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Civil Procedure—Reversal By Appellate Division And Granting Of New Trial Held Not to Be Interlocutory Under Section 590 of the Civil Practice Act

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Though a single judge dissented[10] in regard to the issue of classification of bargaining units, asserting that the courts should compel arbitration if the agreement so provides,[11] even though the issue may involve a matter that will ultimately give rise to a proceeding before the NLRB, it seems that the Court has merely sidestepped useless and time-consuming negotiations by the parties by "sending" them to the NLRB in an area the Board has undertaken to regulate. Thus, the Court of Appeals, in *Carey*, has done no more than reaffirm the position of the New York courts that labor disputes arising out of collective bargaining agreements, or in areas clearly under NLRB jurisdiction, will not be settled by the courts except as a last resort.

T. C. L.

CIVIL PROCEDURE

REVERSAL BY APPELLATE DIVISION AND GRANTING OF NEW TRIAL HELD NOT TO BE INTERLOCUTORY UNDER SECTION 590 OF THE CIVIL PRACTICE ACT

The appellants (plaintiffs below) were the sister and niece of Daniel Huntting, who at 79 had married 63-year-old Sally Jennings. Appellants, relying on the fact that Huntting had been declared incompetent almost two years after the marriage due to imbecility arising from old age, sought to prove that he was also incompetent at the time of marriage. Following a trial without a jury, the lower court gave an interlocutory judgment granting an annulment. On appeal the intermediate court reversed the interlocutory judgment as being based on inconclusive evidence and ordered a new trial but made no new findings of fact. After the judgment of the trial court, Daniel Huntting died. The wife died after her appeal was filed but before it was heard by the Appellate Division. After the Appellate Division's reversal and order for a new trial, the appellant appealed this decision to the Court of Appeals and stipulated for judgment absolute in the event of affirmance.[1] Meanwhile, at the new trial, the complaints were dismissed under the authority of section 1137 of the Civil Practice Act.[2] Appellants then moved in the Court of Appeals for permission to withdraw their stipulation and substitute an appeal from the dismissal by the trial court. The Court would not accept the new appeal because of a lack of jurisdiction, but it granted the withdrawal of the stipula-

10. Carey, supra note 2, at 458, 184 N.E.2d at 301, 230 N.Y.S.2d at 706.

11. Since the two unions had been organized under the auspices of the NLRB (Carey, supra note 1, at 11, 221 N.Y.S.2d at 308) and the collective bargaining agreement that the petitioning union claimed arbitration rights under was negotiated between the company and the union on this basis, it is hard to see how the union would be competent to arbitrate the matter.

1. N.Y. Civ. Prac. Act § 588(3): Before a party can appeal to the Court of Appeals and where the judgment below has been against the party he must stipulate for judgment absolute. By this, he appeals to the Court to hear his case and allows a final judgment to be rendered against him should the Court affirm the decision below.

2. N.Y. Civ. Prac. Act § 1137. This section does not permit a relative of an insane person to maintain an action for annulment after the other party to the marriage has died.

tion on the condition that appellants pay the cost of the appeal to the respondent, the legal representative of the deceased wife. *Rattray v. Raynor*, 10 N.Y.2d 494, 180 N.E.2d 429, 225 N.Y.S.2d 39 (1962).[3]

Despite the death of the husband and wife, which made a new trial impossible,[4] the Court declared that the action had not abated, and, therefore, the appellate process which had already commenced could be carried to its termination.[5] The appellants could, as they did, file stipulation for judgment absolute in the event of affirmance before the Court of Appeals.[6] However, the Court would have no choice but to affirm the Appellate Division's decision and render judgment absolute against them. The Court reasoned that since the Appellate Division's reversal was based on the law and the facts, in that it held that the evidence presented at the trial was inconclusive, the correctness of that determination was outside the scope of powers of the Court of Appeals.[7]

The Court then declared that the Appellate Division order of reversal and for new trial which resulted in judgment of Special Term dismissing the complaints was not a decision of the Appellate Division as would entitle appellants to appeal to the Court of Appeals as a matter of right. The New York State Constitution provides that an appeal to the Court of Appeals from a court of record of original jurisdiction is possible only where the question on appeal is the validity of a state or federal statute under the state or federal constitution and then only the constitutional question will be considered.[8] Section 590 of the Civil Practice Act provides that "where a final judgment or order is entered in the court of original instance after the appellate division (a) has directed the entry of an interlocutory judgment or rendered an interlocutory order . . ."[9] the aggrieved party may appeal directly to the Court of Appeals from the final judgment. Here, the court concluded that the Appellate Division had merely ordered a new trial. Since the Appellate Division neither made any new findings of fact nor held that the evidence was insufficient as a matter of law, its order for a new trial was not an interlocutory determination under section 590.

The Constitution of New York allows an appeal to the Court of Appeals as a matter of right where the Appellate Division has finally determined an action.[10] However, the Civil Practice Act declares that such appeal is a matter of right where the Appellate Division directs a reversal or modification.[11] The appellants contended that the Appellate Division in essence directed the

3. Edwards v. Huntting, 11 A.D.2d 768, 205 N.Y.S.2d 234 (2d Dep't 1960); Rattray v. Huntting, 11 A.D.2d 785, 205 N.Y.S.2d 232 (2d Dep't 1960).
4. N.Y. Civ. Prac. Act § 1137.
5. See Morgan v. Keyes, 302 N.Y. 439, 99 N.E.2d 230 (1951).
6. N.Y. Civ. Prac. Act § 588(3).
7. See Hirsch v. Jones, 191 N.Y. 195, 83 N.E. 786 (1908).
8. N.Y. Const. art. VI, § 7; N.Y. Civ. Prac. Act § 588.
9. N.Y. Civ. Prac. Act § 590.
10. N.Y. Const. art. VI, § 7(1).
11. N.Y. Civ. Prac. Act § 588(1)b(ii).

reversal of the interlocutory judgment of annulment. It was the appellants' belief that the Appellate Division should never have ordered a new trial since a new trial was impossible and since all the procurable evidence had been presented at the original trial.[12]

Leonhardt v. State of New York[13] was similar to the present case. There the Appellate Division reversed the decision of the trial court and ordered a new trial. On direct appeal from the latter judgment to the Court of Appeals, it was held that the Appellate Division's order of a new trial was not interlocutory and thus not within section 590. The Court in the instant case, noting that it has adopted a liberal practice in allowing withdrawal of stipulations for judgment absolute,[14] granted appellants' motion.

The appellants, after all this litigation, have yet another course open to them. They can still try the issue on its merits in Surrogate's Court. Despite this enormous amount of litigation, the parties are in the same position as when they started. The merits of the case have never been finally determined.

Why did the appellants attempt to substitute the appeal from the dismissal at the new trial for the appeal from the decision of the Appellate Division? They were desperately attempting to keep their case before the Court without having to resort to Surrogate's Court. The dismissal by the trial court without regard to the prior litigation would have been final for all practical purposes. An appeal from it to the Appellate Division would have been useless since the case clearly falls within section 1137 of the Civil Practice Act. Their stipulation before the Court of Appeals would only result in a judgment being affirmed against them. However, by claiming that the Appellate Division had reversed the interlocutory judgment in the original action and ordered a reversal of it by a lower court, appellants could appeal the dismissal directly to the Court of Appeals. On this appeal the dismissal would not be the only issue brought before the Court. Rather, the more important issue of the Appellate Division's reversal could be reviewed on the law and facts by the Court of Appeals.[15] The Court of Appeals could then pass on the merits of the case.

It is not difficult to see the problem which arises in determining whether or not the Appellate Division is holding as a matter of law that the evidence is insufficient when that court states that the evidence is inconclusive. The Court of Appeals held, however, that this is not a reversal on the facts and does not touch the merits of the case, when accompanied by an order for new trial, in the sense of giving an interlocutory determination.

J. P. D.

12. See Ashby v. Fancher, 187 App. Div. 45, 175 N.Y. Supp. 142 (4th Dep't 1919).
13. 291 N.Y. 676, 51 N.E.2d 943 (1943).
14. See Cohen & Karger, Powers of the New York Court of Appeals, 304, 305 (1952).
15. Scarnato v. State, 298 N.Y. 376, 83 N.E.2d 841 (1949).