MISSOURI SECTION

COMMENTS

APPEAL AND ERROR — PARTY AGAINST WHOM JUDGMENT WAS ENTERED HELD AGGRIEVED BY ORDER GRANTING NEW TRIAL

Adair County v. Urban, 268 S.W.2d 801 (Mo. 1954)

Plaintiff recovered $4,000 in a breach of contract action, but moved for a new trial on the ground that the judgment was inadequate. The trial court overruled plaintiff's motion, but granted a new trial on its own motion.[1] Defendant was satisfied with the original judgment and appealed, contending the new trial was erroneously granted. Plaintiff challenged defendant's standing to appeal on the ground that, under the applicable Missouri statute, only parties aggrieved may appeal.[2] The Missouri Supreme Court held that, although judgment against defendant had been set aside by the order granting a new trial, defendant was aggrieved within the meaning of the statute. The court reasoned that defendant had a right to terminate the litigation by accepting the $4,000 judgment against it, thereby escaping the inconvenience of further litigation and avoiding the possibility of a greater judgment being entered against it upon retrial of the case.[3]

The general rule is that a party is aggrieved and may appeal from any judgment[4] denying him any part of that which he seeks.[5] Under

1. MO. REV. STAT. § 510.370 (1949) allows trial courts to grant new trials on their own initiative. The ground assigned in the principal case, dealing with a supposed error in change of venue, was erroneous; plaintiff's recognition of this may have caused it to raise what amounted to a novel challenge to defendant's standing to appeal in order to keep the error from coming before the Missouri Supreme Court.

2. *Id.* § 512.020 states:

> Any party to a suit *aggrieved* by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the Constitution, nor clearly limited in special statutory proceedings, may take his appeal to a court having appellate jurisdiction from any order granting a new trial, or order refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers, or dissolving an injunction, or from any interlocutory judgments in actions of partition which determine the rights of the parties, or from any final judgment in the case or from any special order after final judgment in the cause; but a failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case. [Italics added.]

3. Adair County v. Urban, 268 S.W.2d 801 (Mo. 1954).

4. The right to appeal is wholly statutory, and while one may generally appeal from a final judgment, only about half of the states allow appeal from an order granting a new trial. See Comment, 38 MICH. L. REV. 208, 210 (1939).

5. The rule most often quoted by the courts was originally stated by Sergeant

this rule, a party may appeal from a partial judgment in his favor, if by such appeal he seeks to gain a judgment entirely in his favor.[6] Appeal is also allowed from a judgment which is apparently in a party's favor, but actually is illusory in nature.[7] A party is not aggrieved by any judgment truly in his favor, however, and will not be allowed to appeal when he seeks to divest himself of anything gained in the course of the litigation.[8]

The problem raised by the principal case is whether the defendant was seeking to divest himself of a gain by his appeal from an order granting a new trial which he did not seek, and setting aside a judgment against him, inasmuch as a new trial would allow the defendant to reassert his position of non-liability. Although the problem is potentially present in a large number of cases, the only other American case in which it was raised and decided is *Hawkins v. Nuttallburg Coal & Coke Co.*,[9] a 1909 West Virginia decision. That case held, as did the principal case, that the defendant was aggrieved by an order granting plaintiff a new trial, and that by its appeal defendant was not seeking to divest itself of anything gained in the litigation as it had gained nothing from a new trial order which it had not sought. The court said the defendant had the right to have the judgment of the trial court stand if the defendant so desired, and that it could appeal from any order infringing upon that right.

There are, however, two distinctions to be drawn between the principal case and the *Hawkins* case. First, in the *Hawkins* case the trial court granted a new trial upon plaintiff's motion as an *exercise of its discretion*;[10] in the principal case the order granting a new trial was based upon a *ruling of law* by the trial court.[11] Appellate courts are more hesitant to overrule a decision by a trial court which involves that court's discretion than they are to overrule a decision which involves an error of law by the trial court.[12] Thus, the court

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Williams, in Williams v. Gwyn, 2 Saund. 46 (1680), to be: "a writ of error can only be brought by him who would have had the thing if the erroneous judgment had not been given." See POUND, APPELLATE PROCEDURE IN CIVIL CASES 123-125 (1941).

6. Galloway v. General Motors Acceptance Corporation, 106 F.2d 466 (4th Cir. 1939); Scott v. Parkview Realty & Improvement Co., 241 Mo. 112, 145 S.W. 48 (1912); Lenoir v. South, 32 N.C. 237 (1849). See POUND, *op. cit. supra* note 5, at 124.

7. Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927); Teal v. Russell, 3 Ill. 319 (1840); Booras v. Logan, 266 Mass. 172, 164 N.E. 921 (1929). See POUND, *op. cit. supra* note 5, at 123, 124; 2 TIDD, PRACTICE 1134, 1188 (1856).

8. Humphries v. Shipp, 238 Mo. App. 985, 194 S.W.2d 693 (1946); Western States Portland Cement Co. v. Bruce, 160 Mo. App. 246, 142 S.W. 783 (1912); Maxwell Hardware Co. v. Foster, 207 Cal. 167, 277 Pac. 327 (1929).

9. 66 W. Va. 415, 66 S.E. 520 (1909).

10. *Id.* at 416, 66 S.E. at 520.

11. Adair County v. Urban, 268 S.W.2d 801, 803 (Mo. 1954).

12. See POUND, *op. cit. supra* note 5, at 217-231 for a discussion of the historical factors which have led appellate courts to hesitate in overruling any errors other than those of law.

in the *Hawkins* case, while presented with the same logical problem as to whether defendant was an aggrieved party, nevertheless went a step further than the principal case in finding the defendant aggrieved by a decision involving the discretion of the trial court.

A second distinction between the two cases can be found in the fact that in the *Hawkins* case the new trial motion originated in the *plaintiff*,[13] while in the principal case the motion originated as an independent action by the *trial court*.[14] In the principal case, the court, leaning on a prior Missouri holding not precisely in point,[15] indicated that it felt the fact that the motion for a new trial originated in the act of the trial court was of importance.[16] It would seem that the difference in how the motion originated is immaterial; the main factor relied upon by both courts[17] is that the defendant was not the moving party in either instance.

From a practical standpoint, the defendant in the principal case was clearly aggrieved by a decision forcing him from a position which he felt was favorable and requiring him to defend the same action again. Although the litigation terminated with an adverse judgment, the defendant was interested in paying the judgment rather than being subjected to the possibility of a second and more detrimental action, and a correct ruling would allow the defendant to maintain his position. The Missouri court in the principal case has apparently laid a firm foundation for holding the defendant to be an aggrieved party, and hence entitled to appeal, whether the order from which appeal is brought constitutes a ruling of law by the trial court or amounts to an exercise of that court's discretion, and whether the order originates in the plaintiff or in the trial court.

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13. Hawkins v. Nuttallburg Coal & Coke Co., 66 W. Va. 415, 66 S.E. 520 (1909).

14. Adair County v. Urban, 268 S.W.2d 801, 802 (Mo. 1954).

15. In Stith v. St. Louis Public Service Co., 363 Mo. 442, 251 S.W.2d 693 (1952), the trial court rejected defendant's motion for a new trial in all particulars except as to the issue of damages, and granted a new trial as to damages alone. The Missouri Supreme Court declared that such new trial had been granted by the trial court independent of the defendant's motion, and that both defendant and plaintiff were aggrieved by the order for a new trial. The plaintiff, who had gained a judgment for the full amount of his action and asked nothing more, was clearly aggrieved; the defendant, who received only a part of what it desired and was seeking to gain the rest, a complete new trial, also was aggrieved. The *Stith* case is clearly distinguishable from the principal case, therefore, as in the *Stith* case both parties were denied something which they actively had sought.

16. Adair County v. Urban, 268 S.W.2d 801, 805 (Mo. 1954).

17. *Id.* at 804. Hawkins v. Nuttallburg Coal & Coke Co., 66 W. Va. 415, 416, 66 S.E. 520 (1909).