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Time of Entry of Interlocutory Decree of Divorce as Affecting Date of Final Decree

F. C. Hackman

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NOTES AND COMMENT

TIME OF ENTRY OF INTERLOCUTORY DECREE OF DIVORCE AS AFFECTING DATE OF FINAL DECREE. The neglect of parties to divorce suits to file the interlocutory decree in their respective suit on the day of rendition or promptly, and, in order to remedy such omission, the procuring at some subsequent time of the entry of the interlocutory decree nuc pro tunc as of the date of rendition, the entry of final decrees on the last day of the period of six months which must elapse before a final decree may be lawfully entered, are practices of omission or commission common enough, and which so vitally concern the status of the parties interested, as to deserve the most serious consideration.

Section 988-1 of *Remington's Compiled Statutes of Washington* (chapter 109, Laws of 1921), the act which established the proceedings now in effect governing divorce, provides.

> "At any time after six months have expired, after the entry of such interlocutory order, and upon conclusion of an appeal, if taken therefrom, the court, on motion of either party, shall confirm such (interlocutory) order and enter a final judgment granting an absolute divorce, from which no appeal shall lie."

It will be observed that this statute authorizes the entry of final

judgment at any time "after six months have expired after the entry of" the interlocutory decree. It must be borne in mind that the word "entry" as used in the quoted section has a definite meaning in this jurisdiction. A judgment is "made or rendered" when the court announces its decision, and the judgment is "entered" when the decision expressed in writing and signed by the court—the formal written judgment—is "filed" with the clerk of the court.[1] In view of this signification of the word "entry," it is manifest that a final decree cannot be had prior to the expiration of six months from the time a formally written interlocutory decree, signed by the judge, has been filed with the clerk. In other words, a final decree of divorce cannot be secured until after six months have expired after the filing with the clerk of the court of the interlocutory order granted in the suit. And, of course, a final decree cannot be obtained while an appeal from the interlocutory decree is pending. The date of filing the interlocutory decree must be taken as the date from which the six months must be computed, and not the date on which the interlocutory decree was signed by the court. This view is supported by decisions in California from which the divorce law of this (Washington) state was derived. There the statute provides

> "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting divorce, * * * but if any appeal is taken from the interlocutory judgment or motion for a new trial, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed."[2]

In a divorce suit there, after trial, the court entered an order in the minutes reciting, "it is ordered by the court that an interlocutory decree of divorce be entered herein in favor of the plaintiff on the grounds of defendant's wilful neglect and desertion." No findings were filed, no further proceedings had, and no decree entered. More than a year after the making of the minute entry, motion was made for a final decree, which was denied. On appeal the Supreme Court of California said

> "We hold that the proper construction of section 132 of the Civil Code (above quoted), * * * an interlocutory decree of divorce must be entered in the judgment book one year before a final decree can be granted. * * *"[3]

Since the period of six months begins to run only from the time of actual entry of the interlocutory decree, an interlocutory decree cannot be entered nunc pro tunc as of the day it was rendered but not then actually entered, and be made effective as of that day to start the running of the six months. This period will begin

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[1] *Morley v. Morley*, 130 Wash. 77, 226 Pac. 132 (1924) *Brown v. Brown*, 31 Wash. 397, 72 Pac. 86 (1903) *Quarles v. Seattle*, 26 Wash. 226, 66 Pac. 389 (1901).

[2] Sec. 132, Cal. Civ. Code.

[3] *Smith v. Superior Court*, 147 Cal. 336, 82 Pac. 79 (1905)

to run only from the *actual* date of entry of the interlocutory decree. This is the rule in California. In a case there, an interlocutory decree of divorce was entered September 15, 1904, nunc pro tunc as of September 4, 1903. On September 21, 1904, the plaintiff applied for a final decree, which was refused on the ground the formal interlocutory decree entered nunc pro tunc as of September 4, 1903, was not in fact or actually entered until September 15, 1904, that, therefore, one year had not passed since the date of actual entry, and that it was the latter date, and not the theoretical entry thereof which fixed the time from which the period should run for entry of final decree. Of this state of facts, the Supreme Court of California said.

> "We think the defendant is correct in his position that the year which must elapse before final judgment can be given begins to run from the time of actual entry of the interlocutory judgment, and not from any theoretical nunc pro tunc date of entry"[4]

In another case, the suit was tried June 28, 1909. On June 28, 1910, the interlocutory decree was signed, together with an order "that the foregoing decree be entered nunc pro tunc as of June 28, 1909." This decree was entered July 5, 1910, as of June 28, 1909. On July 1, 1910, a final decree of divorce purporting to be based upon the interlocutory decree so entered nunc pro tunc was signed by the judge, and entered July 6, 1910. On November 12, 1912, the court, on its own motion, entered an order setting aside and vacating said final decree, "because it was entered within a week after the actual entry of the interlocutory decree of divorce." Considering an appeal from this order, the appellate court said,

> "if * * * an interlocutory decree in like form as the one that was entered in 1910, had been signed on June 28, 1909, by the judge who tried the case, and had been delivered to the clerk for filing, and if without filing or entry of such decree the same was lost by the clerk, these would be circumstances strongly appealing to the court in the exercise of its judgment favorably to the request of the plaintiff that the decree be entered as of the date of the trial.
>
> "It is well established that, where a judgment has been rendered and its entry omitted, it may be subsequently entered, and, if justice requires, may be made to take effect nunc pro tunc as of the date it was actually made. (Cites cases.)
>
> "The order setting aside the final decree is not necessarily based upon the lack of authority of the court to enter its interlocutory decree nunc pro tunc as of the date when it was rendered, but is based upon the ground that the court has no power to enter a final decree until the expiration of one year after the entry of the interlocutory decree."

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[4] *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897 (1905).

And the court further said (quoting *Spencer v. Troutt*[5])

"'It hardly requires argument or authority to establish the proposition that a court cannot by antedating an order, or the entry of it, cut off the right of a party to move for a new trial, to move to set the judgment aside, or to appeal. These rights, * * * cannot be lost to a party by such action, whether the effect was designed or not.'

"* * * while the power of a court over its records, in order to make them speak the truth, is fully recognized, and for that purpose errors or omissions in the entry of judgments may in some instances be corrected by entering them as of the date when rendered, the full effect of the nunc pro tunc order is limited so as to prevent results not contemplated by the law There seems to be no reason why such limitation should not apply to the established time when the right to a final judgment of divorce will accrue, in the same manner that it applies to the time when an appeal may be taken, * * *

"* * * we are satisfied * * * that a final decree of divorce could not be entered until one year after the *actual* entry of the interlocutory decree. The language of section 131 contemplates that a final decree shall not be entered until after the expiration of the time in which an appeal may be taken from the interlocutory decree, nor during the pendency of such appeal if taken. As we have seen, the entry of the interlocutory decree nunc pro tunc as of the earlier date does not affect the time prescribed within which an appeal may be taken."[6]

The provisions of the divorce law

"interpreted in the light of previous legislation and decisions and the purpose to be accomplished by the law, are clearly to be understood as a limitation on the power of the court in the matter, and as intended to forbid the entry of a final judgment until after the prescribed period. * * *

"The law in question * * * was intended as a limitation upon the power of the court with respect to the subject-matter, so that the court shall not be competent to grant a final divorce at any time during the year succeeding the interlocutory judgment, and as to require that the interlocutory judgment be first entered. The parties could not waive these proceedings, nor invest power in the court by their consent or acquiescence. The purpose of the statute is to provide that in any event and under all circumstances there shall be an interval of one year after the party is declared to be entitled to a divorce before it can become absolute."[7]

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[5] *Spencer v. Troutt*, 133 Cal. 605, 65 Pac. 1083 (1901)

[6] *Nolte v. Nolte*, 29 Cal. App. 126, 154 Pac. 873 (1915).

[7] *Grannix v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 894, 895, 106 Am. St. Rep. 23 (1905)

The foregoing interpretation of the law

> "necessarily leads to the conclusion that a final decree of divorce could not be entered until one year after the *actual* entry of the interlocutory decree."[8] (Italics ours.)

That the California decision in *Nolte v. Nolte, supra,* may and should be regarded as a sound precedent in this (Washington) state, is manifest when it is considered that here the time for appeal from a final judgment (and an interlocutory decree of divorce is such under the divorce statute), begins to run from the time the judgment is "entered", that is, from the day the formal written judgment, signed by the court, is filed with the clerk.[9] And the Supreme Court of this state has declared.

> "An appellant cannot be deprived of his right of appeal by the entry of a nunc pro tunc order. If this were not so, he could be deprived of his right of appeal by the court taking under advisement the determination of a motion for a new trial for a period of ninety days or longer, and then entering a nunc pro tunc order."[10]

In New York the statute provides a final decree of divorce may be obtained three months "after the entry" of the interlocutory decree. It is there held an interlocutory decree cannot be entered nunc pro tunc to effect an entry as of that date, for

> "If an interlocutory decree may be entered nunc pro tunc, there is no logical reason why it may not be actually entered the day before the final decree is entered. The subversion of the purpose of the (statute) which would thus be possible, * * * affords sufficient reason for refusing to adopt the practice of entering nunc pro tunc an interlocutory decree of divorce."[11]

There are decisions holding a divorce decree may be entered nunc pro tunc,[12] but these are not precedents here. In some of these cases[13] the statutes considered made judgments effective when rendered, and made it the clerk's duty to enter judgments when announced or rendered. Nunc pro tunc entries were allowed to remedy omissions of the clerk. In another one[14] the court had

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[8] *Nolte v. Nolte*, note 6.

[9] *Mathison v. Anderson*, 107 Wash. 617, 182 Pac. 622 (1919) *Reynolds v. Pacific Marine Ins. Co.*, 105 Wash. 666, 178 Pac. 811 (1919) *Rupe v. Kemp*, 99 Wash. 371, 169 Pac. 871 (1918) *Crawford v. Seattle R. & S. Ry. Co.*, 92 Wash. 670, 159 Pac. 782 (1916) *Gust v. Gust*, 70 Wash. 695, 127 Pac. 292 (1912) *Robertson v. Shine*, 50 Wash. 433, 97 Pac. 497 (1908).

[10] *Reeves v. Wilson*, 105 Wash. 318, 177 Pac. 825 (1919).

[11] *Townsend v. Townsend*, 100 N. Y. S. 464 (1906).

[12] In *re Cook's Estate*, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567 (1888), (This under an earlier statute having provisions unlike that now in force in that state, which latter is the one construed in the other California decisions heretofore cited) *Mock v. Chaney*, 36 Colo. 60, 87 Pac. 538 (1906) *Moster v. Moster* 53 Mo. 326 (1873) *Curnen v. Curnen*, 155 App. Div. 536, 140 N. Y. S. 805 (1913), (construing Massachusetts law) *Rush v. Rush*, 97 Tenn. 279, 37 S. W 13 (1896) *Zahorka v. Geith*, 129 Wis. 498, 109 N. W 552 (1906)

[13] In *re Cook's Estate, Mock v. Chaney, Rush v. Rush, Zahorka v. Geith*, all in note 12.

[14] *Moster v. Moster*, note 12.

denied a divorce, but the clerk's entry of judgment showed a divorce was granted, and a nunc pro tunc entry allowed to correct this error. In yet another of these cases[15] the statute provided for a decree nisi, to be final in six months unless the court ordered otherwise, and by statute nunc pro tunc entry of judgment was authorized. The difference between the system of entering judgments in this state, and the system obtaining in California and considered in the case of Cook's Estate,[16] is made plain by the statement of the latter system in this case. It is therein said

> "The judgment is a judicial act of the court, the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute. * * * there is no statutory provision for the signing of a judgment by the judge, either before or after its entry, and his signature gives it no additional solemnity or validity * * * when, after the trial and final submission of the case, the court pronounces a judgment in apt language which finally determines the rights of the parties to the action, and leaves nothing more to be done except the ministerial act of the clerk in entering it, and especially when what the court has pronounced has been entered in the minutes, then the judgment has been rendered, and the rights of the parties established. * * * an appeal from a final judgment must be taken within one year from the rendition of the judgment. The time begins to run from the time when the judgment was rendered, not from the time when it is entered."

The principle on which the entry of judgments nunc pro tunc is sustained is that such action is necessary in furtherance of justice, and to save a party from unjust prejudice through delay caused by the act of the court or the course of judicial procedure. To support a nunc pro tunc entry the delay in entering the judgment must either be solely the fault of the court, or, at least, not attributable to the laches of the party in whose favor the practice is resorted to. In other words, the practice is intended merely to make sure that we shall not suffer for an event he could not avoid.[17] As said in *Freeman on Judgments*:[18]

> "But with respect to proceedings which depend upon and date from the entry of the judgment, they cannot be affected by the fact that the entry is nunc pro tunc."

The statute in question fixes the date of entry of the interlocutory decree as the arbitrary, definite, fixed date or point of time from which the six months period begins to run. The entry of a judgment is not the ministerial duty of the clerk, the entry or filing is a duty of the parties to the divorce suit. Their failure

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[15] *Curnen v. Curnen*, note 12.
[16] Note 12.
[17] *In re Finks*, 224 Fed. 92 (1915).
[18] 5th ed., sec. 139, p. 264.

to enter the judgment is not an omission of the clerk to perform his ministerial duty, remediable by a nunc pro tunc order of the court. It is their own fault, and so not within the principle governing the entry of judgments nunc pro tunc, and not to be remedied by the exercise of that power of the court.

As the statute declares,

> "At any time *after* six months have *expired after* the *entry*"

of the interlocutory order and upon conclusion of an appeal, if an appeal be taken therefrom, a final judgment may be obtained, the italicized words in the above quoted clause make it manifest that the full period of six months from, after and exclusive of the date of entry of the interlocutory decree must elapse before a final decree of divorce may be enterd. In other words, six full calendar months must intervene between and exclusive of the date of entry of the interlocutory order and date of entry of the final decree. If the latter be entered on the last day of the six months period, it is void, because jurisdiction to enter a final decree does not exist until the full period specified has elapsed. In New York the divorce statute provides.

> "No final judgment annulling a marriage or divorcing the parties and dissolving the marriage, shall be entered, * * * until after the expiration of three months after the filing of the decision of the court or report of the referee. After the expiration of said period of three months final judgment shall be entered."

There it is held that application for final decree can be made only "when three months shall have expired from the date of filing the interlocutory judgment."[19]

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[19] *Gibson v. Gibson*, 81 N. Y. S. 343 (1903). And see *Phillips v. Phillips*, 92 N. Y. S. 78 (1904).