C. R. I. & P. RD. CO. *v.* COHEN.

5-400 267 S. W. 2d 774

Opinion delivered May 10, 1954.

1. COURTS—MUNICIPAL COURTS—REVIEW, REQUISITES FOR.—The law requires an affidavit for an appeal from municipal courts to circuit court as a prerequisite to the circuit court's jurisdiction to entertain an appeal, and, unless waived, is grounds for dismissal.
2. STATUTES—REPEAL BY IMPLICATION.—Act 280 of 1941 (Ark. Stats., § 22-707) requiring certain court costs to be paid before an appeal in civil cases can be taken from Municipal Courts and outlining the duties of the clerk thereof does not cover anew the entire subject of appeals from municipal courts to circuit court and does not,

therefore, by implication repeal Ark. Stats., § 26-1302, requiring an affidavit.

Appeal from St. Francis Circuit Court; *Elmo Taylor,* Judge; affirmed.

Wright, Harrison, Lindsey & Upton, for appellant.

Harold Sharpe, for appellee.

Robinson, J. This is an appeal from an order of the St. Francis Circuit Court dismissing an appeal from the municipal court of Forrest City because appellant failed to make or file with the municipal court an affidavit stating "that the appeal is not taken for the purpose of delay, but that justice may be done," as required by Ark. Stat. § 26-1302. It is the contention of appellant, Chicago, Rock Island & Pacific Railroad Company, that Ark. Stat. § 22-707 is controlling and that this section does not require the filing of the affidavit mentioned in § 26-1302.

Section 22-707 is § 7 of Act 60 of 1927 as amended by Act 280 of 1941; it does not provide for the making of the affidavit mentioned. However § 22-708, which is § 8 of the 1927 Act, provides: "All provisions of the general laws applying to Police Courts in cities of the first class, and to the judges thereof, not inconsistent with the provisions of this Act, and all provisions of the general laws applying to Justices of the Peace not inconsistent with the provisions of this Act, or with the provisions of the general laws to Police Courts in cities of the first class and the judges thereof, shall apply with like force and effect to Municipal Courts and the Judges thereof."

In *Arkansas Brick & Tile Co.* v. *Crabtree,* 172 Ark. 752, 290 S. W. 361, the court said: "The law requires an affidavit for an appeal from a justice court to the circuit court as a prerequisite to the circuit court's jurisdiction to entertain an appeal, and, unless waived, is ground for dismissal . . . This is likewise the law as to appeals from municipal courts. Act 87 of the Acts of 1915, § 9, page 342-347." It is the contention of appellant that the

Crabtree decision, rendered January 31, 1927, was prior to the adoption of the 1927 Act as amended by Act 280 of 1941, and that the opinion only deals with the 1915 Act; thus appellant says the decision in the *Crabtree* case is not controlling. However, that part of the 1915 Act on which the *Crabtree* case is based is identical with the 1927 Act, nor did the 1941 Act amend this section of the 1927 Act, there being no change with reference to requiring an affidavit as a prerequisite to an appeal from the municipal court to the circuit court. Neither Act specifically mentions the necessity of making such an affidavit; however, § 9 of Act 87 of 1915, § 8 of Act 60 of 1927, and Ark. Stat. § 22-708, quoted above, are identical; and as construed in the *Crabtree* case, require the affidavit as provided by Ark. Stat. § 26-1302. None of these sections are mentioned in the 1941 Act, but appellant contends they were repealed by implication insofar as requiring an affidavit for appeal.

Act 280 of 1941 amends Act 60 of 1927, Ark. Stat. § 22-707, by making it clear that the Act only applies to civil cases, and further that before the appeal can be lodged in circuit court certain costs must be paid, and that within five days after the payment of such costs the clerk of the municipal court shall lodge a transcript in circuit court. The appellant maintains that this amendment does away with the requirement of the affidavit as provided in § 26-1302; that § 22-707 sets out all the steps necessary to perfect an appeal; and that hence § 26-1302 is repealed by implication.

We have held that where an act of the legislature deals with an entire subject anew, and it is apparent from the mere reading of the new act that it was the intention of the general assembly to cover the entire subject, plainly showing that the new act was intended as a substitute for the old act, there is a repeal by implication; but repeals of this kind are looked on with disfavor. In *Forby* v. *Fulk,* 214 Ark. 175, 214 S. W. 2d 920, this court quoted with approval from *Coates* v. *Hill,* 41 Ark. 149, as follows: "Repeals by implication are not favored. To produce this result, the two acts must be upon the

same subject and there must be a plain repugnancy between their provisions; in which case the latter act, without the repealing clause, operates to the extent of repugnancy, as a repeal of the first. Or, if the two acts are not in express terms repugnant, then this latter act must cover the whole subject of the first and embrace new provisions, plainly showing that it was intended as a substitute for the first. *United States* v. *Tynen,* 11 Wall 88, 20 L. Ed. 153."

In addition to § 22-707-8, § 26-1301-24 deal with appeals from Justice of the Peace courts, and therefore in accordance with § 22-708 may be applicable in appeals from municipal courts. § 26-1302 also provides for a supersedeas bond and it could hardly be said a bond is no longer necessary to supersede the judgment. Hence it can not be said that Act 280 of 1941 covers anew the entire subject of appeals from municipal court to circuit court, thereby repealing by implication § 26-1302 requiring the affidavit.

The court was correct in dismissing the appeal because of the failure to file the affidavit. The judgment is therefore affirmed.

The Chief Justice and Justices Holt and Ward dissent.

J. Seaborn Holt, J., dissenting. The General Assembly in 1941 passed Act 280 (now Section 22-707, Ark. Stats. 1947) and digested under the heading "appeals—Costs—Time of Trial," which provides (in its entirety: "ACT 280. AN ACT To Amend the Municipal Court Act, § (7) of Act 60 of the General Assembly of 1927, Approved February 28, 1927, § 9903 of Pope's Digest. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS: Section 1. That Section Seven (7) of Act 60 of the General Assembly of 1927, Section 9903 of Pope's Digest, be amended as follows: 'All appeals (of civil cases) from Municipal Courts must be taken and the transcripts of appeal lodged in the office of the Clerk of the Circuit Court within thirty days after judgment

is rendered, and not thereafter, (only after the party appealing has paid to the Clerk of the Municipal Court the costs now allowed for the preparation of the transcript, and also the filing costs due the circuit clerk. The Clerk of the Municipal Court shall within five days after such payment lodge such transcript with the circuit clerk and pay to him the amounts due as filing costs.) The Circuit Court shall advance on its docket such causes on appeal and the same shall stand for trial *de novo* in the Circuit Court ten days after being docketed.'

"SECTION 2. That all laws and parts of laws in conflict herewith are hereby repealed and this act being necessary for the immediate preservation of property, public health and safety, an emergency is hereby declared to exist and the same shall be in full force and effect from and after its passage. APPROVED: March 26, 1941."

It will be noted that the above Act (#280) amends § 9903, Pope's Digest (Act 87 of the laws of 1915) by adding the following language: "of civil cases," "only after the party appealing has paid to the Clerk of the Municipal Court the costs now allowed for the preparation of the transcript, and also the filing costs due the circuit clerk. The Clerk of the Municipal Court shall within five days after such payment lodge such transcript with the circuit clerk and pay to him the amounts due as filing costs."

Prior to this 1941 amendment, this court had decided in 1927 (*Acme Brick and Tile Company* v. *Crabtree*, 172 Ark. 752, 290 S. W. 361) that the filing of an affidavit that the appeal was not taken for delay, was a prerequisite for an appeal from the Municipal Court to the Circuit Court.

The present 1941 Act is a comprehensive act, applying only to *civil cases* from the Municipal Court and clearly sets out the necessary steps to follow in taking such appeal, which are "(1) Payment to the Clerk of the Municipal Court of costs for preparing the transcript; (2) Payment to the Municipal Clerk of fil-

ing costs due the Circuit Clerk; (3) Taking the appeal and lodging the transcript of appeal in the office of the Circuit Clerk within 30 days after judgment is rendered."

It is undisputed that appellant took all these steps and having done so, the following duties become mandatory on the Municipal Court Clerk: He *shall* lodge the appeal with the Circuit Clerk and pay to the Circuit Clerk all filing costs due. After this is done, the Circuit Clerk *shall* advance the case on the docket for appeal and same *shall* stand for trial *de novo* in the Circuit Court ten days after so docketed. The word *shall* used in this act is clearly mandatory.

"It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory." *State* v. *Wymore,* 343 Mo. 98, 119 S. W. 2d 941.

"The word 'shall' in its ordinary sense is imperative. When the word 'shall' is used in a statute, and a right or benefit to anyone depends upon giving it an imperative construction, then that is to be regarded as peremptory." *Ballou* v. *Kemp,* 92 F. 2d 556.

The prerequisites for appeal under Act 280 seem to me to be inconsistent with the former statute (in effect prior to this 1941 act) requiring the filing of an affidavit as a prerequisite to appeal.

I think this 1941 act was intended by the lawmakers to embrace all the mandatory and necessary requirements for appeal in *civil cases* only, to simplify and facilitate such appeals, and was enacted to cover the entire appellate prerequisites in civil cases, and to remove and by implication repeal the requirement for the affidavit prior to its enactment.

"The right of appeal is given in all cases by our Constitution, and the majority of the court is of the opinion that statutes regulating it should be construed so as to facilitate rather than impede its exercise." *McNutt* v. *State,* 163 Ark. 122, 259 S. W. 1.

Act 280 is couched in such plain and unambiguous language that no judicial construction seems necessary.

I would reverse.

The Chief Justice and Justice WARD join in this dissent.