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Civil Practice Act Cases

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that the court should have sustained the defendant's motion for a directed verdict.

The court points out that a person seeking to avoid a contract for misrepresentation or lack of capacity is bound to restore all that he has received under it, and, while he might not be compelled to rescind before the suit is brought, as where he does not know of the existence or nature of the contract, still the rescission and offer to restore must be at the earliest practicable moment. The plaintiff's failure to so offer before defendant's motion for a directed verdict resulted in too long a delay and hence barred a recovery. Seemingly the only element which obviates the necessity of returning the money is "actual intended fraud."[7]

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CIVIL PRACTICE ACT CASES

ACTION—ABOLITION OF DISTINCTION AS TO FORM—AVAILABILITY OF MOTION IN NATURE OF CORAM NOBIS IN CHANCERY PROCEEDINGS.—Section 72[1] of the Illinois Civil Practice Act, abolishing the writ of error coram nobis[2] and providing a similar remedy by motion to correct "all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ," was held applicable to chancery proceedings in the recent case of *Frank* v. *Newburger*.[3] It has generally been held, in the absence of statutory provision otherwise, "that a writ of error coram nobis has no place in chancery proceedings, and is strictly a common-law writ,"[4] although some equity courts have treated the petition for the writ as a bill to avoid a decree[5] or a motion for a new trial.[6] While the Frank case seems to reach a just result,[7]

7 Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621 (1900).

1 "The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. . . . " Ill. Rev. Stat. 1937, Ch. 110, § 196.

2 The writ of error coram nobis, or coram vobis, was a common law writ for the purpose of correcting a judgment in the same court in which it was rendered. The writ was predicated on an alleged error in fact not appearing on the record, which error it was presumed would not have been committed had the fact in the first instance been brought to the notice of the court. See Fugate v. State, 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268 (1904), and 2 R. C. L. 305, § 259.

3 298 Ill. App. 548, 19 N. E. (2d) 147 (1939).

4 Bradford v. White, 130 Ark. 532, 197 S.W. 1175, L.R.A. 1918A 1177 (1917). See also Reid's Adm'r v. Strider's Adm'r, 7 Gratt (Va.) 76, 54 Am. Dec. 120 (1850).

5 "The pleading . . . though denominated a petition for writs of error *coram nobis*, is a bill to avoid a decree as well." Leftwick v. Hamilton, 9 Heisk. (Tenn.) 310 (1872).

6 Estes v. Nell, 163 Mo. 387, 63 S.W. 724 (1901).

7 The original proceeding was one to foreclose a mortgage. The defendants defaulted. Thereafter, the complainants, by leave of court, amended their complaint without notifying the defendants. The new decree found a larger amount to be due than that which had been allowed by the original decree and also stated that the plaintiff was entitled to recover from the defendants "the value of all

there is much to be said for the view of the dissent that the clause in Section 72, "which, by the common law, could have been corrected . . .," seems to modify "all errors in fact" and thus was probably inserted by the legislature for the purpose of limiting the use of the motion to cases in which coram nobis was available before the act.

W. L. SCHLEGEL

APPEAL AND ERROR—JURISDICTION—WHEN APPELLATE COURT HAS JURISDICTION OVER APPEAL PERFECTED AFTER DISMISSAL.—The First Division of the Illinois Appellate Court, in the recent case of *Melsha* v. *Johns-Manville Sales Corporation*,[1] has held that, where an appeal was dismissed for failure to file the transcript of the record within the sixty day period from the date of the filing of the notice of appeal,[2] which failure was not due to culpable negligence on the part of the appellant,[3] the appeal could still be perfected under Section 76[4] of the Civil Practice Act, it being shown that there was merit in the appeal. The contention that this practice would permit two appeals was rejected on the ground that the first attempt had resulted in a nullity.

Under the former practice the right to appeal was statutory, and it was held that the statute must be strictly followed. The reason for this strictness lay in the fact that relief by writ of error could still be secured as a matter of right in civil cases even though the original appeal failed.[5] Since the writ of error is now abolished, the court concludes that the reason for the rule of strict construction no longer exists.[6]

The decision appears to be just. Any other construction of the section would mean that the right to have a judgment reviewed might be denied to one having a meritorious case through a mere technicality.

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assets received by them from the two estates of their parents for any deficiency. . . . " The defendants filed their motion under Section 72 to vacate the new decree and all other orders subsequent to that decree, in order that they might defend the amended bill of foreclosure, which petition was granted.

1 299 Ill. App. 157, 19 N. E. (2d) 753 (1939).

2 Ill. Rev. Stat. 1937, Ch. 110, § 259.36, as amended by Ill. Rev. Stat. 1938 Supp., Ch. 110, § 259.36, provides among other things that "The record on appeal shall be transmitted to the reviewing court not more than 60 days after notice of appeal has been filed."

3 The failure arose from the illness of appellant's counsel.

4 "No appeal shall be taken to the Supreme or Appellate Court after the expiration of ninety days from the entry of the order, decree, judgment or other determination complained of; but, notice of appeal may be filed after the expiration of said ninety days, and within the period of one year, by order of the reviewing court, upon motion and notice to adverse parties, and upon a showing by affidavit that there is merit in appellant's claim for an appeal and that the delay was not due to appellant's culpable negligence." Ill. Rev. Stat. 1937, Ch. 110, § 200.

5 Drummer Creek Drain. Dist. v. Roth, 244 Ill. 68, 91 N. E. 63 (1910).

6 The court distinguishes the case of People ex rel. Bender v. Davis, 365 Ill. 389, 6 N. E. (2d) 643 (1937), which was followed by the Appellate Court for the third division in Schroeder v. Campbell, 289 Ill. App. 337, 7 N. E. (2d) 329 (1937), and Moss v. Federal Life Ins. Co., 289 Ill. App. 379, 7 N. E. (2d) 468 (1937), on the ground that in the Bender case the appeal had been heard on its merits and that the matter came up in the Supreme Court on a petition for mandamus in which the order dismissing the appeal could not be considered.

EXECUTION—EXECUTION AGAINST THE PERSON—SPECIAL FINDING THAT DEFENDANT WAS MALICIOUS AS CONDITION PRECEDENT TO ISSUANCE OF THE WRIT UNDER ILLINOIS STATUTE.—The recent Illinois Appellate Court case of *Miles* v. *Glad*[1] involves an interesting change in the Illinois statute[2] relating to executions against the person.[3] Formerly, the successful plaintiff in a tort action could take out execution against the person of the defendant without any showing of malice.[4] The defendant was then compelled to apply to the County Court for a determination that the tort action was not founded on malice in order to obtain his release.[5] The Miles case decided that, under the present modified act, it is a condition precedent to the issuance of such an execution that the jury, or the court, if the case is tried without a jury, make a special finding that malice is present. The court also held that, if the defendant feels that execution has been improperly issued, his remedy is to apply to the court where the judgment was rendered to have the execution quashed.[6]

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1 19 N. E. (2d) 844 (Ill. App., 1939).

2 Prior to amendment, the provision read as follows: "No execution shall issue against the body of the defendant, except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum (respondendum)* as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors." Cahill's Ill. Rev. Stat. 1933, Ch. 77, § 5. The defendant obtained his release under Cahill's Ill. Rev. Stat. 1933, Ch. 72, § 5, which reads as follows: "When any person is arrested or imprisoned upon any process issued for the purpose of holding such person to bail upon any indebtedness, or in any civil action when malice is not the gist of the action . . . such person may be released from such arrest or imprisonment upon complying with provisions of this Act." This latter provision has not been amended, but the former section now reads: "No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, and it shall appear from a special finding of the jury, or from a special finding by the court, if the case is tried by the court without a jury, that malice is the gist of the action. . . ." Ill. Rev. Stat. 1937, Ch. 77, § 5.

3 Execution against the person was a well known common-law remedy. It was affected by the writ of capias ad satisfaciendum. It is well settled that such an execution is not a violation of a constitutional prohibition against imprisonment for debt. The judgment, while a debt for some purposes, is considered in the nature of a punishment where it has been obtained for tort. People ex rel. Brennan v. Cotton, 14 Ill. 414 (1853); Lipman v. Goebel, 357 Ill. 315, 192 N. E. 203 (1934), cert. den. 294 U. S. 712, 55 S. Ct. 508, 79 L. Ed. 1246 (1935).

4 See Fetz v. People, 239 Ill. App. 250 (1926).

5 See Reinwald v. McGregor, 239 Ill. App. 240 (1926).

6 Miles v. Glad, 19 N. E. (2d) 844 at 845 (Ill. App., 1939). It was also held that a special finding by the jury that the defendants were "guilty of wilful and wanton conduct which was the proximate cause of the plaintiff's injury" was tantamount to a finding of malice. The court went on to say that "it is manifest that malice is the gist of an action for assault and battery." In many cases of assault and battery malice will be present, but sound reasoning would indicate that it is not an essential element to either of the two torts. See Singer Sewing Mach. Co. v. Phipps, 49 Ind. App. 116, 94 N. E. 793 (1911); Booher v. Trainer, 172 Mo. App. 376, 157 S.W. 848 (1913); Pizitz v. Bloomburgh, 206 Ala. 136, 89 So. 287 (1921); Luttermann v. Romey, 143 Iowa 233, 121 N.W. 1040 (1909).