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Appellate Division Exercises Its Power to Vacate or Modify Ex Parte Orders of the Supreme Court Only in "Unusual Circumstances"

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the appeal. The supreme court, appellate division, in a recent case [264] held that an appendix containing only 13 pages of excerpts of testimony taken from a stenographic transcript of 950 pages did not permit a review of the weight of the evidence. It was impossible, said the court, to render a decision on questions of law presented where the facts (primarily meaning testimony, in this context) upon which the legal conclusions depended were not contained in the appendix. The court pointed out that it was "under no obligation to examine the original record where the appendix clearly is insufficient. . . ." [265]

The appendix in the *Reynolds* case was *clearly* insufficient, not merely deficient in some minor details. On the basis of the above decision, it would appear safe to assume that the court would examine the original record only when the appendix is deficient in a comparatively minor particular. The question of what would be considered a minor omission as against what would constitute a clearly insufficient appendix will naturally depend on the matter sought to be reviewed.

In the *Reynolds* case, appellant was seeking reversal based on the weight of the evidence. In such context, it is patently absurd to offer the appellate court only 13 of the 950 pages of transcript. If all that was sought was review of alleged errors, *e.g.*, the exclusion of certain tendered evidence, the colloquy surrounding which appeared on the 13 pages, such appendix would have sufficed. The scope of the appendix should be coordinated with the scope of review sought.

One further counseling point evolves. The mere presence of a complete transcript in the appellate court must not be taken as an invitation to the formulation of sketchy appendices. The transcript is present for the court's convenience (and the respondent's [266]), not the appellant's; as far as the appellant is concerned, the assumption should be that all that the judges have available is the appendix contained in the brief.

ARTICLE 57—APPEALS TO THE APPELLATE DIVISION

Appellate Division exercises its power to vacate or modify ex parte orders of the supreme court only in "unusual circumstances."

In the case of *In re Willmark Serv. Sys., Inc.*,[267] the New York Supreme Court, special term, granted an order, pursuant to

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[264] E.P. Reynolds, Inc. v. Noger Elec. Co., 21 App. Div. 2d 306, 250 N.Y.S.2d 487 (2d Dep't 1964).
[265] *Id.* at —, 250 N.Y.S.2d at 489.
[266] See the last sentence of CPLR 5525(a).
[267] 21 App. Div. 2d 478, 251 N.Y.S.2d 267 (1st Dep't 1964).

BCL § 1106,[268] to show cause why a certain corporation should not be dissolved. Application was made, pursuant to CPLR 5704(a), to the appellate division to vacate the show cause order. The appellate court held that the power granted to it by that provision should be exercised only in "unusual circumstances," and that the preferred practice is for the applicant to move, on notice, to vacate the order pursuant to CPLR 2221(2) [269] or, if a stay in the proceedings is required, to obtain an order to show cause why the order should not be vacated.

The appellate division has been vested with the power to "vacate or modify any order of the supreme court . . . granted without notice to the adverse party . . ." [270] for some time. It has, however, declined to use it in other than unusual circumstances. In 1899 the appellate division acknowledged the possession of this power but declined to utilize it except where "some exigency seems to require that they shall do so in the interest of justice." [271]

CPLR 5704(a), the present day counterpart of Section 1348 of the Code of Civil Procedure, which originally granted this power to the appellate division was omitted from the original draft of the CPLR.[272] The advisory committee felt that "sound judicial administration particularly calls for restraint by the Appellate Division in the situations" [273] covered by this section.

In upholding its traditional position in the instant case, the court cited two paths open to the practitioner in other than "unusual circumstances." First, a motion may be made, on notice, to any judge of the court (not necessarily the judge who made the order [274]), to vacate the show cause order. An alternate, states the court, is to obtain an order to show cause why the original order to show cause should not be vacated. The latter method is to be used when a stay in the proceedings is desired. CPLR 5704, in short, is on the books and is available if the exigencies of any given case support its use; but absent such exigencies, the remedy of vacatur of the order is to be sought at the same judicial level of its rendition.

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[268] This section provides for the issuance of an order requiring the corporation and all persons interested therein to show cause why the corporation should not be dissolved.

[269] This section provides the procedure for presenting a motion, on notice, to vacate an order to the judge who issued that order.

[270] CPLR 5704(a).

[271] Matter of Barkley, 42 App. Div. 597, 609-10, 59 N.Y. Supp. 742, 750 (4th Dep't 1899).

[272] CPLR 5704(a) is taken in substance from CPA §§ 66 and 132(1).

[273] FOURTH REP. 196.

[274] See CPLR 2221(2).