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# Civil Practice Act Cases

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The burden, therefore, is now on the states. The bill granted the premise that regulation by the states is in the public interest. The states, however, are to retain control only if they can prove their ability to control before January 1, 1948. Before that date, it is expected that state action of all kinds will occur. Hasty legislation, radical changes, refusal to change, good measures and bad will likely appear. It appears too much to hope that forty-eight states will pass legislation adequate, in Congressional judgment, to free the insurance industry from imminent federal control. Test cases of various state measures will undoubtedly arise, but the present prospect seems to be that lack of uniformity of action will eventually give Congress sufficient excuse to take over all-out regulation of the insurance business. State failure to provide adequate regulation for transportation led to the Interstate Commerce Commission. A federal Insurance Commission appears looming on the horizon.

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## CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE—WHETHER OR NOT FILING OF MOTION IN TRIAL COURT TO VACATE JUDGMENT OR DECREE OPERATES TO STAY RUNNING OF TIME FOR FILING OF NOTICE OF APPEAL—A motion was made, in *Corwin* v. *Rheims*,[1] to dismiss an appeal on the ground that the same had not been taken in apt time. The original decree from which relief was sought had been entered on February 2, 1944. Six days later, the unsuccessful plaintiff moved to vacate such decree which motion was continued generally and was not passed upon until May 19, 1944, when it was overruled. Three days after the order overruling the motion to vacate the decree, notice of appeal was filed in the trial court. It was urged that since such notice was not filed within ninety days next following the date of the original decree, as provided in Section 76 of the Civil Practice Act,[2] the appeal was taken too late to warrant consideration thereof. Held: motion to dismiss the appeal denied.

The intimation contained in *Deibler* v. *Bernard Brothers, Incorporated*,[3] to the effect that a motion to vacate a judgment does not operate to stay the running of time within which to file notice of appeal, was clarified in the instant case when it was pointed out that the rule therein announced was proper in view of the fact that, subsequent to the filing of such motion and before the same had been determined, the appellant had filed a notice of appeal. Such action

[1] 390 Ill. 205, 61 N. E. (2d) 40 (1945). Gunn, J., dissented over questions not involved herein.

[2] Ill. Rev. Stat. 1943, Ch. 110, § 200.

[3] 385 Ill. 610, 53 N. E. (2d) 450 (1944), affirming 319 Ill. App. 504, 48 N. E. (2d) 422 (1943).

was deemed to amount to a waiver of the motion to vacate the judgment so as to make the judgment a final and appealable one from the date of its original rendition.[4] The same result does not follow when the moving party refrains from filing notice of appeal, as in the instant case, until his motion has been decided for such a judgment or decree, in effect, has been suspended until the court can act on the motion.[5]

It is true that Section 76 of the Civil Practice Act directs that no appeal shall be taken after the expiration of ninety days "from the entry of the order, decree, judgment or other determination complained of."[6] The term "entry," as used therein, must be understood to mean the original date of entry in case no motion to vacate is presented or, being presented, is withdrawn; but otherwise must be read as meaning the date on which such motion was finally determined.[7] To hold otherwise would be to provide a snare for the litigant who unsuccessfully endeavors to have the trial court correct its own errors before seeking the aid of a higher court.

DISMISSAL AND NONSUIT—VOLUNTARY DISMISSAL—WHETHER OR NOT ORDER OF DISMISSAL MAY BE VACATED AND CASE REINSTATED AGAINST A DEFENDANT WHOM PLAINTIFF HAS VOLUNTARILY CAUSED TO BE DISMISSED FROM SUIT—The series of errors made by plaintiff in *Fulton* v. *Yondorf*[1] precipitated a chain of events that led to disastrous consequences. The plaintiff there had brought an action against a single defendant, both as trustee and in his individual capacity, seeking damages for personal injuries alleged to have been sustained while on certain premises owned by such defendant as trustee. At the close of all the evidence, plaintiff voluntarily moved to dismiss the suit as to the individual defendant and the case proceeded against the trustee. After verdict against him in that capacity, he moved for judgment in his favor notwithstanding the verdict.[2] While that motion was pending, plaintiff moved the court to vacate the order of voluntary dismissal, to reinstate the case as to the individual defendant, and to amend the verdict by deleting the reference to the trustee so as to make the same read as if it were a personal one. The trial court granted the motion of defendant, in his trust capacity, for judgment notwithstanding the verdict but at the same time also granted plaintiff's motions to vacate the order of dismissal and to reinstate the

[4] See also Marks v. Pope, 370 Ill. 597, 19 N. E. (2d) 616 (1939).

[5] Lenhart v. Miller, 375 Ill. 346, 31 N. E. (2d) 781 (1941); Hosking v. Southern Pac. Co., 243 Ill. 320, 90 N. E. 669 (1910).

[6] Ill. Rev. Stat. 1943, Ch. 110, § 200(1).

[7] As to just what constitutes "entry" of the judgment or decree, see Snook v. Shaw, 315 Ill. App. 594, 43 N. E. (2d) 417 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 98.

[1] 324 Ill. App. 452, 58 N. E. (2d) 640 (1944).

[2] The liability of a trustee for tort growing out of the management of trust premises is discussed in Bogert, Trusts and Trustees, Vol. 3, § 731 et seq.

case as to the individual defendant. The court did, though, on its own motion order a retrial of the cause.[3] Upon appeal by the defendant in his individual right, the Appellate Court held that after the plaintiff had once voluntarily dismissed the defendant out of the case, the trial court lacked jurisdiction to reinstate the cause as to him and that plaintiff's remedy lay in instituting a new suit. The statute of limitations had, however, run in the meantime so it was worthless for plaintiff to begin the case anew.

The instant case appears to be the first one since the adoption of the Civil Practice Act wherein an opinion has been reported in full covering the precise question here involved.[4] The question had arisen before that time, however, for in *Weisguth* v. *Supreme Tribe of Ben Hur*[5] the controlling rule was stated as follows: "In case of a voluntary nonsuit upon motion of a plaintiff the court has no power to set aside the order of dismissal and reinstate the cause unless at the time the nonsuit is taken leave is given the plaintiff to move to set it aside."[6] The reason given for such view is based on the fact that if a plaintiff by his deliberate and voluntary act secures the dismissal of his suit, he must be held to have anticipated the effect and necessary results of this action, and should not be restored to the position and rights which he voluntarily abandoned. His only remedy, after dismissal, is to commence new proceedings and acquire jurisdiction again in the usual fashion.[7] A contrary result can be obtained, however, in case the order of dismissal is obtained by the defendant over plaintiff's protest.[8]

The common-law rule announced in the Weisguth case has not been specifically changed by any provision in the Civil Practice Act although the practice of taking a voluntary nonsuit has been subjected

[3] It was urged that, as defendant was appealing from an order granting a new trial, he should have filed a petition for leave to appeal pursuant to Ill. Rev. Stat. 1943, Ch. 110, § 201. The court distinguished this case from those covered by the statute on the ground that the provision thereof was restricted to cases wherein a trial had, in fact, been had whereas in the instant case the defendant, in his individual capacity, had never been granted a trial.

[4] Becker v. Loebs Ins. Agency Co., 304 Ill. App. 575, 26 N. E. (2d) 653 (1940), abstract opinion, and Moist v. Jones, 323 Ill. App. 286, 55 N. E. (2d) 556 (1944), abstract opinion, in fact both reached the same result.

[5] 272 Ill. 541, 112 N. E. 350 (1916).

[6] 272 Ill. 541 at 543, 112 N. E. 350 at 351.

[7] Thompson v. Otis, 285 Ill. App. 523, 2 N. E. (2d) 370 (1936), held that where several defendants were involved in the original proceeding and one was dismissed voluntarily, the plaintiff might, by filing an amended complaint and causing a new summons to issue against the defendant so dismissed, avoid the effect of the dismissal order since the action taken was the equivalent of bringing a new suit. That method would be unavailing where a voluntary nonsuit is taken against the sole defendant in the case.

[8] See Watson v. Trinz, 274 Ill. App. 379 (1934).

to some restrictions.[9] Section 50(7) of that statute provides for the setting aside of judgments or decrees within thirty days after the entry thereof[10] but that provision has been held inapplicable to voluntary nonsuits,[11] so no benefit can be gained therefrom. Interlocutory orders may, of course, be amended or vacated at any time prior to final judgment, but an order of dismissal is a final one so cannot be included in any such category. It must be deduced, therefore, that the intent of the legislature was not to change the law relating to the rights of the parties growing out of voluntary nonsuits when the Civil Practice Act was adopted.

Although the rule, as applied in the instant case, could well be said to work a hardship on the particular litigant, it does not seem unreasonable to force a plaintiff to take the foreseeable consequences of his voluntary acts. The holding should serve, however, as a warning to any plaintiff to exercise extreme caution before making a motion to dismiss a defendant from a case.

P. E. MONTGOMERY

[9] Ill. Rev. Stat. 1943, Ch. 110, § 176. See also Flassig v. Newman, 317 Ill. App. 635, 47 N. E. (2d) 527 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 348. In Bernick v. Chicago Title and Trust Co., 325 Ill. App. 495, 60 N. E. (2d) 442 (1945), it was held that a voluntary nonsuit should be denied where defendant had filed a motion under Ill. Rev. Stat. 1943, Ch. 110, § 172, based on the ground that the cause of action asserted therein had been previously adjudicated.

[10] Ill. Rev. Stat. 1943, Ch. 110, § 174(7). The plaintiff in Becker v. Loebs Ins. Agency Co., 304 Ill. App. 575, 26 N. E. (2d) 653 (1940), abst. opin., relied on a comparable provision in Ill. Rev. Stat. 1943, Ch. 77, § 83, to no avail.

[11] Moist v. Jones, 323 Ill. App. 286, 55 N. E. (2d) 556 (1944), abst. opin.