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Civil Procedure—Right to Appeal Intermediate Order After Trial

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deemed not to apply to actions for reinstatement by wrongfully discharged persons, the reason is that "the illegal act occurs *in the future*, when a demand is refused for reinstatement."³⁵

The case can hardly be said to overrule the decision in *Simon v. Simon* inasmuch as the logical distance between an interest in a copartnership and an interest in personal jewelry is considerably greater than that between a claim for damages for wrongful expulsion from a union and a demand for reinstatement therein.

Right To Appeal Intermediate Order After Trial

In *Cohen v. Cohen*,³⁶ an action by the wife for legal separation was discontinued and the settlement was embodied in a judicial stipulation. In compliance with his only affirmative duty under this stipulation, the husband moved out of the house. The wife was to retain the income from the house in lieu of alimony or support for herself or child. In the event of the sale of the house, the proceeds would be divided equally between the parties.

Years later, the wife alleged that there never was any net income from the house which could be used for support as provided in the stipulation. The wife's motion for an order modifying the stipulation to provide support was denied, but a subsequent motion to set aside the stipulation and restore the case to the court calendar was granted. The trial resulted in favor of the wife, and then the husband appealed the intermediate order, restoring the case to the court calendar. The right to appeal, the intermediate order, after an adverse trial result, is the only question presented to the Court.

Where an intermediate order affects a final determination, it is a proper subject matter for an appeal.³⁷ Mere participation in the proceedings after such an intermediate order does not waive the right to appeal.³⁸ It is, however, a general rule that a party who accepts the benefits of a judgment or order waives his right to appeal from it.³⁹

The Appellate Division⁴⁰ concluded that the intermediate order vacating the stipulation relieved the husband from complying with its provisions; that the husband accepted this benefit of relief and, therefore, waived his right of appeal.

35. 2 N.Y.2d at 167, 157 N.Y.S.2d at 956.

36. 3 N.Y.2d 339, 165 N.Y.S.2d 449 (1957).

37. N. Y. CIV. PRAC. ACT §580.

38. *Matter of New York Central & H.R.R.*, 60 N.Y. 112, 116 (1875); *Johnson v. International Harvester Co.*, 237 App. Div. 778, 779, 263 N.Y.Supp. 262, 263 (3rd Dep't 1933).

39. *In re Silverman*, 305 N.Y. 13, 17, 110 N.E.2d 402, 403 (1953).

40. 2 A.D.2d 680, 152 N.Y.S.2d 691 (2d Dep't 1956).

The majority of this Court reversed the Appellate Division, holding that as the only obligation of the husband had been completely performed, he was relieved of no duty. Moreover, the rights accrued, to demand half of a non-existent income or move back into the house, do not appear beneficial. In any event, these questionable benefits were never acted upon and the right to claim certain benefits, without acceptance, does not result in a waiver of the right of appeal.

Although the dissent believed that the evaluation of the benefits was improper, the majority approach appears preferable. There was no change in the wife's position because of the delay of the appeal. To deny the husband the important privilege of appeal without the evaluation of possible benefits to determine their actual worth, would appear to be an unnecessarily harsh decision.

Poor Person—Notice To Satisfy Due Process

Under the provisions of the Civil Practice Act, there is granted leave to prosecute or defend as a poor person during the progress of an action or special proceeding.⁴¹ The definition of the term, poor person, is set forth,⁴² as are provisions for transferring the cost of furnishing any transcript of litigation relevant to the question whether the person fits the statutory definition.⁴³ Such cost is in effect transferred by an order directing the clerk of the county in which the action is commenced to furnish the transcript, and place the charge for the work done upon the county.

In *Smith v. Smith*,⁴⁴ defendant-appellant made timely motion and complied with the statutory requirements described above. No notice was given at that time to the county in which the application was sought, but a later order compelling payment of transcript fees was attacked by the county and a hearing given. The county contended that the defendant-appellant had failed to meet the statutory requirements, and also that the statute in question denied it due process in that it did not require notice to be given to the party to be charged.

The Court rejected the reasoning of the county by declaring, first, that the term, "available property," meant property on hand, ready to use, and not such property as had to be sold and the proceeds applied to the payment of the tran-

41. N. Y. CIV. PRAC. ACT §198-a.

42. N. Y. CIV. PRAC. ACT §199 provides:

A poor person . . . shall be a person who is not worth three hundred dollars in cash or available property besides the wearing apparel and furniture necessary for himself and his family, and the subject matter of the action or proceeding.

43. N.Y. CIV. PRAC. ACT §1493. See *People v. Sutliff*, 1 A.D.2d 985, 150 N.Y.S.2d 86 (3rd Dep't 1955).

44. 2 N.Y.2d 120, 157 N.Y.S.2d 456 (1956).