

DIVISION OF PUBLIC SAFETY: Justice of the Peace, whether striking of appeal to the Superior Court from the docket of the Superior Court has the effect of dismissing the justice of the peace judgment.

September 28, 1943.

Mr. James C. Dunn, Director,
Financial Responsibility Div.,
Division of Public Safety,
State House,
Indianapolis, Indiana.

Dear Mr. Dunn:

This will acknowledge receipt of your letter dated September 16th, 1943, which reads as follows:

"In the case of a judgment in a Justice of Peace Court and an appeal then taken to a Superior Court and said appeal was stricken from the Docket by the Judge of Superior Court for failure to prosecute said appeal, does the original judgment in the Justice Court then stand against the defendant?"

Burns' R. S. 1933, Section 5-1007, which is a part of the Justice of Peace Act, reads as follows:

"When an appeal is dismissed by the court, such fact shall be certified to the justice by the clerk, and such judgment stands on the justice's docket as if no appeal had been taken."

Lowe's McDonald's Treatise, ninth edition, in discussing the effect of the dismissal of an appeal taken from a Justice of Peace Court to the Circuit or Superior Court, in part reads as follows:

"The appellant, of course, may dismiss his appeal at any time, the effect of which is to reinstate the judgment on the justice's docket as if no appeal had been taken. The statute makes it the duty of the clerk to certify the dismissal to the justice."

In the case of Reeves et al. v. Andrews, 7 Ind. 207, the court discusses the effect of an appeal upon the judgment rendered by Justice of Peace and on page 209 the court says:

“When a party against whom a judgment is rendered before a justice, appeals to the Circuit Court, and the appeal for any cause is dismissed, the effect of such dismissal must be to affirm the judgment below. * * * There is, therefore, a material difference between the effect of dismissing an appeal and dismissing the suit. The latter, in our opinion, is an avoidance of all the proceedings before the justice. To hold a judgment valid for any purpose when the suit in which it was rendered had been dismissed, would seem to involve an absurdity. * * *”

In the case of Springer v. Gosztola, 109 Ind. App. 273, 34 N. E. (2d) 155, there is language used by the court which indicates that when an appeal is taken from a judgment rendered by a Justice of Peace and the appeal is dismissed, the judgment is not reinstated. An examination of this case discloses that the court does not cite, or in any manner consider, the effect of Section 5-1007, *supra*, and an examination of the briefs filed in this case further discloses that said section of the statute was not cited to the court by either of the parties. An examination of the record in the case of Springer v. Gosztola, *supra*, discloses that the cause was ordered stricken from the docket pursuant to Rule 12 of the court. The entry does not state that the cause of action was dismissed. It is our opinion that striking a case from the docket is the same as dismissing the appeal and such an entry is not the equivalent of dismissing the cause of action which generally is done upon motion of the plaintiff or by the court for failure of plaintiff to prosecute and the entry expressly states that the action is dismissed.

For these reasons it is our opinion that the case of Springer v. Gosztola, *supra*, is not decisive of the question propounded by your letter. As stated by the Supreme Court of Indiana, in the case of Reeves v. Andrews, *supra*, and also in Lowe's McDonald's Treatise, if the record shows that the appeal is dismissed for any reason the judgment is reinstated in the

records of the Justice of Peace. On the other hand, if the cause of action is dismissed then there is no judgment.

Therefore, in answer to your question, it is my opinion that if the transcript of the record certified to you discloses that the appeal was dismissed in the Superior Court, or stricken from the docket, the judgment of the Justice of Peace would be reinstated under and pursuant to the express provisions of Section 5-1007, *supra*, and on the other hand, if the transcript of the record affirmatively discloses that the cause of action was dismissed instead of the appeal, then and in that event, it is our opinion that the judgment would not be reinstated under the provisions of Section 5-1007. If the transcript of the record is vague, indefinite, or ambiguous, and it is impossible for you to determine whether it was the appeal or the cause of action which was dismissed, then, and in that event, it would be proper for you to request a new transcript specifically stating the facts with reference to the dismissal so that you will have no difficulty in determining whether it was the appeal or the cause of action which was dismissed.

STATE EXAMINER: Construction of Chapter 139 and Chapter 129 of the Acts of 1943 to determine which of two acts applies to the City Hospital of Indianapolis.

INDIANAPOLIS: City Hospital, whether such hospital is governed by Chapter 139 or 129 of the Acts of 1943.

September 29, 1943.

Hon. Otto K. Jensen,
State Examiner,
State House,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter pointing out certain conflicts between Chapter 139 of the Acts of 1943 and Chapter 129 of the Acts of 1943. You request an official opinion upon the question as to which Act is controlling in making purchases for the City Hospital in the City of Indianapolis. Chapter 129 of the Acts of 1943 appears as Section 53-501 to and including Section 53-510 of Burns' Indiana Statutes Annotated, June