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Civil Procedure -- Serving Statement of Case on Appeal in North Carolina -- An Unfortunate Interpretation

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should be regarded merely as another contact and not the sole determinant of jurisdiciton over an out-of-state cause of action.[42] Perhaps a legislative solution to this problem might resolve the present uncertain status of New York attachment law.[43]

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Civil Procedure—Serving Statement of Case on Appeal in North Carolina—An Unfortunate Interpretation

In North Carolina two formal steps are required in appealing a decision from a trial court. The appellant must prepare and serve to the appellee a statement of the case on appeal, and the case must be docketed on the appellate court's calendar in accordance with the rules of the higher court.

N.C. GEN. STAT. § 1-282[1] allows only fifteen days to serve statement of case on appeal and ten days thereafter for counter case or exception, but the statute includes a proviso that gives the trial judge discretion "to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case."[2] The statute does not expressly authorize any subsequent extensions of time to be ordered by the judge hearing the case. As a practical matter, however, it is sometimes impossible for the appellant to secure a copy of the transcript of the trial and to prepare his statement within the original extension period set by the judge. Often the delay is occasioned by an official of the court, but the North Carolina Supreme Court has ruled that this does not excuse a failure to serve the statement within the time allotted.[3] Consequently, it has been common practice for the trial judge, even without specific statu-

REV. 550 (1967); Note, *Quasi In Rem Jurisdiciton Based on Insurer's Obligations*, 19 STANFORD L. REV. 654 (1967).

[42] *See, e.g.*, Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 567-71 (1967).

[43] Such a statute should at least do the following: (1) allow the insurer to set up the defenses of the insured, (2) resolve whether the insurer can defeat an action successfully on the insured's failure of cooperation, and (3) clearly specify the minimum contacts in New York sufficient to attain jurisdiction.

[1] N.C. GEN. STAT. § 1-282 (1953).

[2] *Id.*

[3] State v. Wescott, 220 N.C. 439, 17 S.E.2d 507 (1941) (illness of the court reporter); Rogers v. City of Asheville, 182 N.C. 596, 109 S.E. 685 (1921) (stenographer busy).

tory authority, to grant a second and even a third extension for service of the case upon request by the appellant.

Most appeals are now taken to the new intermediate appellate court.[4] Rule 5 of the North Carolina Court of Appeals provides that the case on appeal must be docketed within ninety days after judgment.[5] Yet, the trial judge is authorized to extend the time for up to an additional sixty days for good cause shown. Construing § 1-282 and Rule 5 together, the reasonable and practical construction would be that since the trial judge can extend the time for both serving and docketing the case on appeal and since there is no express limitation on his granting successive extensions for service or docketing, he has the authority to grant successive extensions of time for service and docketing. The only implicit limitation would be that the extensions of time for service of case on appeal cannot exceed the one hundred and fifty day limit for docketing imposed by Rule 5.[6]

Interpreting the statute narrowly, the North Carolina Court of Appeals held in *Roberts v. Stewart*[7] that additional extensions of time granted by the trial judge for service of the case on appeal were entered without authority because upon filing the notice of appeal the case was removed to the court of appeals.[8] Since there was no case on appeal before the court, the court reviewed only the record proper for error, and finding none, affirmed the decision of the superior court.

As authority for its decision, the court in *Roberts* relied principally upon *American Floor Machine Co. v. Dixon*.[9] There the supreme court, in interpreting the statute creating a county civil court,[10] held that upon filing notice of appeal from the county court to the superior court the case was removed to the higher court, thereby making the trial judge *functus officio*.[11] The judge thus no longer had jurisdiction to extend the time for service of case on appeal beyond his original order setting the time

[4] See Steed, *The North Carolina Court of Appeals—An Outline of Appellate Procedure*, 46 N.C.L. REV. 705 (1968).

[5] N.C. CT. APP. R. 5 (the rules may be found in the 1967 supplement to Volume 4A of N.C. GEN. STAT.).

[6] In granting extensions of time for service, the trial judge must allow sufficient time to settle the statement of the case if the appellee files exceptions, so that docketing may still take place under Rule 5.

[7] 3 N.C. App. 120, — S.E.2d — (1968).

[8] *Id.* at 124, — S.E.2d at — (1968).

[9] 260 N.C. 732, 133 S.E.2d 659 (1963); *accord*, Pelaez v. Carland, 268 N.C. 192, 150 S.E.2d 201 (1966).

[10] Ch. 691, § 59, [1937] N.C. SESS. LAWS (repealed 1967) (this statute providing for the establishment of county civil courts was repealed in 1967 when the statutes setting up the new district court system became effective).

[11] 260 N.C. at 735-36, 133 S.E.2d at 662.

for service.[12] His only remaining authority was to resolve the statements of case on appeal, if the appellee filed a counter statement or exceptions that gave a different account of the events at trial, or to adjudge an abandonment of the appeal.[13]

It is arguable that the court reached a correct result in *Roberts* since the supreme court's ruling in *American Floor Machine Co.* was rendered in 1963 and the profession and bench should have been aware of the opinion. Yet, the court was not interpreting § 1-282 in *American Floor Machine Co.*, even though the situations were analogous in that both involved an appeal to a higher court. Moreover, to apply the familiar fiction that an attorney and judge are deemed to "know the law" seems unnecessary and even unfair in this circumstance where practicality should be a paramount consideration and where a contrary result could have rested upon a more reasonable interpretation of the purposes of the statute and court rule.

The fact that the court of appeals heard three other cases in 1968 dealing with extensions of time for service should testify to the frequency of the practice. In the first case, *Smith v. Stevens*,[14] the court chose not to dismiss the appeal *ex mero motu*, the appellee not having moved to dismiss. The court considered the appeal on the merits and granted a new trial, although the trial judge had granted subsequent extensions to serve the statement of case on appeal under color of Rule 5, but had not extended the time for docketing the case. Another case, *Williams v. Williams*,[15] was dismissed under Rule 16[16] because the statement was served one hundred and fifty-three days after judgment was entered. In *State v. Farrell*,[17] decided after *Roberts*, the appellant had been granted successive extensions of time totalling one hundred and twenty days to serve the case. The court said the appeal should be dismissed. The court reviewed the record, however, "to determine that justice is done," and found no prejudicial error,[18] even though, unlike *Roberts*, no order was entered extending the time for docketing, which took place one hundred and fifty days after the judgment. In a parenthesis in the opinion, the court said:

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[12] *Id.*

[13] *Id.*

[14] 1 N.C. App. 192, 160 S.E.2d 547 (1968).

[15] 1 N.C. App. 446, 161 S.E.2d 757 (1968).

[16] Rule 16 provides for a motion, before argument on the merits of the case, to dismiss the appeal for failure to comply with the requirements of statutes or rules of the court in perfecting an appeal.

[17] 3 N.C. App. 196, — S.E.2d — (1968).

[18] *Id.* at 200, — S.E.2d at —.

> Each of these extensions of time was consented to by the Solicitor and upon this record we make no decision whether the trial judge has authority under G.S. 1-282, with or without the consent of the parties, to extend the time for serving case on appeal beyond that contained in the original order extending the statutory time.[19]

This statement could indicate that the court itself did not "know the law" it had so recently set forth. On the other hand, the court may have thought that this issue was not ripe for consideration because no extension had been granted for docketing.

The technicality in appellate procedure raised by the court's decision in *Roberts* was rectified in early 1969 by newly adopted Rule 50.

> If it appears that the case on appeal cannot be served within the time provided by statute, rule, or order, the trial judge (or the chairman of the Industrial Commission or the chairman of the Utilities Commission as the case may be) may, for good cause and after notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and counter-case or exceptions to the case on appeal, provided this does not alter the provisions of Rule 5 relating to the docketing of the case on appeal.[20]

It is interesting to note that the North Carolina Supreme Court in effect overruled the decision in *Roberts* by adoption of a court rule rather than by judicial decision.

It is arguable that § 1-282 pre-empts the field of service of the case, thereby making the supreme court's promulgation of Rule 50 technically improper.[21] Service of the case, however, seems to be a procedural requirement for appeal and the supreme court has exclusive authority under the constitution[22] and by statute[23] to provide rules of practice and procedure for the appellate division. Thus, if Rule 50 is interpreted to be in conflict with § 1-282, the statute would seem to be invalid because the legislature cannot change a rule of the court.[24] Yet, Rule 50 may be seen as nothing

[19] *Id.* at 198-99, — S.E.2d at —.

[20] N.C. CT. APP. R. 50 (since this new rule was only adopted Feb. 11, 1969, as of this writing it may only be found in advance sheet No. 3 to 3 N.C. App. at xv).

[21] *See* Lehnen v. Hines & Co., 88 Kan. 58, 127 P. 612 (1912) (dictum) (court may enforce reasonable rules regulating practice in pending cases, but times set by statute within which steps are to be taken cannot be shortened by rules).

[22] N.C. CONST. art. IV, § 11.

[23] N.C. GEN. STAT. § 7A-33 (Supp. 1967).

[24] State v. Martin, 210 N.C. 459, 187 S.E. 586 (1936); Calvert v. Carstarphen, 133 N.C. 25, 45 S.E. 353 (1903); *accord*, Jaworski v. City of Opa-Locka, 149 So. 2d 33 (Fla. 1963).

more than a clarification of the meaning of § 1-282,[25] in which case Rule 50 would not be an implicit declaration by the supreme court that § 1-282 is invalid as an infringement on the court's right to promulgate procedural rules for the appellate division.

As a word of warning to the practicing bar, it should be emphasized that Rule 5 itself does not specifically authorize the trial court to enter *successive* orders extending the time for docketing the case on appeal. Possibly, then, a trial judge may have jurisdiction to issue only one order extending the time for docketing the appeal. Thus, it may become necessary for the supreme court to adopt a docketing rule, similar to Rule 50, authorizing the trial judge to grant *successive* extensions of time for docketing the appeal within the one hundred and fifty day limit of Rule 5. Hopefully, in making future rulings on appellate procedure, the new intermediate court will be less narrow in its view of the processes of appeal and will accommodate its interpretation of the rules to the practicalities involved.

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Contracts—Contracts To Devise—Effect of Excluded Forced Heirs

A contract to make a will necessarily juxtaposes the law of contracts and of decedent's estates and brings into conflict the policy of compelling performance of a promise with that of allowing free testamentary disposition.[1] A recent case, *In re Estate of Stewart*,[2] injected a third basic consideration: the effect of an excluded forced heir upon the distribution of property willed pursuant to an antenuptial contract to devise. The California Supreme Court held the contract beneficiaries' interest paramount to the forced heir's claim, thus upholding the policy for contractual certainty of performance against the challenge posed by the conflicting policy disfavoring spousal disinheritance. The court's treatment of the problem brings the factors involved sharply into focus.

In 1936, Walter Stewart, his wife Jennie, and his brother John, cotenants of specific real property, entered into a written contract to devise

[25] See text accompanying notes 5 & 6, *supra*.

[1] Note, *Separation Agreements to Make Mutual Wills for the Benefit of Third Parties*, 18 HASTINGS L.J. 423 (1967); *see generally*, 6 R. POWELL, REAL PROPERTY § 963 (1965).

[2] — Cal. 2d —, 444 P.2d 337, 70 Cal. Rptr. 545 (1968).