

fees on appeal and provided that interest would run from the date of the third judgment. Apparently, this has been the Appellant's belief throughout these proceedings because the certificate of cash deposit filed by the Appellant in lieu of a cash bond reflects that the deposit was made to appeal from a judgment entered on July 20, 1976. In addition, the last point in the brief of Appellant concerns a complaint about attorney's fees as provided for in the judgment signed and entered July 20, 1976.

If we should sustain the Appellant's motion for rehearing and conclude that the second judgment vacated and set aside the first judgment, and that the third judgment vacated and set aside the second judgment, the Appellant would be before this Court without any assigned errors for our consideration. No motion for new trial was filed in the trial Court following the entry of the third judgment. This being a jury-tried case, a motion for new trial is a prerequisite to an appeal under Rule 324, Tex.R.Civ.P. All of the Appellant's points of error in its original brief reflect that they are germane to an amended motion for new trial, and the amended motion for new trial filed on June 17, 1976, is expressly stated to be an attack upon the judgment "rendered * * on May 21, 1976." There being no motion for new trial following the judgment entered on July 20, 1976, any error required to be assigned by such a motion has been waived. Should we be mistaken about the validity of the July judgment, we have examined the record and find no fundamental error.

The Appellant's motion for rehearing is overruled.



Jerry JOHNSON, Appellant,

v.

Rosa Lee BARGE, Appellee.

No. 21704.

Court of Civil Appeals of Texas,
Dallas.

April 28, 1977.

Rehearing Denied May 19, 1977.

In a civil action, the County Court at Law No. 4, Dallas County, Robert E. Day, J., rendered judgment and a party filed an affidavit in lieu of cost bond. A contest to the pauper's oath was sustained and the party appealed and moved to require the clerk of the Court of Civil Appeals to docket the appeal. The Court of Civil Appeals held that: (1) the order was not appealable and (2) that attempted appeal could not be considered as application for writ of mandamus to require preparation of record without cost and, even if it were so considered, primary appeal would still fail where no record had been timely tendered for primary appeal and time prescribed for filing motion to extend filing date had expired.

Motion overruled.

1. Appeal and Error ⇐82(1)

Order sustaining contest to pauper's oath, in affidavit filed in lieu of cost bond for appeal, was interlocutory and not appealable.

2. Mandamus ⇐57(1)

Appellant's only remedy where time for filing cost bond has passed and contest to pauper's oath is sustained is writ of mandamus to direct trial judge to require preparation of record without cost. Rules of Civil Procedure, rule 356.

3. Mandamus ⇐1, 187.7

Attempted appeal from order sustaining contest to pauper's oath could not be considered as application for writ of mandamus to require preparation of record without cost and, even if it were so considered, primary appeal would still fail where no record had been timely tendered for primary appeal and time prescribed for filing motion to extend filing date had expired. Rules of Civil Procedure, rules 21c, 356, 388.

4. Appeal and Error ⇔624

Motion to extend date for filing record could not be granted where it did not reflect date of judgment on which appeal was based. Rules of Civil Procedure, rule 21c.

5. Appeal and Error ⇔619

Clerk may refuse filing of prospective appeal pending decision by court where clerk feels that appeal would not properly be before court. Rules of Civil Procedure, rule 388.

Edith L. James, Dallas, for appellant.

Roy L. Stacy, Bradshaw & Bynum, Dallas, for appellee.

PER CURIAM.

[1] Appellant, Jerry Johnson, has filed a motion to require the clerk of this court to docket his appeal from an order sustaining a contest to his pauper's oath. The question before the court is whether we have jurisdiction over such an appeal. We hold that such an order is interlocutory and not appealable and, accordingly, overrule the motion.

Judgment was rendered on November 5, 1976, and appellant's amended motion for new trial was overruled on December 10, 1976. An affidavit in lieu of cost bond was filed within the prescribed time, and a contest to that affidavit was subsequently sustained on February 4, 1977. By that time the thirty-day period prescribed by Tex.R. Civ.P. 356 for filing a cost bond had passed, and the only way the primary appeal can now be heard is by appellate review and reversal of the order sustaining the pauper's oath contest.

[2-4] That order, however, cannot be reviewed by an ordinary appeal because it is interlocutory in nature. *Florek v. Shaw*, 357 S.W.2d 769, 770 (Tex.Civ.App.—Dallas 1962, no writ); *Burleson v. Rawlins*, 174 S.W.2d 979, 980 (Tex.Civ.App.—Dallas 1943, no writ). Appellant's only procedural remedy in such a case is to seek a writ of mandamus to direct the trial judge to require preparation of the record without cost

on the basis of the pauper's affidavit. *Williams v. Maynard*, 515 S.W.2d 9, 11 (Tex. Civ.App.—Austin 1974, writ dismissed); *Burleson v. Rawlins*, *supra*. This attempted appeal cannot be considered as an application for a writ of mandamus. Even if it were so considered, the primary appeal would still fail. No record has been timely tendered for the primary appeal, and the time prescribed by Tex.R.Civ.P. 21c for filing a motion to extend the filing date has now expired. We recognize that appellant could not have filed the record without obtaining a writ of mandamus, but we could have extended the filing date under rule 21c if a timely and proper motion had been filed. Although appellant did file a motion to extend, it was overruled because it did not reflect the date of the judgment upon which the appeal was based. Without such a showing, we were unable to determine whether the motion had been filed within the time allowed under rule 21c.

[5] We hold, therefore, that our clerk acted within her authority in refusing to file this appeal. When the clerk feels that a prospective appeal would not be properly before the court, she is authorized to refuse filing pending a decision by the court. Tex. R.Civ.P. 388. Since we agree with the clerk's jurisdictional opinion, appellant's motion is overruled.



GOURMET, INC., Appellant,

v.

Charles W. HURLEY, Appellee.

No. 19193.

Court of Civil Appeals of Texas,
Dallas.

April 29, 1977.

Rehearing Denied May 26, 1977.

Plaintiff sought judgment against non-resident corporation. The District Court,