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KENTUCKY
STATE BAR ASSOCIATION SECTION

THE PRACTICE ACT OF 1930*

By JUDGE RICHARD PRIEST DIETZMAN**

In the decade prior to the year 1928, the cases in the Franklin Circuit Court involving public questions, the construction of revenue laws, the constitutionality of statutes affecting the public service, the interpretation of laws imposing duties on public officers had very appreciably increased in number. Most of these cases required a prompt determination, for public interests were involved and could illy brook delay. But the Franklin Circuit Court was not a court of continuous session nor could it under the provisions of Section 138 of our Constitution be created into a separate judicial district as the Court of Appeals in the case of *Scott* v. *McCreary*, 148 Ky. 791, 147 S. W. 903, expressly held. Some measure of relief to expedite the public business was imperatively needed and so the Act of 1928, Chapter 28 of the Acts of that year, was passed. In substance, it provided that all circuit courts sitting in any county containing a city of the second or third class, not then courts of continuous session, should so far as the hearing of motions, the making of interlocutory orders, and the trial of cases, except where a jury trial was called for by the parties or ordered by the court be open at all times and be governed by the rules of practice applicable to courts of continuous session, although they were not actually courts of continuous session. At least this was the construction placed on the Act by the case of *Clapp* v. *Sandidge*, 230 Ky. 594, 20 S. W. (2d) 449. It will be noted that the Act applied not only to counties containing a city of the third class, as Franklin County then was, but also to counties containing a city of the second class and not having a court of continuous session. Such counties were McCracken and Boyd, and it is be-

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**Justice, Court of Appeals of Kentucky.

lieved the Act was framed as it was to meet the situation of the growing amount of business in these two counties, especially Boyd, which has long desired a court of continuous session of its own. For two years, the Act of 1928 was tried out. Its efficacy in dispatching business, especially cases involving public questions was marked. So at the November meeting of the Judicial Council in 1929, Judge Prewitt, one of the most active, tireless and efficient members of that body, proposed to extend the principle of the 1928 Act to all the circuit courts of the State not courts of continuous session. His proposal receiving the sanction of the Judicial Council, he drafted an act which was presented to the 1930 Session of the Legislature and which became Chapter 17 of the Acts of that Session. It is now embraced in Sections 964b-1 to 964b-3 of the 1933 Supplement to Baldwin's 1930 edition of the Statutes. They read:

Section 964b-1: "All circuit courts of this Commonwealth, other than those of continuous session, and the judge thereof, may make or direct in vacation or term time at his chambers, or at the circuit clerk's office or at any other place in any county in said district, any order, rule, judgment or decree in any proceeding whether at law or in equity or on the criminal docket upon reasonable notice to the parties, except where trial by jury is called for or ordered by the parties."

Section 964b-2: "All regular and special terms of court in any of such courts shall be held as now provided by law or as may hereafter be provided by law."

Section 964b-3: "This act shall in no wise affect existing laws or those which may hereafter be enacted relative to circuit courts of continuous session and shall not take effect until after January 1, 1931."

It will be noted that though the principle back of the 1928 Act was carried into the 1930 Act, the latter differs very much in wording from the former one.

The 1930 Act was first before the Court of Appeals in the case of *City of Owensboro* v. *Nolan*, 242 Ky. 342, 46 S. W. (2d) 490. The only question there raised under the Act was concerning the power of the circuit court to enter judgment in an equitable action during vacation on notice to the parties. Without discussion, the appellate court upheld such power under the express wording of the act.

The Act was next before the court in the case of *Center's Guardian* v. *Center,* 244 Ky. 502, 51 S. W. (2d) 460. It was there held that a circuit court or judge thereof has control over any order, rule, judgment or decree entered in vacation pursuant to the authority so to do granted by Section 964b-1 of the Statutes (1933 Supplement) not only during the vacation, but until the expiration of the succeeding term of court. This ruling has been much criticised by students of the 1930 Act. They claim that in large measure it nullifies the purposes of the Act to give expedition to litigation; for if a judgment rendered in vacation be subject to the control of the court or judge who rendered it not only during vacation but until the close of the succeeding term of court, it has no such finality as that the parties thereto can safely act in reliance upon it. They might just as well have waited for the regular term to secure their judgment so far as finality is concerned. On the other hand, it is argued that a judgment secured in vacation is just as final for purposes of appeal as well as all other purposes as one secured during term time. Such judgments though subject to control of the court can be enforced, appealed from and acted upon. Indeed, they are often acted upon despite the possibility of the court setting them aside or modifying them during the term at which they are rendered. At all events, the Center case is yet the law, although possibly the theory upon which it is rested is incompatible with what the Court of Appeals said in the next and up to the writing of this paper the last case involving the 1930 Act. That case is *Estes* v. *Woodford,* 246 Ky. 485, 55 S. W. (2d) 396. The substance of that case and the construction it put on the 1930 Act is succinctly stated in one short sentence near the close of the opinion. It is:

"In effect, the court or judge sitting in any case as authorized by Section 964b-1 is equivalent to a special term within the meaning of Section 971-13" (of the Statutes).

It will be recalled that Section 971-13 of the Statutes referred to is the one providing for special terms of court as we have always known such terms.

If action under the 1930 Act is equivalent to action during a special term of the court within the meaning of Section 971-13 of the Statutes, can the ruling of the Center case longer stand? A judgment entered during a special term can be controlled by

the court which rendered it only during such special term. Why should a different rule prevail under the 1930 Act if action pursuant to it is equivalent to action during a special term?

Applying the theory of a special term to the 1930 Act, the court in the Estes case logically held that the Act did not abrogate, alter, change, modify, or supplant Sections 367a-1 to 367a-11, inclusive of the Civil Code, or any section of the Statutes controlling a circuit court in regular or special term. Accordingly, if the action be one at law, it does not stand for trial under Section 964b-1 until summons shall have been served for 10 days if directed to the county or 20 days if directed to another county. See Section 367a-2 of the Civil Code. If the defendant be constructively summoned and does not answer, the action does not stand for trial until 60 days after the warning order is entered. See Section 367a-6 of the Civil Code. If the action be an equitable one, it will stand for trial at any time at the convenience of the judge or court after 30 days from the time when the issues have been or should have been completed under the provisions of the Code regulating that subject. Interlocutory orders may be entered by the court or judge sitting in vacation under Sections 367a-7 of the Civil Code and 964b-1 of the Statutes.

If at the time notice is served requesting a trial in vacation under Section 964b-1 of the Statutes, the issues have not been formed but should have been under the provisions of the Code applicable to the forming of issues, all of the Code provisions applicable to a court in regular or special session control that matter when the case comes on to be heard before the judge or court in vacation.

Further, the provisions of the Code relating to the separation of law and facts, the filing of the motion for a new trial, the granting or refusing such motion for a new trial, the filing of the bill of exceptions and all related matters apply and control the parties and the court. In the application of the provisions of Section 340, 341, 342 and 344 of the Civil Code relating to new trials and Sections 517 to 524, inclusive, of that Code, relating to proceedings to reverse, vacate, or modify judgments, the action of the judge in entering a judgment in vacation under this Section 964b-1 of the Statutes is to be regarded in the same light as a judgment entered at a regular or special term of court.

Thus we see that if we liken the sitting of a judge during vacation pursuant to the authority granted by Section 964b-1 of the Statutes to a special term as authorized by Section 971-13 of the Statutes, and apply to the situation the same Code provisions as to time of trial, formation of issues, method and time of filing motions for new trial, and of bills of exceptions and of proceedings to vacate, modify or reverse judgments as we would to special terms, all procedural difficulties under the 1930 Act disappear and its beneficient effect in the expediting of litigation, especially in equitable causes, the settlement of estates and sales of realty, will clearly appear.

It must not be overlooked that the Estes case expressly held that this 1930 Act did not in any way affect Section 378 of the Statutes or Section 390 of the Civil Code. These sections are the ones requiring the orders and judgments of the court to be entered on the order book of the court and signed by the judge. Until they are so entered and signed, they are, under familiar law, ineffective.

The court in this Estes case significantly and expressly left open the question whether under Section 964b-1 of the Statutes the trial of a case can be held in a county other than the one in which it is pending over the protest of any of the parties thereto. Of course, if sui juris, the parties can waive any or all requirements of the Code as to time of trial, formation of issues, or place of trial. Being a member of the tribunal before which the question thus left open by the Estes case may yet come, I express no opinion upon it at this time. I simply call attention to this important quesion.

It is obvious from this resume of the Estes case which I believe disposes of most of the questions that will arise under the 1930 Practice Act, that to put the Act into effective operation, one that will avoid confusion and afford certainty to the bar, the various circuit courts should adopt rules looking to that end. To illustrate, Judge Prewitt informs me that he has set aside Saturday of each week for work under Section 964b-1 of the Statutes. As he has four counties in his district, he visits each county once a month on Saturday and disposes of such matters as can be dispatched under this 1930 Act. As a result, he tells me that almost all the equitable business of his courts is transacted during vacation and when the regular terms come around,

his undivided attention can be given to the actions at law coming up at such terms. As administered by Judge Prewitt, the 1930 Act has given complete satisfaction to the bar of his circuit. In other circuits, such as the very large one of Judge Fulton, a different arrangement would probably have to be made but by the adoption of rules adapted to the particular and peculiar circumstances existing in each circuit, the 1930 Act can be made very effective in the prompt and expeditious dispatch of business. Of course, as held in *Dorman* v. *Wheeler*, 244 Ky. 628, 51 S. W. (2d) 941, and repeated in the Estes case, no rule can be adopted which nullifies or conflicts with any of the provisions of the Code or Statutes.

It may not be amiss in this connection to refer to another Act of the 1930 Legislature,—Chapter 19 of the Acts of that session—which authorizes the approval, signing and filing of a bill of exceptions in vacation time. So far as I have been able to observe from the records which have passed through my hands since the passage of this Act, but few lawyers or judges have taken advantage of it. A wise use of the Act by the bench and bar will expedite very much the appeal of cases carried to the Court of Appeals. Between it and the 1930 Practice Act, there should be afforded to the critic of the administration of justice but little excuse to complain of delay in trial or in time of getting a case from the circuit court to the Court of Appeals.

In an address before this body at its session held in 1927, Judge S. S. Willis, speaking on the subject of "Improving Practice and Procedure in Kentucky," proposed the question: "What is the aim of substantive law which procedure is designed to realize?" In response to the question, he stated that two theories were advanced in answer to it. One is that courts exist that controversies may be speedily ended and the other that right and justice may prevail. He pointed out how one school of thought teaches the doctrine that the vital thing is the prompt settlement of disputes, the policy being to accomplish the end of controversy in the interest of peace. The other school, he said, in the interests of peace with justice, stands on the principle that nothing is ever really settled until it is settled right.

Judge Willis in that address laid down the postulate that any practice or procedure that looks to mere haste, disregarding the justice of the result, is utterly unsound and intolerable.

There can be no quarrel with this proposition. But any procedure that eliminates unnecessary delay and expedites the disposition of causes while at the same time giving to the parties an ample and adequate hearing and to their counsel and the bench full opportunity for research and reflection should and, indeed, in this age when our courts and profession as never before are subject to the searching criticism of the laity, must be welcomed. Of course any innovation is received with reluctance for to upset the settled practice of men is not an easy task to accomplish. A bar grown accustomed to a settled line of procedure looks askance at any change no matter how good it may appear theoretically. But a new orientation has taken place in the profession in recent years. It is valiently striving to bring its procedure and practice into rapprochement with the demands of the time. One of these is to do away with the laws' delays. It is believed that with full respect to the ideal of orderly hearing and reflective judgment, the two Acts of 1930, the Practice Act and the Bill of Exceptions Act, will if administered in a cooperative spirit and taken full advantage of in that spirit, accomplish much to effect an expeditious, speedy, and at the same time, just disposition of disputes.