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Questions "Moot" on Appeal

NOTES AND COMMENTS

ADMINISTRATIVE LAW

QUESTIONS "MOOT" ON APPEAL

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue."[1]

This thrifty principle of judicial administration has bulwarked the judicial refusal to render advisory opinions, thereby complying with the constitutional requirements of "case and controversy." An analysis of the cases involving moot questions discloses that the effect of the decisions are not always consistent with the principles involved. This is especially true in those cases involving the validity of administrative orders. Mootness usually is effected by one of four means.

First. The plaintiff may cause a case to be moot. This the Supreme Court recognized when it said: "if the intervening event is owing to the plaintiff's own act . . . . the court will stay its hand."[2] Not all jurisdictions sanction the unlimited use of this method at the same point in a judicial proceeding. Thus, Indiana gives a plaintiff an almost unlimited right to withdraw his complaint,[3] but in the federal courts this right is restricted.[4]

Second. The parties by their combined action may cause a case to be moot. The usual procedure is by a settlement. The law clearly favors the practice of settlement because it tends to reduce the amount and the cost of litigation. Similarly, in a criminal action, a prosecutor, usually subject to the approval of the court, is permitted to enter a *nolle prosequi.* There is a diversity of opinion relevant to the stage

1. Mills v. Green, 159 U.S. 651, 653 (1895)
2. Id. at 654.
3. "An action may be dismissed without prejudice: first by the plaintiff before the jury retires; or where the trial is by the court, at any time before the finding of the court is announced." Ind. Stat. Ann. (Burns' Repl. 1946) §2-901.
4. After an answer is filed, plaintiff may not withdraw his complaint without approval of the court. Fed. R. Civ. P., 41.
5. Princeton Coal Co. v. Gilmore, 170 Ind. 366, 83 N.E. 500 (1908). compare Cochran v. Rowe, 225 N.C. 645, 36 S.E. (2d) 75 (1945) with Walsh v. Soller, 207 Ind. 82, 190 N.E. 61 (1934).

in judicial proceedings beyond which the courts will not allow the parties to settle the controversy.[6]

Third. A defendant may cause a case to be moot.[7] In reference to *Schechter Poultry Corporation* v. *U.S.*,[8] Mr. Robert L. Stern said: " . . . the Government, merely by using the full twenty days open to it under the rules for responding to the petition, could have prevented the case from reaching the Court before the Act expired. *But that would not have been a seemly course for public officials.*"[9] (Italics added.) Defendants, who are public officials, may moot the case in numerous ways.

Mootness may be created by the defendant where the plaintiff is denied injunctive relief in the lower court and, pending appeal, the defendant performs the acts sought to be enjoined.[10] In *Johnson* v. *Paris*,[11] the lower court denied the plaintiff an injunction restraining the defendant from executing a contract for the construction of a gymnasium. Pending an appeal, the gymnasium was constructed. The appeal was moot. In such situations, there is no great wrong

6. Compare the holding of the majority (no opinion) with the dissent in Garrison v. National Rubber Machinery Co., 64 N.Y.S.(2d) 852 (App. Div., 1st Dept. 1946).

7. Commercial Cable Co. v. Burleson, 250 U.S. 360 (1918); Dakota Coal Co. v. Fraser, 26 Fed. 130 (C.C.A. 8th, 1920); Spreckels Sugar Co. v. Wichard, 131 F.(2d) 12 (App. D.C. 1941); Glass v. Ickes, 107 F. (2d) 259 (App. D.C. 1939); Chesapeake Western R.R. v. Jardine, 8 F.(2d) 794 (App. D.C. 1925); Commercial Motor Freight, Inc. v. Public Utilities Commission, 141 Ohio St. 643, 49 N.E.(2d) 764 (1943). Cf. Pike v. Pike, 24 Wash.(2d) 735, 167 P.(2d) 401 (1946) (though the appeal was not moot, the conduct of the defendant constituted a waiver of the right to appeal).

8. 295 U.S. 495 (1935).

9. Stern, "The Commerce Clause and the National Economy, 1933-1946," (1946) 59 Harv. L. Rev. 646,659. The Schechter case demonstrates the thin margin by which a case escaped being moot. As another example, if the case of Olsen v. Nebraska, 313 U.S. 236 (1941) had been decided three days later, under other judicial precedents, the case would have been moot since the license applied for would have expired before the decision was rendered. Thus, it appears that the time margin between an advisory opinion and a case and controversy may be negligible.

10. Kunze v. Auditorium Co., 52 F.(2d) 444 (C.C.A. 8th, 1931) (moving picture was shown); Katz v. San Antonio, 91 Fed. 566 (C.C.A. 5th, 1899) (fund expended); Dunn v. Dunn, 96 Ind. App. 620, 185 N.E. 334 (1933) (taxes collected); Bloom v. Town of Albion, 96 Ind. App. 229, 183 N.E. 325 (1933) (road constructed and taxes collected); Johnson v. Paris, 78 Ind. App. 110, 134 N.E. 880 (1922) (gymnasium built).

11. 78 Ind. App. 110, 134 N.E. 880 (1922).

done except where there is need for a decision to serve as a guide for the future or where a question of public importance is raised.[12]

The defendant has introduced mootness into a case by the cancellation[13] of a contract. Similarly, in *Spreckels Sugar Co.* v. *Wickard,*[14] the Secretary of Agriculture, acting in an administrative capacity, rescinded an order which the plaintiff was contesting in the courts. The recission was made pending an appeal from a lower court decision; thus, the appeal was dismissed as moot. Conceivably by rescinding and then reissuing similar orders, an administrative agency could stifle any attempt to secure judicial review of its orders.

Where the plaintiff seeks to enjoin the defendant and the defendant agrees to restrain himself, the litigation is moot.[15] In *Rivers* v. *Miller*[16] the Governor of Georgia violated a federal injunction which had enjoined him from violating a state injunction. Pending an appeal from a judgment for civil contempt for violation of the federal injunction, a Georgia state court sustained the validity of the original state injunction. The appeal from the contempt judgment was then dismissed as moot. Clearly, the proposed willingness of Governor Rivers to abide by the state injunction, not the decision of the state court, rendered this appeal moot. This case cannot be justified. Governor Rivers deliberately interfered with the judicial process. Instead of at least a reprimand, he was permitted to benefit by escaping payment of damages for violation of the federal injunction.

The War Department, acting as an administrative agency, has introduced mootness by two dubious methods, into a case initiated by a service man. First, in *Hicks* v. *Hiatt,*[17] the petitioner was released from prison by a War Department order four days prior to the filing of a federal court opinion

12. See n. 39 and n. 40, infra.
13. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 38 F.(2d) 444 (C.C.A. 10th, 1930); McKinley Memorial Baptist Church v. American Workmen, 59 F.(2d) 303 (App. D.C. 1932).
14. 131 F.(2d) 12 (App. D.C. 1941).
15. Rivers v. Miller, 112 F.(2d) 439 (C.C.A. 5th, 1940); Casey v. Civil Liberties Union, 100 F. (2d) 354 (C.C.A. 3d, 1939). Contra: U.S. v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1896); Burkhart Mfg. Co. v. Case, 39 F.(2d) 5 (C.A.A. 8th, 1930).
16. 112 F.(2d) 439 (C.C.A. 5th, 1940).
17. 64 F. Supp. 238 (M.D. Pa. 1946).

granting habeas corpus for violation of the petitioner's constitutional rights in a military trial. Although this order rendered the case moot, the opinion was filed and Circuit Judge Biggs observed that " . . . the errors committed . . . were so numerous and of such an effect as to deprive Hicks of the substance of a fair trial . . . in a fundamentally fair way."[18] Had this opinion not been published, no public record of the illegality of the trial would exist as a vindication of the defendant. Second, in *Lynn* v. *Downer*,[19] a proceeding was dismissed a moot because the complainant had been transferred by the War Department beyond thhe jurisdiction of the original court.[20] The Supreme Court denied certiorari and the complainant, completely subject to the will of the armed forces, was without a remedy because of their power to moot the case and prevent a final judicial determination of the legality of the complainant's induction. These practices of avoiding judicial review evade the responsibility expected of an administrative agency.

Fourth. Mootness may arise because of extrinsic circumstances. This method was recognized by the Supreme Court when it said: "if the intervening event is owing . . . to a power beyond the control of either party, the court will stay its hand."[21] Some of the extrinsic factors which have caused a case to be moot are: destruction of property by fire;[22] war rendering a contract unenforceable;[23] a court decision;[24] an infant at the time of a lower court action becomes an adult by the time an appeal is perfected;[25] death of a party terminating the controversy;[26] statutory change in the law;[27]

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18. Id. at 249.
19. 140 F.(2d) 397 (C.C.A. 2d. 1944), cert. denied, 322 U.S. 756 (1945).
20. For a statement of the facts as to why the case was moot, see Memorandum of the United States in Reply to Petition for Rehearing, pp. 2-4, Lynn v. Downer, 323 U.S. 817 (1945).
21. Mills v. Green, 159 U.S. 651,654 (1895).
22. Wynne v. Pancheri, 54 F.(2d) 73 (C.A.A. 3d, 1941).
23. U.S. v. American-Asiatic S.S. Co., 242 U.S. 537 (1916); U.S. v. Hamburg-American Co., 239 U.S. 466 (1916)
24. The John Cadwalader, 99 F.(2d) 678 (C.C.A. 3d, 1938); Palm v. Weber, 71 Cal. App. (2d) 481, 162 P.(2d) 863 (1945).
25. Otherton Mills v. Johnson, 259 U.S. 13 (1922).
26. Director of Prisons v. Court of First Instance, 239 U.S. 633 (1915) (Court held an appeal was moot where the death sentence imposed by lower court had been executed); Bell v. McCain, 98 Ind. App. 68, 188 N.E. 378 (1934).
27. U.S. v. Alaska S.S. Co., 253 U.S. 113 (1920); Keller v. Powers,

and where a party is enjoined from doing a particular act on a specific date, and pending appeal, the date passes.[28]

Many of these extrinsic factors arise because of the lapse of time between a lower court decision and a reversal or affirmance by an appellate court. If the lower court would grant a stay of execution in many instances of this sort, mootness would be avoided; however, where injunctive relief is sought and denied by the lower court, this remedy is undesirable since allowing a stay of execution would be tantamount to awarding the injunctive relief. This problem is especially acute where the validity of administrative orders is in dispute. In *National Jockey Club* v. *Illinois Racing Commission*,[29] an order was issued alloting the petitioner racing dates for the season. Pending an appeal from this order, the racing season terminated and the order expired. The appeal was dismissed as moot; thus, the question whether the factors considered by the commission in making this allotment were valid was never decided. When the next racing season opened, the litigants had no judicial determination to serve as a guide in making future allotments. If a new controversy arose over these same factors, the possibility of it ending in a moot case is likely. By this delay in the judicial process, kindly called a lapse of time, final judicial review of administrative orders is precluded.

The expiration of a patent,[30] contract,[31] or license[32] is another extrinsic circumstance causing mootness. License cases involving the orders of administrative agencies, have been a prolific source of litigation, repeatedly ending in a

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189 Ind. 339, 127 N.E. 149 (1920); Riley v. Bell, 184 Ind. 110, 109 N.E. 843 (1915); Division of Labor v. Indianapolis News Publishing Co., 109 Ind. App. 88, 32 N.E.(2d) 722 (1941). But see Moore v. Smith, 160 P.(2d) 675,678 (Kan. 1945).

28. Johnson-Kennedy Radio Corp. v. Chicago Bears, 97 F.(2d) 223 (C.C.A. 7th, 1938). But cf. Good v. Burk, 167 Ind, 462, 77 N.E. 1080 (1906).

29. 364 Ill. 630, 5 N.E.(2d) 224 (1936).

30. Chapin v. Friedberger-Aaron Mfg. Co., 158 Fed. 409 (C.C.A. 3d, 1907).

31. State Highway Commission v. Crystal Flash Petroleum Co., 109 Ind. App. 255, 34 N.E.(2d) 148 (1941); Wyss v. Eskay Dairy Co., 99 Ind. App. 620, 192 N.E. 324 (1934); Nusbaum v. Geisinger, 46 Ind. App. 586, 93 N.E. 232 (1910); Dolan v. Richardson, 181 S.W.(2d) 997 (St. Louis Ct. App. 1944).

32. Starr v. Glueck, 186 Ind. 405, 116 N.E. 419 (1917); State v. Noftzger, 174 Ind. 140, 91 N.E. 562 (1910); Hale v. Berg, 41 Ind. App. 48, 83 N.E. 357 (1908).

conclusion that the issue was moot. In *Rayhayel* v. *McCampbell*,[33] an appeal from a decision affirming a denial of the plaintiff's application for a liquor license was dismissed as moot because it appeared that the term for which the license was to be in effect had expired. A decision on the merits in such a case is desirable to serve as a guide for the future, efficient operation of the agency and to reduce repetitious and fruitless litigation.

Some extrinsic circumstances have been held insufficient to cause a case to be moot. Insolvency of one of the parties[34] or inability to grant the total relief prayed[35] do not cause mootness. In an appeal otherwise moot where the only issue remaining is which party shall bear costs, the courts have uniformly held this insufficient to render a decision on the merits.[36] Although a case may be otherwise moot, if leaving the judgment unreversed would prejudice some other right of the appellant, some jurisdictions will render a decision on the merits.[37] In *Barretta v. Cocreham*,[38] a license case, the court denied a motion to dismiss an appeal because of mootness. Although the license which was revoked had expired before the decision, the court said a decision on the merits must be made since a statute precluded granting a new license for a

33. 55 F.(2d) 221 (C.C.A. 2d, 1932).

34. McCluer v. Super-Maid Cook-Ware Corp. 67 F.(2d) 426 (C.A.A. 10th, 1932).

35. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (damages); U.S. v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1896) (injunction); Burkhart Mfg. Co. v. Case, 39 F.(2d) 5 (C.C.A. 8th, 1930) (relief from liability on a bond); Beard v. Link, 81 Ind. App. 293, 141 N.E. 792 (1923) (damages); Hubrite Informal Frocks v. Kramer, 297 Mass. 530, 9 N.E.(2d) 570 (1937) (damages).

36. Johnson-Kennedy Radio Corp. v. Chicago Bears, 97 F.(2d) 223 (C.C.A. 7th, 1938); Chancellor v. Sweitzer, 329 Ill. 380, 160 N.E. 747 (1928); Riley v. Bell, 184 Ind. 110,109 N.E. 843 (1915) Wyee v. Eskey Dairy Co., 99 Ind. App. 620, 192 N.E. 324 (1934). Where an appeal is made moot by the voluntary conduct of the appellant, it is right that he should bear the costs. Bender v. Donoghue, 70 F.(2d) 723 (C.C.A.5th, 1934). Where an appeal appears to be frivolous, costs will be assessed against the appellant. Palm v. Weber 71 Cal. App.(2d) 481, 162 P.(2d) 863 (1945). If an issue of costs were sufficient to establish a controversy, no appeal would ever be moot. Dolan v. Richardson, 181 S.W. (2d) 997 (St. Louis Ct. App. 1944).

37. Fishwick v. U.S. 67 S. Ct. 224 (1947); Kessinger v. Schaal, 200 Ind. 275, 161 N.E. 262 (1928); Moore v. Smith, 160 P.(2d) 675 (Kan. 1945); Barretta v. Cocreham, 210 La. 55, 26 So.(2d) 286 (1946); State v. Romero, 49 N.M. 129, 158 P.(2d) 851 (1944).

38. 210 La. 55, 26 So.(2d) 286 (1946).

period of five years after the revocation of an old license. Clearly a failure to decide the issue on the merits would have prejudiced the plaintiff's right to apply for a license in the future.

In two other situations the courts have decided the issues on the merits even though the case was otherwise moot; first, where a question of public importance was involved;[39] and, second, where it is necessary to provide a guide for the future.[40] Manifestly, where a court may decide an appeal on the merits which appears to be moot either because the court finds a question of public importance or because it is necessary to provide a guide for the future, then rules pertaining to the existence of moot questions become extremely flexible.

Where a decision on the merits is desirable, what alternative solutions are available? There are two opposing policies which must be considered. It is desirable to facilitate the administration of justice by the elimination of noncontroversial litigation and to avoid gratuitous interferences with governmental operations. On the other hand, it is desirable, if not constitutionally required, to provide judicial review of the validity of administrative orders and the conduct of public officials so as to impeach arbitrary conduct and to provide reasonable guides for the future.

A proper disposition of appellate cases which become moot is one solution. There are three possible dispositions of an appeal. First, the procedure adopted by the Supreme Court of the United States is to reverse the lower court, but

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39. No question of public importance found: Dakota Coal Co. v. Fraser, 267 Fed. 130 (C.C.A. 8th, 1920); Keller v. Rewers, 189 Ind. 339, 127 N.E.149 (1920); Riley v. Bell, 184 Ind. 110, 109 N.E. 843 (1915); Dunn v. Dunn, 96 Ind. App 620, 185 N.E. 335 (1933); Fox v. Holman, 95 Ind. App. 598, 184 N.E. 194 (1933); J. B. Lyon Co. v. Morris, 216 N.Y. 497, 185 N.E. 711 (1933). Question of public importance found: Southern Pacific Terminal Co., v. Interstate Commerce Commission, 219 U.S. 498 (1911); Letz Mfg. Co. v. Public Service Commission of Indiana, 210 Ind. 467, 4 N.E.(2d) 194 (1936); Brown v. Baumer, 310 Ky. 315, 191 S.W.(2d) 235 (1946); Glenram Wine and Liquor Corp. v. O'Connell, 295 N.Y. 336, 67 N.E.(2d) 570 (1946); McCanless v. Klein, 182 Tenn. 631, 188 S.W.(2d) 745 (1945). For further information on questions of public importance, see Note (1941) 132 A.L.R. 1185.

40. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911); Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911); Gay Union Corp v. Wallace, 112 F.(2d) 192 (App. D.C. 1940); Technical Radio Laboratory v. Federal Radio Commission, 36 F.(2d) 111 (App. D.C. 1929).

not on the merits, and remand the case with directions to dismiss.[41] Second, the appeal may be dismissed without affirming or reversing the lower court.[42] Third, the lower court may be affirmed, but not on the merits.[43] Manifestly, the first rule is subject to criticism. The decision of the lower court was on the merits. It is only the appeal that was moot. There is no cause for reversing a decision that was on the merits.[44] This procedure destroys what otherwise might serve as a guidepost for the future operation of administrative agencies. The second rule allows this guidepost to remain and is, thus, the best procedure. The third rule serves no useful purpose because it is just as illogical to affirm, but not on the merits, as it is to reverse with directions to dismiss, but not on the merits.

Another possible solution is to use the declaratory judgment procedure. In holding a case to be moot and refusing to render a decision on the merits, courts have frequently stated that even though a judgment was given it could not

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41. Norwegian Co. v. Tariff Commission, 274 U.S. 106 (1927); Commercial Cable Co. v. Burleson, 250 U.S. 360 (1918). "To dismiss the writ of error would leave the judgment of the court of appeals . . . in force,—at least, apparently so,—notwithstanding the basis therefor as disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this court . . . is to reverse the judgment below and remand the case with directions to dismiss . . . ." Brownlee v. Schwartz, 261 U.S. 216, 218 (1923). "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the case with directions to dismiss." Duke Power Co. v. Greenwood County, 299 U.S. 259,267 (1936). The appellate courts below have not always followed this principle. Spreckels v. Wickard, 131 F.(2d) 12 (App. D.C., 1941) (appeals dismissed); Glass v. Ickes, 107 F.(2d) 259 (App. D.C., 1939) (appeal dismissed).

42. Harrison Beverage Co. v. Woodcock, 67 F.(2d) 441 (C.C.A. 3d, 1933); Rayhayel v. McCampbell, 55 F.(2d) 221 (C.C.A. 2d. 1932); Spreckels v. Wickard, 131 F.(2d) 12 (App. D.C. 1941); 107 F.(2d) 259 (App. D.C. 1939); Glass v. Ickes, 107 F.(2d) 259 (App. D.C. 1939); Brockett v. Maxwell, 200 Ga. 38, 35 S.E. (2d) 906 (1945); Division of Labor, Inc. v. Indianapolis News Publishing Co., 109 Ind. App. 88, 32 N.E.(2d) 722 (1941); Cochran v. Rowe, 225 N.C. 645, 36 S.E.(2d) 75 (1945); Austin v. City of Alice, 193 S.W.(2d) 290 (Tex. Civ. App. 1946); Jones v. Byers, 24 Wash.(2d) 730, 167 P.(2d) 464 (1946).

43. Compare Wynne v. Pancheri, 54 F.(2d) 73 (C.C.A. 3d, 1931) (affirmed but not on the merits) with Harrison Beverage Co. v. Woodcock, 67 F.(2d) 441 (C.C.A. 3d, 1933) (appeal dismissed).

44. In all cases cited in footnotes 1-43 inclusive where the appellate court had found the issue to be moot, the lower court decision had been on the merits.

be executed. Using the declaratory judgment procedure in many of these cases would obviate this objection. One difficulty in using this procedure is that no case and controversy exists, but this seems not well-founded. There are two requirements for a case and controversy: adverse parties asserting conflicting claims;[45] and finality short of execution.[46] Both requirements are satisfied in most of these situations. A more serious objection, however, is the necessity of exhausting the statutory remedy providing for an appeal from an order of an administration agency.[47] This objection seems insurmountable. It would be possible to obviate this by enabling legislation authorizing the use of the declaratory judgment procedure prior to exhausting the statutory remedy when proof that the statutory remedy would be unavailing because of anticipated mootness is presented to a court.

The most feasible and immediately available solution is for the courts to recognize more fully their power in those cases where a question of public importance is raised[48] or where a decision on the merits is needed to establish a guide for the future operation of administrative agencies.[49] As already stated, this provides a great degree of flexibility in the determination that a case is moot. By more frequent recognition of these problems and a broader application of these powers, the courts could insure that controversies involving administrative agencies be given proper judicial review and could render decisions on the merits even in moot cases where issues of public importance justify the establishment of standards for future administrative conduct.

BILLS AND NOTES

IN GOOD FAITH AND WITHOUT NOTICE

Plaintiff, an investment broker, purchased a bearer bond from a fly-by-night broker at slightly less than market price. The bond had been stolen from the original purchaser to whom a duplicate was issued. The duplicate was paid. Defendant

45. Nashville, C. & St. L. R.R. v. Wallace, 288 U.S. 249 (1933).
46. Id. at 263; Fidelity National Bank v. Swope, 274 U.S. 123 (1927).
47. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Central High School Athletic Assoc. v. Grand Rapids, 274 Mich. 147, 264 N.W. 322 (1936).
48. See cases cited in n. 39, supra.
49. See cases cited in n. 40, supra.