Denver Law Review

Volume 33 | Issue 1 Article 5

May 2021

One Year Review of Appeals and Agency

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ONE YEAR REVIEW OF APPEALS AND AGENCY

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During the year last preceding there have been a great many cases covering the subject of appellate procedure which have been decided by our Supreme Court, but only two cases covering the field of agency. Therefore, this article will be devoted primarily to a consideration of the problems faced by the practitioner when he gets ready to appeal a case to the Supreme Court of Colorado. In general, the author will use the term "appeal" and "Writ of Error" interchangeably unless otherwise noted.

Turning first to the matter of appellate procedure one is reminded of the admonition given by a law school professor to his class in civil procedure. Namely, that clients do not, as a rule, come to lawyers' offices in order to find out what they should do, they come to lawyers' offices in order to find out how to do it. The matter of procedure is clearly the "how" of the practice of law. To paraphrase the old saying, "while procedure may not make the case, it clearly helps it."

The writer has divided this subject into seven separate headings as a matter of convenience in classification. The first heading which we will cover is that of Judgments.

Surely there is not a lawyer in the State of Colorado who does not know that the primary object of a lawsuit is to secure a judgment, and that if the judgment is secured he may then perhaps, execute on same. It would follow, therefore, that if judgment is secured in the Trial Court, the next end to attain is to see that that judgment is sustained in the Supreme Court. In order to do this it necessary that a proper record on appeal be prepared. Our Court, in the case of *Ruth King and Joe King* vs. *Frank Williams,*[1] ruled that the length of time within which a defeated litigant may secure a Writ of Error in the Supreme Court is three months[2].

Here it appeared that on August 6th, 1954, verdict was had for the defendant. On the 24th day of September the Trial Court denied motions for a new trial and entry of judgment notwithstanding the verdict. At that time, the Trial Judge requested the winning attorney to prepare a formal order of judgment. The formal order was not filed in the District Court until the 11th day of October. On the 8th od December counsel for the defeated litigant filed a motion to extend the time within which to prepare the transcript. The motion was granted and on the 11th of January a praecipe was was issued. It should be noted that the praecipe was filed exactly three months from the date of the *entry* of the final order of judgment in the Trial Court.

Mr. Justice Clark sustaining a motion to dismiss, ruled "that

[1] C.B.A. Ad. Sh. Vol. 7, No. 8, Pg. 271, 1955.
[2] Colo. Rules C.P. 111(b).

the sole question here is at what date did the judgment become effective and final. A judgment is binding and effective from the time of its pronouncement, although not actually entered into the record until later." (Page 272) Mr. Justice Clark emphatically states that it is the *statement* of the Court that judgment is *entered* that constitutes the judgment and that it is from that day that time will run.

The entry of judgment is ministerial and unless a Writ of Error is taken out within 90 days from the date of pronouncement of judgment, Writ of Error will not lie. This case illustrates the point that counsel cannot be too careful in computing the time within which he must perfect a Writ of Error to the Supreme Court.

In another interesting decision *Byrdie W. Johnson* vs. *Harry A. Johnson*,[3] the following occured: In what appeared to be a tort action, complaint was filed on March 22, 1949. Answer thereto was filed November 30, 1951. On January 15, 1954 the defendant filed a motion to dismiss the complaint for failure to prosecute, "pointing out" that four terms of court have passed since the matter had been at issue; that said matter has been at issue for more than two years without any diligent prosecution by any of the plain-

[3] C.B.A. Ad. Sh. Vol. 7, No. 13, 1955.

tiffs or their attorneys (Page 491). The Court heard this motion, and on the 22nd day of January, 1954, found, "that defendant's motion is well taken," and ordered, "that it be and is hereby granted and the case is hereby dismissed." The Court then gave sixty days in which to file a Bill of Exceptions and tender a trascript.

On the 5th day of March of the same year, the plaintiff filed a motion for vacation of the judgment of dismissal, and on March 8th the Trial Court entered said motion by way of order granting same. On the 29th day of March the Trial Court reconsidered the defendant's original motion to dismiss for failure to prosecute and on that day it entered inter alia the following findings: "It is hereby ordered, adjudged and decreed that the motion be sustained and that the complaint of the plaintiff filed herein be dismissed."

The plaintiff had had several different counsel, and on June 18th new counsel filed a motion for "Relief From Judgment" relying on provisions of Rule 60(b) (1) (2). On the 7th of September, 1954, the Trial Court again entered extensive findings followed by a document entitled "Judgment." In said document the Court stated "It is therefore ordered, adjudged and decreed by the Court that the motion for relief from judgment filed by Byrdie W. Johnson and heard September 7, 1954, be denied." Thereafter, counsel for the plaintiff, on the 6th of December, approximately 89 days sub-

sequent to the entry of the order of September 7th, filed praecipe for Writ of Error.

Our Court, in ruling on the question under a motion to dismiss stated "the question presented on this issue is when was a final judgment entered by the Trial Court . . . the final determination of the cause is a judgment whether the relief granted is legal or equitable."[4] "Any action by which a Trial Court terminates the proceeding is a final judgment . . . now the Court considers what was the action of this Trial Court that terminated the case. Was it the document entitled "Judgment," or was it the entry and pronouncement of its order of March 29th, dismissing the case under the defendant's motion to dismiss for failure to prosecute. The Court notes that the so-called judgment of September 7th goes merely to the question as to whether plaintiff was entitled to relief from the judgment theretofore entered." The Court states, "it has been held that the character of an instrument, whether a judgment or an order, is to determine by its contents and substance and not by its title" (Page 492).

The Court then notes that it is unfortunate that counsel was misled by this document, but that under Rule 60(b), "that a motion under this subdivision does not affect the finality of a judgment or suspend its operation . . . such motion in any event is directed to the discretion of the Trial Court, and when one files such a motion he admits for all practical purposes that the judgment is in all respects regular on the face of the record, but asserts that the record would show differently except for mistake, inadvertence or excusable neglect on behalf of counsel or client. No such showing was here presented. If it be that probable error appears in the record, then, of course, proper procedure indicates a review upon writ of error procured within the prescribed period of time following the entry of final judgment" (Page 493).

In the instant case a most difficult problem seems to be presented, for here we have a situation in which after judgment of dismissal is entered counsel for the defeated litigant seeks review of same by an appropriate motion under Rule 60(b). In the interim, the time in which counsel would have to take a writ of

[4] 49 C.J.S, Pg. 26.

error under Rule 111(b), from the decision of the Trial Court granting the motion to dismiss, is running, so that within 90 days from the date of the granting of the motion, the right to appeal to the Supreme Court by Writ of Error is gone. In the instant case, indeed, the right to appeal to the Supreme Court under the ruling of the Court herein, had lapsed prior to the ruling of the Trial Judge on the motion to set aside its previous judgment of dismissal. The Court, through Mr. Justice Clark points out that the proper procedure is to file an independent action in the Trial Court. In the interim, taking the case, to the Supreme Court.

This, of course, would appear to be proper procedure, but the writer wishes to point out that where counsel finds himself in a position in which he believes a motion under Rule 60 should be filed, and particularly 60(b) thereof, that he should certainly do one of two things: Request the Trial Court to determine the matter speedily in order that the 90 day period within which to docket in the Supreme Court will not elapse prior to the determination by the Trial Court under Rule 60(b), or (2) he should file an independent action.

The writer would also note that there appears to be a hiatus in the rules under this problem in this respect. Suppose that a motion under Rule 60(b) to set aside a judgment is filed in apt time; suppose also that counsel, heeding the instant case, dockets within 90 days the case in the Supreme Court; suppose that subsequent to the docketing of the case in the Supreme Court the Trial Court determines that its previous judgment was in error, and reverses same. The question then arises, what is counsel to do? Has the Trial Court continued jurisdiction after the docketing of the case in the Supreme Court? And, if so, may the counsel substiute th new judgment of the Trial Court for the judgment of the Trial Court theretofore entered in the matter docketed in the Supreme Court? To the writer, at least, the rules are not clear, unless the phrase in 112(a) governs as to filing of a supplemental record.

Having considered the cases cited during the past year, within which the question has arisen as to the date from which the time for Writ of Error runs, we come now to the next important con-

sideration, and that is the state of the record itself. There have been two decisions concerning a matter which appears to have given lawyers difficulty and that is: What must be in the record insofar as the question of a final judgment is concerned? Our Court has held that the final judgment, as such, must be a part of the record. In the case of *W. B. Sutley vs. Glenn C. Davis and Roy S. Lofton,*[5] the following occurred: This was a condemnation proceeding in which commissioners were appointed. The commissioners found that there was no necessity for the condemnation, and the counsel for the plaintiff moved to set aside the findings. The Trial Court, on the 12th day of September, denied the motion and declared that a rehearing was dispensed with. Within the proper time counsel for the plaintiff tendered and had the record and the reporter's transcript of the evidence before the commissioners approved by the judge. Nothing further was in the record. Our Court citing Rule 112(a) states: The record shall contain. "the material pleadings without unnecessary duplication the verdict, or the findings of fact and conslusions of law, together with directions for the entry of judgment thereon. The master's report, if any. The opinion, if any. The judgment or part thereof to be reviewed and the designation or stipulation of the parties as to the matters to be included in the record." The Court pointed out that no judgment appeared in this case; that therefore, dismissal followed. The writer cannot urge too strongly upon his brethren the need for careful study of the rules pertaining to appellate practice in order that the pitfall herein illustrated and others like it may be avoided.

Again, in the decision of *Edward L. French and Dorothy French vs. Art L. Haarhues and Roy N. Jones,*[6] the Court pointed out that a designation for a direction for entry of judgment but no designation for any final judgment as shown on the designation of record in error is a fatal defect and the Court again cites Rule 112, stating that the judgment itself must appear as part of the record; that to designate the entry of judgment is not sufficient, since that is merely a ministerial duty devolving upon the

[5] C.B.A. Ad. Sh. Vol. 6, 1955.
[6] C.B.A. Ad. Sh. Vol. 7, No. 13, 1955.

clerk of the Trial Court after the judgment itself has been entered. The writer would suggest that in every case in which counsel feels that there is the slightest chance that the matter will be appealed to the Supreme Court, counsel should prepare findings of fact, conclusions of law and a judgment. If such is done, the question presented in the instant case and in the previous cases cannot arise.

An interesting matter that has come up to our Court within the past year has involved the proper parties to an appeal; that is. who may take a writ of error to the Supreme Court? In the first of these cases, *Mayme Schoenewald vs. Louis Shoen, et al,*[7] we had the following situation: A complaint for damages in which a third party complaint was filed. Third party defendants then proceded by motion to dismiss and the Trial Court entered an order dismissing without prejudice, the third party complaint. Third party plaintiff thereupon proceeded by writ of error to the Supreme Court. The Supreme Court held that the order of a trial court dismissing without prejudice a third party complaint is not a final judgment from which writ of error can lie under Rule 11. Again in *Elwood Edwards, Inc., a Colorado corporation and Elwood Edwards vs Hugo F. Sill,*[8] the court ruled that where the real party in interest does not take a case to the Supreme

[7] C.B.A. Ad. Sh. Vol. 7, No. 12, 1955.
[8] C.B.A. Ad. Sh. Vol. 7, No. 10, 1955.

Court, nor is a party therein, appeal to the Supreme Court by Writ of Error will not lie at the behest of a nominal party.

Although there has been but one decision in our Court within the past year considering the general state of the record. still it cannot be over emphasized that precision is needed in the perfecting of the Writ of Error and in the compilation of the record upon which the Supreme Court will sit in judgment. Perhaps many of us who know full well that the Trial Court having witnesses before it, may many times reach judgments where we have committed errors in procedure and unfortunately let this habit slip into our practice in front of the Supreme Court. The thing which counsel must keep in mind is that the Supreme Court passes judgment solely upon the record, occasionally supplemented by oral argument, and that the record may appear vastly different from the actual trial in the nisi prius court.

In the decision of *Bernard E. Teets, et al, vs. Lee T. Richardson, individually, and doing business as Western Commission Company.*[9] The Court, through Mr. Justice Bradfield, in a short opinion points out that the matter could be decided, "by dismissal of the writ or error because of failure of compliance with the pertinent rules of procedure, or upon the merits." The court points out, that the record is defective in at least the following respects: "It contains only the pleadings filed by the parties, and the finding and judgment of the Trial Court. There was no transcript and no exhibits attached thereto." The Court states, "that without a transcript of the evidence (in effect being unable therefore to construe the exhibits as well) the presumption is that the judgment is supported by the evidence." This case well illustrates the fact that if the record in complete detail is not before the Court the chance for reversal is correspondingly lessened. One could almost say that it is better to have a sloppy record, provided that it is complete, than to have none at all, or one that is quite incomplete.

The next matter considered by our court, and one which has formerly taken a considerable portion of its attention from time to time, with respect to appellate procedure is that of original jurisdic-

[9] C.B.A. Ad. Sh. Vol. 7, No. 11, 1955.

iton. There has been but one decision within the past year in this field. *Arthur J. Kemper vs. The District Court of the City and County of Denver in the Second Judicial District, the Honorable Joseph E. Cook, one of the Judges thereof, and Hazel I. Kemper,*[10] In this decision, pursuant to Rule 116, the petitioner sought to invoke the original jurisdiction of the Court in a divorce matter in which an interloctuory decree had been entered by an unverified petition. The Court set aside the interloctuory decree and informed petitioner that he would have 15 days within which to tender the record, or 15 days within which to answer. Petitioner did neither, but rather went to the Supreme Court under Rule 116. The Court points out, "the fact that a Court has erroniously granted or denied a change of venue, or is otherwise proceeding without or in excess of jurisdiction will not be regarded as sufficient to invoke Rule 116," and states further, "that a Writ of Prohibition is not to be granted except in matters of great public importance." The present one is not such a matter. The Court properly points out that here petitioner could have proceeded in one of two fashions: Either by answer, or by tendering the record and proceeding on Write of Error. He did neither and therefore suffered the result above.

Within the past year there have been two cases considering the question of the record in a criminal case before the Supreme Court of this state. It should be noted at the outset that the Rules of Civil Procedure do not apply in criminal cases, and that it is up to counsel representing a defendant in a criminal case to be prepared pursuant to statute to represent his client in the proper procedural fashion. In the first case the defendant was found guilty of driving under the influence of intoxicating liquor. He was so found by a jury empaneled in the County Court. His counsel appealed to the Supreme Court under Writ of Error. The Supreme Court noted that there was no bill of exceptions; that in the motion for new trial the only grounds stated were, "that the complaint was erroneous and prejudicial, the testimony of a witness was incompetent and the sentence was contrary to law." The Court notes that pursuant to Vol. 1, 53, C. R. S. Page 120, there must be:

[10] C.B.A. Ad. Sh. Vol. 7, No. 9, 1955.

(1) Assignments of Error; (2) the record must contain objections to evidence or other matters of which the defendant complains; (3) the record must disclose exceptions to all adverse rulings with which defendant complains (Page 157).

Again in the case of *Pete Joe Narango, also known as Pedro Jose Narango vs The People of the State of Colorado,*[11] the Court points out that when a criminal case is tried in the County Court, appeal does not lie to the District Court, but only lies to the Supreme Court by Writ of Error.

These then are the cases which have been decided by our Supreme Court within the past year covering the question of Appellate Procedure. The Rules of Civil Procedure state the rules of the game and it is up to us as attorneys, if we are to do the best job for our clients, to abide by same.

There have been but two cases decided in the Court within the past year covering the field of agency. In the first of these, *Olson Manufacturing Company, an Idaho Corporation, vs. Charles Corsentino, et al,*[12] we have a rather involved fact situation, but a basic principal of law to determine the controversy. Here the defendant manufacturing company attempted to sell beet harvesters through-

[11] C.B.A. Ad. Sh. Vol. 7, No. 1, 1954
[12] C.B.A. Ad. Sh. Vol. 7, No. 7, 1955.

out the northern part of Colorado. In particular, their attempts led them to stage a parade through the City of Brighton. At the parade was some official of the Platte Valley Motor Company, who became interested in the disposition of these harvesters.

Thereafter an agreement was entered into between the Olson Company and the Platte Valley Company. Olson brought the machines to the Platte Valley, some from its plant and from the territory involved. They were reconditioned by Olson at Platte Valley, and Platte Valley was to pay Olson for the machines only if and when sold. Olson dictated and controlled the sales price and fixed the amount of commission to be paid or retained by Platte Valley at the time of sale. Olson made the arrangements for sale and the method of sale, agreed to recondition the machines, specifically set out the method of remittance, to wit, by Platte Valley and further, in case of unsold machines, it arranged for their storage and reserved a right to dispose of them elsewhere. Olson also consigned a store of parts to Platte Valley. (Page 224).

It appears that Platte Valley sold several of the machines, but none of them worked. As a result this suit was instituted, not only against Olson, but against Platte Valley. The Court states that the sole question here is, "that of agency" (Page 223). The Court analyzes these facts and concludes, "that this was a matter of consignment; that Platte Valley was the agent of the Olson Company, acting within the scope of its employment. That therefore, the Olson Company was liable, whereas the agent was not."

An interesting decision coming under this heading is *Tracy Moore vs Joseph A. Skiles.*[13] This case should be of interest to all attorneys who try tort cases involving automobile collisions. The facts appeared to be as follows: The plaintiff and her husband were driving back from a party which they had attended at Dotsero, Colorado. While on a narrow shelf road at a blind curve they either struck or were struck by the defendant. The plaintiff passenger thereupon sued the defendant. The defendant answered, setting up the defense of contributory negligence, unavoidable accident and the

[13] C.B.A. Ad. Sh. Vol. 7, No. 1, Pg. 5, 1954.

Family Car Doctrine. Trial was to a jury and the jury left each party where they found them. The Court states: "The primary question is when a husband and wife are journeying together in a vehicle jointly owned by both and engaged in a mission with a purpose common to both, can the negligence of the husband in operating the vehicle be imputed to the wife" (Page 6). The Trial Court had submitted the following instruction, "in this case if the jury finds and believes from a preponderance of the evidence that each driver was guilty of negligence which contributed to the proximate cause of the accident and that the accident would not have occurred but for the combined negligence of both drivers, then the plaintiff cannot recover for the damages which she claims to have suffered, and the defendant cannot recover for the damages which he claims to have suffered" (Pg. 6). In a well reasoned opinion, our Court adopts the principal of imputed negligence, which is in effect, set out in that instruction. The Court points out that where two parties, husband and wife, are engaged in a common venture, where the right of control may be exercised by either, then the negligence of a driver should be attributed to the passenger. The Court points out that had this car stood in the name of either husband or wife, the Doctrine of the Family Car would have prevailed and the wife of plaintiff could not have recovered; that it recognizes that authorities are divided on the question of imputed negligence with respect to the non-driving passenger, but that in its opinion a common sense view requires that the owner or joint owner riding as an occupant in his own car, using the car for a purpose in common with the driver, is presumed to have a right to control the driver and a right to manage and direct the movements of the car. "Where joint ownership of the car is shown, where joint occupancy and possession of the vehicle is admitted and where the occupant owners of the car use it on joint missions the driver will be presumed to be driving for himself and as agent for the other present joint owner" (Page 9).

Further, in a situation such as the present there is a presumption of imputed negligence; that is of joint control and management.

It should perhaps, therefore, be noted so far as counsel who may be trying this type case are concerned, that hereafter the question of imputed negligence might be raised by affirmative defense; where counsel can find from discovery procedures that the car appears to be jointly owned or that there appears in one manner or another to be joint control of the car; that the parties are on a common enterprise. If these things are shown the presumption will arise and the burden will be upon plaintiff, to overcome it.

In conclusion, it can be said that not only as to agency but also as to the field of procedure, there has probably been very little new law written within the past year. Rather, there has been a return, particularly with respect to appellate procedure, to the rules as written with a requirement that there be a more strict adherence to same upon the part of trial counsel. It behooves us all, therefore, to know all the rules as well as the substance of the law prior to the representation of any client on a given case.—*M. R.*

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This issue is a transition effort, and we confidently expect to be back to normal size and editorial content with our next issue.

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—The Editors.

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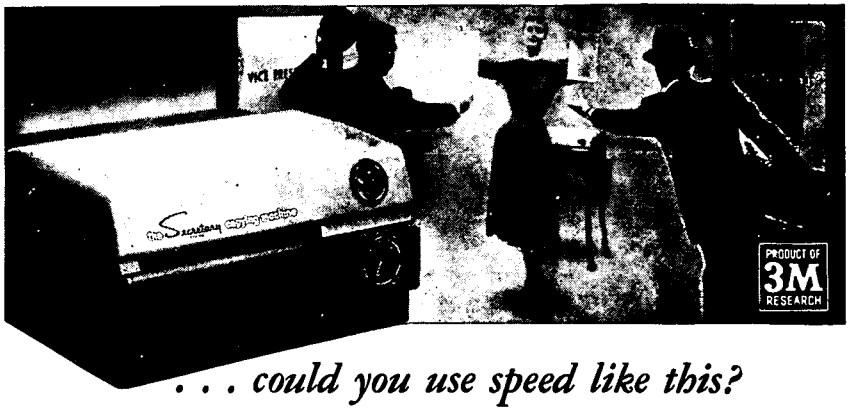

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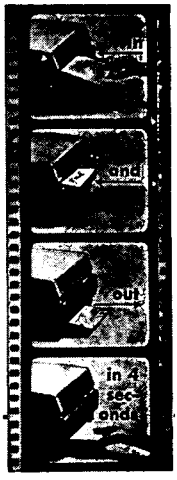

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