAW REVIEW 277.

¹¹ See, for example, *Francke v. Eadie*, 373 Ill. 500, 26 N.E. (2d) 853 (1940), in which appellant was given an opportunity to correct erroneous transcript which omitted to set forth the notice of appeal, though the same had, in fact, been filed.

¹² Ill. Rev. Stat. 1939, Ch. 110, § 200(1).

¹³ He may not abandon it and prosecute another "short" appeal within the ninety-day period. See also *Lanquist v. Grossman*, 282 Ill. App. 181 (1935); *Corrigan v. Von Schill College of Chiropraxy*, 277 Ill. App. 350 (1934); *Cullinan v. Cullinan*, 285 Ill. App. 272, 1 N.E. (2d) 921 (1936).

¹ Ill. Rev. Stat. 1939, Ch. 110, § 192.

² *Sprague v. Goodrich*, 376 Ill. 80, 32 N.E. (2d) 897 (1941) reversing 304 Ill. App. 556, 26 N.E. (2d) 884 (1941); *Walaite v. Chicago, Rock Island & Pacific Railway Company*, 376 Ill. 59, 33 N.E. (2d) 119 (1941), reversing 306 Ill. App. 5, 28 N.E. (2d) 149 (1940). *Farthing, J.*, dissented in each case without opinion.

deny the motion for new trial, and entered judgment on the verdict in favor of the several plaintiffs; each case was, in turn, reversed by the Illinois Supreme Court with directions to remand to the trial court in order to secure a ruling on the motion for new trial.

The jurisdiction conferred on the Illinois Appellate Court is purely appellate³ and was clearly so understood prior to the enactment of the provision of the Civil Practice Act herein involved.⁴ It is also clear that the parties could not, by consent, confer any other jurisdiction upon it.⁵ In passing upon a motion for new trial, the appellate tribunal is necessarily exercising original jurisdiction,⁶ and is not, in any way, reviewing the conduct of a nisi prius court. The mere statement of the problem demonstrates the invalidity of Section 68 (3c) of the Illinois Civil Practice Act⁷ except as it may be saved by having the trial court indicate, in advance of appeal, what action it would have taken upon the motion for a new trial had it not decided to grant a judgment notwithstanding the verdict.⁸ The Illinois Civil Practice Act does not prohibit such alternative rulings and, had the trial court so indicated its decision on each point, the Appellate Court would then have been in a position to exercise its proper function, to-wit: review both questions, and thereafter to enter an appropriate judgment. Such, at least, is the practice under the Federal Rules of Civil Procedure⁹ approved in *Montgomery Ward & Co. v. Duncan*,¹⁰ and tacitly indicated by the Illinois Supreme Court as the proper method to be pursued in state cases.

APPEARANCE—JURISDICTION ACQUIRED—WHETHER PLEADING OVER TO MERITS AFTER SPECIAL APPEARANCE AND MOTION UNDER SECTION 48 CONFERS JURISDICTION OVER PERSON—A clear-cut case involving the effect of overruling a motion to quash the service of summons made pursuant to the provisions of Section 48 of the Illinois Civil Practice Act,¹ following which the defendant answered to the merits, was presented in *Albers, Successor*

³ Ill. Constitution, 1870, Art. VI, § 11. Ill. Rev. Stat. 1939, Ch. 110, §§ 199 and 201.

⁴ Earlier decisions so disclosing are *Hawes, Judge v. People ex rel. Pulver*, 124 Ill. 560, 17 N.E. 13 (1888); *People v. Circuit Court of Cook County*, 169 Ill. 201, 48 N.E. 717 (1897); *People ex rel. Lydston v. Hoyne*, 262 Ill. 82, 104 N.E. 255 (1914).

⁵ It was argued in the *Sprague* case, note 2 *supra*, that the defendant, having claimed the benefit of Section 68 (3c) of the Civil Practice Act, note 1 *supra*, in the trial court, could not, on appeal, urge its unconstitutionality.

⁶ *Corcoran v. City of Chicago*, 373 Ill. 567, 27 N.E. (2d) 451 (1940) and note in 19 CHICAGO-KENT LAW REVIEW 91 (1940).

⁷ Ill. Rev. Stat. 1939, Ch. 110, § 192.

⁸ The allowance of the motion for judgment notwithstanding the verdict cannot be regarded as a denial of the alternative motion for new trial. See *Montgomery Ward & Co. v. Duncan*, 311 U.S.—, 61 S. Ct. 189, 85 L. Ed. 132 (1940).

⁹ Rule 50 (b), 28 U.S.C.A. following section 723 (c).

¹⁰ 311 U.S.—, 61 S. Ct. 189, 85 L. Ed. 132 (1940).

¹ Ill. Rev. Stat. 1939, Ch. 110, § 172 (1a). While this section calls for a motion to dismiss the action, the procedure involved in the instant case was proper by reason of the fact that the litigation concerned a number of defendants over all of whom, except appellant, the court has acquired jurisdiction, hence the action should not be dismissed. See also 16 CHICAGO-KENT REVIEW 118, on p. 123 (1938).

Receiver v. Bramberg,² where the court held such further pleading, involving a general appearance, did not waive the right to urge the lack of jurisdiction of the person of the defendant on appeal from an adverse judgment on the merits.

The defendant in the instant case, an action on a guaranty, was not served personally. Alias summons was served pursuant to the alternative method set forth in Section 13 of the Illinois Civil Practice Act³ by leaving a copy with a maid at defendant's alleged place of residence and subsequently mailing a copy to the same address. Defendant thereafter filed a special appearance and a motion to quash the service, supporting such motion with the affidavit of the maid in question to the effect that she was not employed by defendant and had seen him but once as a visitor to said premises, together with another affidavit by defendant's son who was the householder at the address given. Plaintiff filed no counter-affidavits controverting such averments,⁴ yet the defendant's motion was summarily denied. Subsequently the defendant answered to the merits leading to the judgment above noted.

On appeal, the Appellate Court relied on the language of Rule 21 of the Illinois Supreme Court which reads:

"Where, after denial by the court of a motion under section 48 of the Civil Practice Act, the defendant pleads over, this shall not be deemed a waiver of any error in the decision denying such motion. . . This rule shall extend to the case where the motion is one attacking the jurisdiction of the court over the person made under a special appearance, and the pleading over by the defendant has involved the entry on his part of a general appearance."⁵

The court found defendant's procedural steps were correctly taken,⁶ the uncontroverted averments were conclusive to show the service was fatally defective, and that jurisdiction had not been conferred by the

² 308 Ill. App. 463, 32 N.E. (2d) 362 (1941). Not squarely in point, but involving the same general problem are *In re Rackliffe's Estate*, 366 Ill. 22, 7 N.E. (2d) 754 (1937) noted in 15 CHICAGO-KENT REVIEW 313 (1937), and *Chicago City Bank and Trust Co. v. Kaplan*, 281 Ill. App. 97 (1935) in which the section in question was held not to apply to a garnishment action by reason of Ill. Rev. Stat. 1939, Ch. 110, § 125.

³ Ill. Rev. Stat. 1939, Ch. 110, § 137.

⁴ Ill. Rev. Stat. 1939, Ch. 110, § 172 (3) authorizes counter-affidavits by opponent. As to effect of filing such counter-affidavits in a legal action, see note in 17 CHICAGO-KENT LAW REVIEW 372 (1939).

⁵ Ill. Rev. Stat. 1939, Ch. 110, § 259.21. It should be noted that the operation of this section is confined to motions made under Section 48, upon the limited grounds therein enumerated, and does not apply to motions made under section 45 of the Illinois Civil Practice Act.

⁶ On this point see *Brandt v. St. Paul Mercury Indemnity Co.*, 285 Ill. App. 212, 1 N.E. (2d) 873 (1936), noted in 14 CHICAGO-KENT REVIEW 369 (1936), wherein the special appearance and motion based on lack of jurisdiction of the person was coupled with a motion to dismiss on the ground of *res adjudicata* and the joinder was regarded as amounting to a general appearance.

participation of defendant in a hearing on the merits,⁷ hence it reversed the judgment with directions to sustain the motion to quash the service of summons.

The procedural methods held available in the instant case are an admirable improvement on the older methods, involving as they did the likelihood of a double hearing, both in the trial court and on appeal, first as to the question of jurisdiction and then as to the merits of the case. The defendant may now safely seek a decision on the merits, after proper objection to the lack of jurisdiction over his person, and thereby gain a double advantage for he may be likely to secure a decision on the jurisdictional question or secure a judgment in the trial court upon the justice and validity of his opponent's claim with the right to review the decision on either point or both by the one hearing and the one appeal.

PROCESS—PERSONAL SERVICE—WHETHER PERSONAL SERVICE IS INVALID IF MADE ON SUNDAY—The validity of personal service of summons in a civil action when made on a Sunday was called into question in *Pedersen v. Logan Square State & Savings Bank*.¹ In that case, a suit to enforce the constitutional liability of stockholders in a defunct state bank, two of the many defendants, having been personally served with summons on a Sunday, neither appeared nor answered and a default decree was entered against them. After service of execution, the defendants in question filed a petition seeking to vacate such decree and quash the service of summons, which petition was granted over the protest of the decree creditor predicated on the ground that the chancellor was without authority to disturb the original decree inasmuch as more than thirty days had elapsed between the entry thereof and the filing of the petition.² On appeal, held: decree granting prayer of petition affirmed, as, the service being invalid, no jurisdiction existed in the court to enter the original decree.

In support of such decision the court relied on two early Illinois cases not strictly in point³ and a provision of the criminal code, first

⁷ Such would have been the inevitable result under the former Illinois practice. See *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N.E. 232 (1888); *Haley v. Reidelberger*, 340 Ill. 154, 172 N.E. 19 (1930).

¹ 309 Ill. App. 54, 32 N.E. (2d) 644 (1941).

² Ill. Rev. Stat. 1939, Ch. 110, § 174(7). The petition presented, however, appears to have been based on Section 72 of the Illinois Civil Practice Act (Ill. Rev. Stat. 1939, Ch. 110, § 196), permitting application for correction of errors at any time within five years.

³ *Scammon v. City of Chicago*, 40 Ill. 146 (1866), a proceeding to condemn land for failure to pay a special assessment levied thereon. The owner relied on the invalidity of the original assessment because notice by publication had not been properly given inasmuch as the six days' notice required by city charter included a Sunday, which contention was upheld. *Baxter v. People*, 8 Ill. (3 Gilman) 368 (1846), in which a judgment of conviction for murder and ordering the death penalty was held invalid because pronounced on a Sunday.

enacted in 1821, which reads: "Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion on Sunday, shall be fined not exceeding \$25."⁴

These were regarded as sufficient to establish a policy in this state, not altered by any subsequent expression of either the courts or the legislature,⁵ that judicial acts, including the service of process which is an initial step toward such action, must not be performed on the Sabbath, except where required by necessity,⁶ and if so performed are to be regarded as absolute nullity.

Decisions in other jurisdictions, despite specific statutes prohibiting the transaction of judicial business on Sunday, have held service of summons on that day valid and binding, treating the same as a mere ministerial act rather than one of judicial character, hence not within the prohibition of such statutes.⁷ The distinction thus drawn is not without merit. Service of criminal process may be made at any time in this state by virtue of a specific provision of the criminal code.⁸ Further, such emergency processes as attachment⁹ and writ of injunction¹⁰ may issue and be executed without regard to whether the day is a legal one or *dies non juridicus*. Doubtless the court deciding the instant case would justify such action on the part of a public official as being proper as it might be said to be supported by a specifically stated public policy,

⁴ Ill. Rev. Stat. 1939, Ch. 38, § 549.

⁵ The court noted that in 1939 the legislature, while repealing the sections of the criminal code immediately preceding the one in question, which prohibited the opening of a tipping house on Sunday, and defined Sunday (Ill. Rev. Stat. 1937, Ch. 38, §§ 547, 548), had not seen fit to disturb the provision relied on. It did, however, comment on the public policy it felt thus evidenced by saying: "When one considers the extent to which labor and amusements have entered into the present life of the people of this State . . . [the] language contained . . . sounds strange, indeed, and not in accord with what seems to be the spirit of the times."—309 Ill. App. 54, 59, 32 N.E. (2d) 644, 646 (1941).

⁶ The "necessity" referred to includes receiving verdict, *Baxter v. People*, 8 Ill. (3 Gilman) 368 (1846); taking a recognizance, *Johnston v. People*, 31 Ill. 469 (1863); and approving a bail bond, *People v. Berof*, 290 Ill. App. 1, 7 N.E. (2d) 919 (1937).

⁷ *Heisen v. Smith*, 138 Cal. 216, 71 P. 180 (1902); *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 P. 210 (1914); and *Hastings v. Columbus*, 42 Ohio St. 585 (1885) were noted in the opinion in the instant case. The court might have added *Pelham v. Virginia-Carolina Chemical Corporation*, 23 Ala. App. 93, 121 So. 448 (1929); *Pelton v. Muntzing*, 24 Colo. App. 1, 131 P. 281 (1913); *Van v. Dean*, 192 Iowa 1311, 184 N.W. 646 (1921); *Chaney v. Stacy*, 247 Ky. 520, 57 S.W. (2d) 530 (1933); *McDannald v. Wilmoth*, 82 W. Va. 719, 97 S.E. 132 (1918); and *Lamar-Wells Co. v. Hamilton Co.*, 237 F. 54 (1916). Contra: *Chafin v. Tumlin*, 20 Ga. App. 433, 93 S.E. 50 (1917); *Van Bueren v. Board of Commissioners of City of Wildwood*, 9 N.J. Misc. 187, 153 A. 260 (1931), by reason of express statute forbidding service of process on Sunday; *Atoka Milling Co. v. Groomer*, 131 Okla. 174, 268 P. 208 (1928); and *State ex rel. Barks v. Superior Court of Skamania County*, 144 Wash. 44, 257 P. 837 (1927).

⁸ Ill. Rev. Stat. 1939, Ch. 38, § 659.

⁹ Ill. Rev. Stat. 1939, Ch. 11, § 12.

¹⁰ Ill. Rev. Stat. 1939, Ch. 69, § 23. See also *Langabier v. The Fairbury, Pontiac and Northwestern R.R. Co.*, 64 Ill. 243 (1872).

or else be sanctioned under the express exemption contained in the criminal code above noted.

Should the fact that the official violates that provision and thereby subjects himself to a fine, invalidate his action in making the service? It would be unlikely that the court would deny the ordinary laborer his hire even though his conduct fell within the prohibition,¹¹ and certainly a contract made on that day would withstand criticism.¹² Is the labor in serving process, which, by reason of Section 6 of the Illinois Civil Practice Act,¹³ may now be performed by a private citizen, so intrinsically different that it should be singled out for condemnation? The answer appears, at present, to be in the affirmative in this state, even though, by so acting, the purpose of process, to-wit: notice to the defendant of the pendency of proceedings, is fully satisfied, and the service thereof does not involve any disturbance of peace and good order.¹⁴

¹¹ *McCurdy v. The Alaska and Chicago Commercial Company*, 102 Ill. App. 120 (1902).

¹² *Richmond v. Moore*, 107 Ill. 429 (1883); *Prout v. Hoy Oil Company*, 263 Ill. 54, 105 N.E. 26 (1914).

¹³ Ill. Rev. Stat. 1939, Ch. 110, § 130(1).

¹⁴ It should be noted that the "labor" condemned by Ill. Rev. Stat. 1939, Ch. 38, § 549, is not merely any act of work done but only such acts as do disturb the peace. Reaping grain on Sunday, while amounting to a disturbance, was excused by necessity in *Johnson v. People*, 42 Ill. App. 594 (1891), while plowing on Sunday, by a Seventh Day Adventist, was held not to amount to a disturbance in *Foll v. People*, 66 Ill. App. 405 (1896). Quaere: How much "disturbance," other than the defendant's chagrin, is involved in the usual service of summons?