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Civil Practice Act Cases

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APPEAL AND ERROR—DISMISSAL, WITHDRAWAL, OR ABANDONMENT—WHETHER OR NOT APPELLATE COURT MAY VACATE ORDER DISMISSING APPEAL, ENTERED AT REQUEST OF APPELLANT, AND REINSTATE APPEAL ON DOCKET—An original petition for mandamus was filed in the Illinois Supreme Court in the recent case of *People ex rel. Waite* v. *Bristow*[1] by which the petitioner sought to compel the judges of the Appellate Court for the Fourth District to expunge an order entered therein reinstating the appeal which had been taken in a case in which the petitioner had appeared as appellee. The petition alleged that a certain appellant had served notice of appeal from a judgment rendered by the Circuit Court of Pulaski County; that a transcript of the record was duly filed in the Appellate Court and the cause docketed; that it was subsequently discovered that the transcript contained no final formal judgment order, although the minutes of the trial judge were incorporated therein, for the reason that the clerk had failed to write up the formal judgment; that a motion to dismiss the appeal without prejudice was made by appellant and a motion to dismiss was also made by appellee. The petition also charged that the appellee's motion was denied while that of the appellant was granted under an order which, at the same time allowed the withdrawal of the record.[2] Petitioner further charged that the term of the Appellate Court expired without any further action being taken but that, at the next ensuing term, the appellant moved to vacate the order dismissing the appeal and reinstate the cause because, in the meantime, a formal final judgment had been entered on the records by the clerk of the trial court. That motion also purported to request that leave to appeal be granted. The appellee moved to strike such motion, but the Appellate Court granted the appellant's request and entered a formal order vacating the previous action, reinstating the appeal and also purporting to grant leave to appeal. It was this order which petitioner sought to have expunged. Issue on such petition was made by answer and demurrer thereto,[3] and after

[1] 391 Ill. 101, 62 N. E. (2d) 545 (1945). Gunn, J., wrote a dissenting opinion. Stone, J., also dissented.

[2] The order dismissing the appeal recited that the same was without prejudice: 391 Ill. 101 at 105, 62 N. E. (2d) 545 at 548. The act of withdrawing the record is usually not regarded as revoking a jurisdiction already conferred: Comrs. of Highways v. People ex rel. Walker, 100 Ill. 474 (1881).

[3] The Supreme Court opinion states that "petitioner filed a demurrer" to the answer: 391 Ill. 101 at 103, 62 N. E. (2d) 545 at 547. While the Civil Practice Act does not directly apply to mandamus proceedings, Ill. Rev. Stat. 1945, Ch. 110, § 125, it is made applicable by Ill. Rev. Stat. 1945, Ch. 87, § 11. The latter statute also states that the petitioner "may reply to the answer or present a motion directed against" the same: Ill. Rev. Stat. 1945, Ch. 87, § 4. The choice of terminology used by the court is not strictly accurate.

argument thereon, the Illinois Supreme Court awarded the peremptory writ on the ground that the Appellate Court was without jurisdiction to enter the order in question. It likewise held that such order could not be said to amount to the granting of leave to appeal inasmuch as there had been no proper request made for such relief.

Many instances exist in this state where the Illinois Supreme Court has been called upon to exercise its original jurisdiction over mandamus to supervise the activities of the lower courts of the state in order to insure the proper performance of judicial duties.[4] A proceeding of this character against the judges of an Appellate Court, however, is rather rare,[5] hence the instant case would be noteworthy from that fact alone. It does, however, present certain principles which should be more widely disseminated to prevent the future occurrence of the unfortunate events which led to the pronouncement of that decision.

It is fundamental law that appeals, generally, lie only from final judgments and decrees[6] and that a record on appeal which fails to disclose the existence of such a final order will provide no basis for the exercise of appellate jurisdiction to review.[7] On motion or even *sua sponte*,[8] such a premature appeal will be dismissed by the appellate tribunal. The mere oral pronouncement of a final judgment by the trial court,[9] or the entry thereof in the judge's minutes[10] does not serve to present a suitable final order in the record sent up for review, for that record should recite the formal judgment order noted by the clerk on the public records of the court.[11]

[4] See J. A. Stanley and R. L. Severns, "The Original Jurisdiction of the Illinois Supreme Court," 22 CHICAGO-KENT LAW REVIEW 169-96 (1944), particularly pp. 186-90.

[5] Prior instances may be seen in the cases of People ex rel. Beadles v. Pam, 276 Ill. 181, 114 N. E. 504 (1916); People ex rel. Bender v. Davis, 365 Ill. 389, 6 N. E. (2d) 643 (1937); People ex rel. Village of Westchester v. O'Connor, 378 Ill. 249, 38 N. E. (2d) 157 (1941).

[6] Ill. Rev. Stat. 1945, Ch. 110, § 201. Appeal from certain interlocutory orders is permitted by Section 202.

[7] See, for example, Metzger v. Morley, 184 Ill. 81, 56 N. E. 299 (1900); Lynch v. Spare Motor Wheel of America, 178 Ill. App. 510 (1913); Alton Lime and Cement Co. v. Calvey, 41 Ill. App. 597 (1892).

[8] The court has acted on its own motion even though neither appellant nor appellee has raised the question: Thomas v. Ritholz, 310 Ill. App. 166, 33 N. E. (2d) 932 (1941).

[9] Snook v. Shaw, 315 Ill. App. 594, 43 N. E. (2d) 417 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 98.

[10] Faulk v. Kellums, 54 Ill. 188 (1870); Fitzsimmons v. Munch, 74 Ill. App. 259 (1898).

[11] Ashmore v. Skene Lead Co., 150 Ill. App. 381 (1909); Breese Coal & Mining Co. v. Olney Electric L. & P. Co., 109 Ill. App. 539 (1903); Com'rs of Highways v. Village of Rock Falls, 3 Ill. App. 464 (1879).

For these reasons, the appellant here concerned wisely decided not to urge its appeal after the same had been docketed for had it done so the appeal would have, inevitably, been dismissed. Instead, it chose to seek a voluntary dismissal so that no determination on the merits could occur, intending to renew the appeal when a complete record could be obtained. Therein lay the basic mistake for it is equally fundamental that one who chooses to dismiss his action must be held to anticipate the consequences of that choice and cannot move to have the dismissal order vacated unless jurisdiction for that purpose has been expressly reserved.[12]

By the entry of that order and the expiration of the term, the Appellate Court lost jurisdiction unless the same could be re-acquired in some other fashion. The Illinois Supreme Court has now indicated that an appellant who is faced with the predicament that existed at this stage of the appeal may find adequate remedy not in moving to dismiss the appeal but rather by suggesting a diminution of the record and applying for leave to supply the missing parts.[13] In that way, jurisdiction can be retained and proceedings stayed until the complete record is before the higher court.[14]

If the motion made by appellant was solely one to vacate the order dismissing the appeal, then there can be no question but what the Appellate Court lacked jurisdiction to grant the prayer thereof and its order reinstating the cause was necessarily void and mandamus would lie to expunge the same.[15] That motion could not operate as a petition in the nature of a writ of error coram nobis under Section 72 of the

[12] See note in 23 CHICAGO-KENT LAW REVIEW 327 to Fulton v. Yondorf, 324 Ill. App. 452, 58 N. E. (2d) 640 (1944). See also Bettenhausen v. Guenther, 388 Ill. 487, 58 N. E. (2d) 550 (1945). It was argued, in the instant case, that an order of dismissal "without prejudice" was equivalent to a reservation of jurisdiction for the purpose of vacating such dismissal. The court held that the words "without prejudice" were insufficient for this purpose: 391 Ill. 101 at 112, 62 N. E. (2d) 545 at 551.

[13] 391 Ill. 101 at 113, 62 N. E. (2d) 545 at 551. This practice was sanctioned in People v. Blevins, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C 451 (1911). See also Wolf v. Hope, 210 Ill. 50, 70 N. E. 1082 (1904); Bergen v. Riggs, 40 Ill. 61 (1864); Rubendall v. Tarbox, 200 Ill. App. 260 (1916), cert. den. 200 Ill. App. xii; Ross v. Plano Steel Works, 34 Ill. App. 323 (1889). The suggestion must be promptly made or it will be disregarded: Allen v. LeMoyne, 101 Ill. 655 (1882), where it was made on petition for rehearing; McDonald v. Greenwood, 124 Ill. App. 163 (1906).

[14] The point was made that the appeal would still be imperfect since the notice of appeal would precede the entry of the judgment appealed from. That point was answered by the statement that the failure of the clerk to enter judgment until after notice of appeal had been served did not vitiate the notice since the entry of the order was merely a ministerial act and did not affect the validity of the judgment already pronounced: People ex rel. Holbrook v. Petit, 266 Ill. 628, 107 N. E. 830 (1915). See also Palmer v. Emery, 91 Ill. App. 207 (1900).

[15] People ex rel. Crowe v. Fisher, 303 Ill. 430, 135 N. E. 751 (1922).

Civil Practice Act[16] for the reason that it did not rest on errors of fact unknown to the court at the time it entered the original order dismissing the appeal[17] as all of the facts were then well known. But an appellant, despite the failure to secure review upon notice of appeal, is still entitled to have the judgment reviewed within the time permitted by law upon notice for leave to appeal and upon a showing of the absence of culpable negligence.[18] The motion filed in the instant case to vacate the order dismissing the original appeal also prayed for leave to prosecute an appeal, and the order entered thereon, in addition to other things, granted such leave.[19]

The majority of the Illinois Supreme Court concluded that such motion was insufficient to comply with statutory requirements, hence could not be made the basis for an order granting leave to appeal.[20] There is some merit, however, to the argument of the dissenting judge that, at least in this respect, the order of the Appellate Court was not void but merely erroneous.[21] While notice of appeal is an essential jurisdictional requirement to appeals taken as a matter of right,[22] there is little else about an appeal that is jurisdictional. Most other questions involve compliance with rules which may, in the exercise of discretion, be waived. Certainly, in the case of granting leave to appeal, the statute expressly vests the

[16] Ill. Rev. Stat. 1945, Ch. 110, § 196.

[17] Jerome v. 5019-21 Quincy Street Bldg. Corp., 385 Ill. 524, 53 N. E. (2d) 444 (1944). The petition in the nature of a writ of error coram nobis under the Civil Practice Act is no broader in scope than the common law writ: Frank v. Salomon, 376 Ill. 439, 34 N. E. (2d) 424 (1941), noted in 19 CHICAGO-KENT LAW REVIEW 372, reversing 298 Ill. App. 548, 19 N. E. (2d) 147 (1939), noted in 17 CHICAGO-KENT LAW REVIEW 276. There is reason to doubt that such petition may be presented to an appellate tribunal that possesses no original jurisdiction since it is primarily designed for use in original proceedings. The Illinois Supreme Court refused to pass on this point: 391 Ill. 101 at 116, 62 N. E. (2d) 545 at 552.

[18] Ill. Rev. Stat. 1945, Ch. 110, § 200. The earlier practice, before the 1943 amendment, is illustrated by Spivey Bldg. Corp. v. Illinois Iowa Power Co., 375 Ill. 128, 30 N. E. (2d) 641 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 274.

[19] 391 Ill. 101 at 105, 62 N. E. (2d) 545 at 548.

[20] The motion appeared to be defective in that (1) no affidavit accompanied the same to show the absence of culpable negligence in failing to file notice of appeal within ninety days or failure to prosecute such appeal with diligence as required by Ill. Rev. Stat. 1945, Ch. 110, § 200(1), and (2) no notice of appeal was presented therewith as required by Rule 29: Ill. Rev. Stat. 1945, Ch. 110, § 259.29. The sufficiency of such an affidavit has been tested in Roy v. City of Springfield, 282 Ill. App. 238 (1935), and Melsha v. Johns-Manville Sales Corp., 299 Ill. App. 157, 19 N. E. (2d) 753 (1939).

[21] See dissenting opinion of Gunn, J., in 391 Ill. 101 at 126, 62 N. E. (2d) 545 at 556-7.

[22] Francke v. Eadie, 373 Ill. 500, 26 N. E. (2d) 853 (1940), noted in 18 CHICAGO-KENT LAW REVIEW 416.

appellate tribunals with a discretionary power,[23] and the improper exercise thereof would make the order erroneous but not void. It is true that the litigant should, as a price for using the courts, be obliged to comply with the rules thereof, It is also true that non-compliance therewith may lead to the imposition of penalties, but there have been instances in the past where the Illinois Supreme Court has tolerated infractions of rules without going to the length of dismissing an appeal or holding that such non-compliance amounted to a lack of jurisdiction to proceed [24] all in keeping with the spirit of the Civil Practic Act.[25] While the Appellate Court had no right to reinstate the original appeal, its action on the request for leave to appeal could be no worse than erroneous, hence not open to correction in the drastic fashion applied in the instant case.[26]

The case does, however, serve as a warning that the appellant who is faced with an insufficient record to support an appeal ought not to apply for the dismissal of that appeal, if the deficiencies in the record can be supplied, for the consequences of that action may be more serious than he contemplates. He should, instead, see to it that the dismissal order contains a reservation of jurisdiction to vacate the same, or else present a separate petition for leave to appeal in the regular fashion.

[23] Ill. Rev. Stat. 1945, Ch. 110, § 200(1), states: "The fact that appellant may have filed a notice of appeal prior to the filing of his motion for leave to appeal shall not deprive the reviewing court of the power in its discretion to grant leave to appeal."

[24] Durkin v. Hey, 376 Ill. 292, 33 N. E. (2d) 463 (1941); Swain v. Hoberg, 380 Ill. 442, 44 N. E. (2d) 38 (1942); Harris v. Sovereign Camp, W. O. W., 302 Ill. App. 310, 23 N. E. (2d) 793 (1939). Contra: Knecht v. Sincox, 376 Ill. 586, 35 N. E. (2d) 68 (1941).

[25] Ill. Rev. Stat. 1945, Ch. 110, § 128.

[26] Subsequent to the order granting the peremptory writ in the instant case, the original judgment debtor sought leave to appeal from the original judgment by petition filed more than eighteen months after its rendition. Such petition was stricken by the Appellate Court on the ground that it came too late. On writ of error, the Illinois Supreme Court affirmed: 392 Ill. 318, 64 N. E. (2d) 491 (1946).