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One Year Review of Civil Procedure

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ONE YEAR REVIEW OF CIVIL PROCEDURE

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I. RULE 16

Rule 16 of the Colorado Rules of Civil Procedure has raised relatively few problems in the Colorado courts. As an inevitable result, the scope of the trial judge's authority in pre-trial proceedings remains somewhat shrouded in mystery. One case in 1963, *Glisan v. Kurth*,[1] served to lift a corner of the shroud. Glisan, the defendant in an action for damages brought by Kurth, sought to make Moore Realty Company a third party defendant in the suit. His third party complaint and his amended third party complaint were dismissed on Moore's motion for failure to state a claim. A pre-trial conference was held during which the court ordered Glisan to submit to all parties a list of witnesses and a "brief statement concerning the subject matter of their testimony" together with his second amended third party complaint. The list of witnesses was submitted, but the substance of their proposed testimony apparently was not. The court dismissed the second amended third party complaint solely because of Glisan's failure to detail testimony expected to be produced in support of it.

The supreme court, Pringle, J., reversed.

> While a court may certainly order parties to furnish opposing counsel with the names of witnesses to be called at the trial, and to make a general statement of the issues and subject matter to which this testimony will be directed, such authority does not permit the court to dismiss a case because the complaining party is unable to detail specifically the evidence such witnesses will give, especially where some of those witnesses are adverse.[2]

Although this case is, strictly speaking, one of first impression in the Colorado courts, it is believed to be consistent with the purposes of pre-trial procedures and with the general import of prior related cases. "[P]re-trial conferences are not intended, nor have they ever been, to serve as a substitute for the regular trial of cases."[3] Rule 16 does not provide an alternative for discovery proceedings[4] and for this reason does not require a "disclosure of the details of the issues to be made by the pleadings."[5] It does not "compel the production of any documents or force the making of any admissions."[6] Furthermore, it "confers no special powers of dismissal not otherwise contained in the rules."[7] Even the power to preclude issues from trial "should be exercised only to the extent necessary to achieve the desired purpose — that is, an entirely just disposition of the case in a speedy and efficient manner."[8]

This last statement must be emphasized. Although the purpose of Rule 16 is expediency, it is *just* expediency — to secure early

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1 384 P.2d 946 (Colo. 1963).
2 *Id.* at 949.
3 Lynn v. Smith, 281 F.2d 501, 506 (3d Cir. 1960).
4 Markle v. Sordoni, 64 Pa. D. & C. 424 (1948).
5 Duffy v. Gross, 121 Colo. 198, 214 P.2d 498 (1950).
6 McCoy v. District Court of Larimer County, 126 Colo. 32, 246 P.2d 6119 (1952).
7 Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 914 (2d Cir. 1959).
8 *Id.* at 915.

settlements of cases without sacrifice of the substantive or procedural rights of the parties. Allowing the judge to pass on the weight of proposed evidence, no matter how detailed its description or how weakly controverted the issue, would be such a sacrifice of rights. It would be in effect the equivalent of a forced admission or other equally serious denial of due process.

II. RULE 24

One case in 1963, *Roosevelt v. Beau Monde Co.*,[9] dealt with Rule 24, R.C.P. Colo., Intervention. Beau Monde Co. sought to build a shopping center on land in the City of Englewood but was denied a building permit on the grounds that the property was zoned R-1-A. The company filed an action against the city and its building inspector to compel the issuance of the permit. Roosevelt and ten others moved to intervene as owners and occupants of residence properties "immediately abutting the subject property." The land of six of the intervenors was alleged to be in Englewood but that of the other five was alleged to be in the town of Cherry Hills Village which adjoins Englewood. In their motion the intervenors alleged a diversity of interest between themselves and the city, and, consequently, inadequate representation. The supreme court, Hall, J., reversed the ruling of the District Court of Arapahoe County denying intervention, and remanded with directions to grant the motion.

To the best of my knowledge, this is the first reported case in which the intervenors in a zoning case were from without the zoning municipality. Far from prohibiting this, the Colorado court took it as evidence that since "Englewood is without authority to employ counsel to represent such persons and any effort to do so would be outside of and beyond the scope of its power,"[10] the residents of Cherry Hills Village were without any representation and thus came within the provision of Rule 24(a)(2), allowing intervention of right.

Perhaps a more interesting aspect of the case is provided by an analysis of the court's path to its conclusion that *all* the plaintiffs in error were entitled to intervene as of right. Rule 24, R.C.P. Colo., provides in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . . .
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action . . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

There was no question as to the timeliness of the application. Futhermore, the court gave indication that, even if it had not been admitted by the parties, the court would have found that "there can be no doubt that the rights of those seeking intervention will be

9 334 P.2d 96 (Colo. 1963).
10 *Id.* at 100.

bound by any judgment in the case."[11] The court cited no authority, but there is some precedent for this view.[12]

As can be readily seen, there remains but to establish that "the representation of the applicant's interest by existing parties is or may be inadequate" in order to bring the case within Rule 24(a). I have already noted that the court concluded for the nonresident applicants that no representation was inadequate representation. The court also concluded that the remaining applicants were entitled to intervention under Rule 24(a), but it chose a method of reaching this conclusion that can only be termed confusing.

The court cites *Wolpe v. Poretsky*[13] as a comparable situation in which intervention was allowed. The situation was indeed comparable and intervention was allowed, but in *Wolpe* the intervenors relied solely on Rule 24(b) of the Federal Rules of Civil Procedure (a duplicate of Colorado Rule 24(b)), and the court was forced to make its decision on that basis. Consequently, the conclusion drawn by the court that the appellants might intervene as of right must be regarded as mere dictum, a fact which renders the case at best a weak precedent for the present decision.

The second case cited as authority is *Herzog v. City of Pocatello*.[14] *Herzog* is also decided on the basis of Rule 24(b), the Idaho rule being identical to that of Colorado. In fact, a portion of the opinion quoted by the Colorado court in the present case conclusively demonstrates this: "We are of the view that appellants' defense and the main action have a question of law in common and that appellants have sufficient interest in the matter in litigation to entitle them to intervene."[15]

The supreme court then goes on to cite, apparently as an apology for its failure to utilize cases dealing with the proper portion of the rule, *Textile Workers Union of America v. Allendale Co.*,[16] which is concerned with the permissibility of intervention in a review of an administrative proceeding. The court in that case was bent upon enlarging the scope of allowable intervention to include situations not expressly covered by Rule 24 but in which the court finds a sound reason for intervention. Since in the present case the court brings the facts within the express terms of Rule 24(a), the *Textile Worker* case would seem to be largely irrelevant.

In *Kozak v. Wells*[17] the court at last finds a case dealing with Rule 24(a)(2), but it deals neither with zoning nor with the adequacy of representation of property owners whose property was affected merely by virtue of propinquity. It is a title action and the eventuality which entitles the intervenors to have their petition granted is that their title may actually be placed in jeopardy.

It is clear, therefore, that the case is not precedent for the proposition that contiguous landowners in a zoning action are or may be inadequately represented by city officials. It is not clear upon what basis the court does place its reliance. An educated guess would be that it is merely that Rule 24 is to be liberally construed—

11 *Ibid.*
12 Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir. 1944).
13 *Ibid.*
14 82 Idaho 505, 356 P.2d 54 (1960).
15 356 P.2d a 56, quoted in 384 P.2d at 102.
16 226 F.2d 765 (D.C. Cir. 1955).
17 278 F.2d 104 (8th Cir. 1960).

that a certainty of inadequate representation is not required, a mere possibility being sufficient. This point was, indeed, dealt upon at length in *Kozak* but is not mentioned in the rather cryptic passage quoted by Mr. Justice Hall. The entire reference is as follows:

> In Kozak v. Wells, 8 Cir., 278 F.2d 104, 84 A.L.R.2d 1400, it is said:
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> "We are influenced, also, by the realization that the allowance of intervention here will be in line with the command of Rule 1, F.R.C.P., that the rules 'be construed to secure the just, speedy, and inexpensive determination of every action' * * *
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> * * * * * * * * * * * * * *
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> "In summary, therefore, we conclude that the appellants are entitled to intervene of right. Like Ford, supra, [249 F.2d 27.] we regard this case as one where 'the practical necessities grant the applicant an absolute right to intervene.' * * *."[18]

Reading this, one would be inclined to believe that *Kozak* was on all fours with the *Beau Monde* fact situation, an entirely misleading impression.

The subsequent citation of *Ford Motor Co. v. Bisanz Bros., Inc.*[19] is equally unclear. It states enough of the facts of the case to show that the intervenor's interest has nothing to do with rights of a property owner and then says: "This, we think, is a situation where 'the practical necessities grant the applicant an absolute right to intervene.' . . . "[20]

I must confess that I do not understand how it is that the fact that a customer of a railroad should be allowed to intervene in a suit to enjoin the railroad from providing service because it is a "practical necessity" has any bearing upon whether it is such a practical necessity to allow the present intervention. I assume the court wished to show that "practical necessities" denote an absolute right to intervene. It does not say so, nor does it make any visible attempt to show that such necessity existed.

In both of these last two references, *Kozak* and *Ford*, isolated segments of the opinions were quoted out of context without revealing the purpose for which the quotations were made. This, of course, makes me wonder if there was, in fact, any compelling reason that they should be included. The fact that I happen to have found more or less relevant rules of law in the cases cited is no certain indication that the citations were made to establish the existence of those rules. I cannot help but feel that this is a situation in which the court determined that it wanted to allow intervention but was unable to find a sequence of logical steps which would inevitably lead to the required conclusion that the intervenors might not be adequately represented. It therefore seems to have secreted a cloud of intervention cases in the general direction of zoning and run from point A to point B under cover of the opaque fog. The squid has developed this technique to a fine art.

Actually, the court found what I believe to be sufficient rea-

18 384 P.2d at 102.
19 249 F.2d 22 (8th Cir. 1957).
20 384 P.2d at 103.

son to determine the case as it did without going through the tedious task of citing pointless cases. "Possibly, and probably, Englewood would benefit by the construction of the shopping center, and yet certain individual residents and property owners be adversely affected by such constructions."[21]

Since there are cases in other jurisdictions holding on both sides of the question of adequacy of representation in similar zoning cases,[22] the decision really boils down to one of policy and could conceivably be made in either direction. But in making a policy decision, if it is necessary to cite cases, it would seem to be the wiser course to cite applicable ones, or at least to expressly recognize the deficiencies of the almost relevant ones rather than to make abstruse and confusing references in the sublime confidence that it doesn't really matter anyway since the decision is obviously the equitable one.

III. RULE 59

In a series of five cases, the supreme court reiterated the necessity under Rule 59(f) of filing a motion for new trial as a prerequisite to review on writ of error. *Minshall v. Pettit*[23] held that such a motion was required even after a mere hearing for the granting or denying of a temporary injunction. This ruling was followed by *Bayers v. W.O.W., Inc.*,[24] Chief Justice Frantz dissenting on the ground that "failure to file a motion for a new trial in the trial court is an irregularity . . . such irregularity can be waived."

Noice v. Jorgenson[25] and *Denver Feed Co. v. Winters*[26] further established that, after a trial to the court, "the filing of objections to findings of the trial court (under Rule 52(b)) clearly do [sic] not serve as a motion for new trial and do [sic] not constitute a compliance with Rule 59."[27]

In *Martinez v. Bond*,[28] Martinez' complaint was dismissed by the trial court on the ground that it failed to state a claim upon which relief could be granted. The writ of error was dismissed, even though there was no trial to begin with, because there was no motion for a new trial or order of the trial court dispensing therewith.

But in a sixth case, *Noland v. Colorado School of Trades, Inc.*,[29] the court carved out an exception to its seemingly well-established rule. The trial court had granted the defendant school's motion for a judgment *non obstante veredicto*, vacating a 16,000 dollar judgment in favor of Noland. Noland elected to stand on the record as made and seek review of the single question of whether the trial court erred in granting the motion for judgment *n.o.v.* The school moved to dismiss the writ of error on the ground that a "Motion for

21 384 P.2d at 101.
22 Intervention allowed of right: Oakton Crawford Corp. v. Village of Skokie, 28 Ill. App. 2d 507, 171 N.E.2d 814 (1961); East Maine Township Community Ass'n v. Pioneer Trust & Sav. Bank, 15 Ill. App. 2d 250, 145 N.E.2d 777 (1957). Intervention not of right: Glenel Realty Corp. v. Worthington, 4 App. Div. 2d 202, 164 N.Y.S.2d 635 (1957), *appeal dismissed*, 3 N.Y.2d 924, 167 N.Y.S.2d 939, 145 N.E.2d 880 (1957).
23 379 P.2d 394 (Colo. 1963).
24 379 P.2d 815 (Colo. 1963).
25 378 P.2d 835 (Colo. 1963).
26 380 P.2d 678 (Colo. 1963).
27 *Id.* at 679.
28 379 P.2d 808 (Colo. 1963).
29 386 P.2d 358 (Colo. 1963).

a New Trial" was not filed by Noland following the entry of judgment. The supreme court denied this motion, saying:

> He is not compelled by Rule 59(f) R.C.P. Colo., to file a motion for new trial in circumstances where he doesn't want a new trial. If he elects to stand upon the record as made he is not compelled to run the risk involved in filing a motion for a new trial, which, if granted, would deprive him of his right to review upon the question of whether the court erred in entering a judgment notwithstanding the verdict.[30]

The analogy drawn by the court is to the right of a litigant adversely affected by a grant of a new trial to stand upon the record as made and thereby secure a review of the single question of whether the trial court erred in granting such motion.

The exception as it appears in this case seems to be a wholly admirable one. Without it, a party might be deprived of a beneficial jury verdict by the error of the trial court. He would be caught on the horns of a dilemma: without the motion he could not secure review; with it he might be required to undergo the expense and risk of another trial which he does not want. It would be foolish to require him to file his motion and then to allow him to stand on the record of the first trial in the second trial, entirely unwanted by either side, in order to review the granting of a judgment *n.o.v.*

The question arises as to whether the exception should be limited to the facts of this case or should be extended to any situation in which the litigant does not want a new trial. The closest analogy would be in the case of a party adversely affected by a motion to alter or amend a judgment under Rule 59(e). The same reasoning as above applies.

There is a more common example. A party adversely affected by the granting of a motion for new trial may "stand upon the record as made" and refuse to take part in the new trial, which then proceeds to a judgment against him. He may then secure a review of the trial court's ruling on the motion without going through the motion of moving for a third trial.[31] Indeed, it would be sheer formalism to require him to make such a motion.

Thus it would seem that there is no reason to require a motion for new trial in any case in which a litigant wishes to *reinstate* a favorable verdict or judgment that has been vacated by a judicial act. Additionally, there does not seem to be any other situation in which a litigant would not prefer a new trial to any other permissible action by the appellate court. It is therefore concluded that the exception which the court has made to Rule 59(f) in the instant case is a wise one in its generality.

IV. RULE 60

Brief mention should perhaps be made of *Terry v. Terry*,[32] if only to emphasize that it is possible to seek equitable relief from a judgment in either of two ways: by motion under Rule 60(b) or by an independent action.

30 *Id.* at 361.
31 Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951).
32 387 P.2d 902 (Colo. 1963).

Relief from a decree in a divorce proceeding was sought pertaining to the question of alimony. The defendant moved to dismiss for lack of jurisdiction because: (1) "the judgment from which plaintiff seeks relief is more than six months old and plaintiff is barred in this proceeding by Rule 60(b) of the Colorado Rules of Civil Procedure," and (2) the issue of alimony was or "should have been before the court at the time of the entry of the aforementioned divorce decree" and was therefore res judicata.[33]

The trial court granted the motion, but the supreme court reversed in an opinion by Mr. Justice McWilliams that was short and to the point. Since this was an independent action and not a motion under Rule 60(b), "the six months time limitation contained in said rule has no application." The only applicable limitations of time were laches and the statute of limitations. These, like res judicata, are affirmative defenses and, under Rule 8(c), R.C.P. Colo., must be affirmatively pleaded. I must say that, in my opinion, seldom has such a summary defeat been so richly deserved.

V. Rule 98

City & County of Denver v. Glendale Water & Sanitation Dist.[34] is a completely orthodox case, but since there are so few cases dealing with Rule 98(a), a very brief outline of it without comment might be of some use.

Denver wanted to enjoin the Sanitation District from constructing a sewage plant on the ground that it would deposit sewage in the channel of Cherry Creek which would, in turn, carry it through Denver. The only part of the case on writ of error that is important for our purposes is Denver's contention that the order for change of venue from the City and County of Denver to Arapahoe County, where the Sanitation District is located, was erroneously issued.

Rule 98(a), R.C.P. Colo., reads as follows: "All actions affecting property, franchises, or utilities shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated."

The court first held that the Sanitation District is a municipal utility within the meaning of Rule 98(a) and should have been sued in the county in which it was located. Mr. Chief Justice Frantz then went on to say:

> In ascertaining the venue of an injunctive proceeding, the court should probe for the primary purpose of the suit. If the suit for injunction is not ancillary—and in this case it is not—, and if the decree sought would operate as restraint upon the person, it is clearly an action in personam. [Citations ommitted.]
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> There is no merit in the contention of Denver that this is an action affecting property [Cherry Creek] . . . . At best, property is indirectly affected. But it is not sufficient to establish venue for a suit affecting property.[35]

The change of venue, therefore, was properly made.

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33 *Id.* at 903.
34 380 P.2d 553 (Colo. 1963).
35 *Id.* at 554.

VI. ANON.

Rippy v. Cowieson[36] has no place in this ordered scheme of things because it seems simultaneously to deal with everything and nothing. No rule of civil procedure is mentioned, no case is cited, and the only statute referred to deals with the construction of reservoirs. Yet it is obviously a civil procedure case and equally obviously it reaches the most equitable decision and properly reprimands a wayward trial judge.

The case arises out of an oral "cost plus" contract to grade a road and construct a reservoir on defendant's land. Although many alterations in design were made, including a change in the height of the dam from five or six feet to twenty, defendant refused to pay the plaintiff contractors' bill of almost five times the two thousand dollar estimate.

At the trial one of the plaintiffs stated on cross-examination that the height of the dam had been increased to twenty feet and that no approval for its construction had been obtained from the state engineer. The defendant immediately moved for dismissal on the grounds that C.R.S. '53 § 147-5-5[37] had not been complied with, that therefore by the terms of the statute the work was not completed, and that payment was not to become due until the work was completed. From this motion proceeded a veritable comedy of errors, the final curtain of which never fell.

The trial court entered its order of dismissal over the plaintiffs' plaintive objection that they had not completed their case. The poor plaintiffs, still game if a little battered by this wholly unexpected turn of events, asked that the order be vacated. Denied. They then asked for a reinstatement and a continuance, and that the defendant be directed to cooperate in securing the necessary approval from the state engineer's office. Denied, and formal judgment entered. The judgment very obligingly included findings of fact and conclusions of law to the effect that, since by operation of the statute on facts admitted by the plaintiffs, the contract had not been completed, the action was premature and was dismissed without prejudice. Motion for new trial was dispensed with.

Of course, there is the minor point to be considered that the completion of the contract was not put in issue by the pleadings, defendant having admitted some liability to the plaintiffs, nor had the pleadings been amended. Apparently such a simple consideration as amendment was not thought by the defendant to be dramatic enough.

Whereupon the plaintiffs filed their writ of error.

The setting of act two of our little play is the briefs of the parties before the supreme court. In view of the course later taken

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36 379 P.2d 396 (Colo. 1963).

37 Colo. Rev. Stat. § 147-5-5 (1953) reads as follows: "Approval of plans for reservoir. — No reservoir of a capacity of more than one thousand acre-feet or having a dam or embankment in excess of ten feet in vertical height, or having a surface area at high water in excess of twenty acres shall hereafter be constructed in this state except that the plans and specifications for the same shall have first been approved by the state engineer and filed in his office. The state engineer shall act as consulting engineer during the construction thereof, and shall have authority to require the material used and the work of construction to be done to his satisfaction. No work shall be deemed complete until the state engineer shall furnish to the owners of such structures a written statement of the work of consruction and the full completion thereof, together with his acceptance of the same, which statement shall specify the dimensions of such dam and capacity of such reservoir."

by the court, only one of the plaintiffs' arguments on appeal is important: "Rule 8(c) and Rule 12(b), R.C.P. Colo., require the defendant to plead 147-5-5, C.R.S. 1953, as an affirmative defense if it is to be urged affirmatively or in avoidance. Such a defense cannot be raised in the middle of a trial on motion, especially without amendment of the pleadings."[38] Plaintiffs being the "straight men" and heroes of our drama, this statement appears to be substantially correct. But does it not seem strange that there is no mention in the brief of Rule 41(b)(1), which provides for motion for dismissal "on ground that upon the facts and the law the plaintiff has shown no right to relief," after the plaintiff has completed the presentation of his evidence? No mention is made by the plaintiff of the propriety of such a motion before the completion of plaintiffs' case.

The defendant's answer was, *inter alia,* that this was not a new defense at all but a motion to dismiss for lack of jurisdiction which, under Rule 12(h)(2), R.C.P. Colo., may be interposed at any time. the case, but never fear. The defendant did not press the point, and the word was not heard again. The defendant's major concern was whether the contract was or was not completed. He seems to have assumed that his motion was on jurisdictional grounds with the same certainty that the plaintiffs assumed that it was not.

Enter, then, the supreme court for the denouement. Mr. Justice Hall's opinion states that "the trial court disregarded the issues as

38 Brief of plaintiffs in error, p. 10.

made by the pleadings, made no findings or disposition of any issue before the court, and made findings on matters that were not a part of the pleadings or before the court for determination." This is true. It emphasizes that the issues made by the pleadings remain undetermined. Then, like a true *deus ex machina,* the opinion concludes that "it was error for the trial court to suspend the taking of testimony and to entertain the motion to dismiss." Exit.

In summary, the opinion is almost totally ambiguous. We know that Judge Blickhahn in the trial court did something wrong, but we do not know precisely what it was. Is it always error to grant a defendant's motion to dismiss under Rule 41 (b) before the termination of the plaintiff's case, or is it so only when there are no findings of fact and conclusions of law on the issues in the pleadings? I might add as an aside here that the only reason I believe this to be a 41 (b) motion is that, according to Rule 52 (a), "Findings of fact and conclusions of law are unnecessary on decisions of motions under rules 12 or 56 or any other motion except as provided in rule 41 (b)"; and Mr. Justice Hall emphasized the absence of such findings and conclusions. The answer to the ambiguity is not provided by the opinion.

It should be mentioned that during the entire play there was a ghost in the wings: Rule 111 (a) (1); the final judgment rule. The judgment of dismissal was without prejudice. There seems to have been a tacit agreement to consider this unimportant, but several jurisdictions hold that a dismissal without prejudice is not a final judgment.[39] Others, of course, hold that it is final.[40] Wyoming has an odd case which recognizes that there is no unanimity on the subject, but says that since the attorneys did not argue the point, the supreme court would accept the apparent opinion of the parties that the judgment was final. It adds that the trial court should not dismiss without prejudice unless it intends thereby to say that the order is *not* final.[41]

I am not advocating that any particular rule be adopted here. I just feel that it is worthy of comment that a point of jurisdictional importance, by an adverse decision of which this case could never have been decided, has never been dealt with in Colorado. In fact, the only Colorado case ever to deal with the finality of any dismissal[42] was decided in 1878, and furthermore cannot mean what it says: "A judgment of nonsuit rendered by the court in the exercise of this power is, as to the defendant, *in invitum;* is a complete disposition of the case, and is final within the meaning of the statute concerning appeals."[43] The judgment is without the consent of the plaintiff, not the defendant. Does it not seem that this question merits more than tacit consideration by the courts?

39 Estes v. Gatliff, 291 Ky. 93, 163 S.W.2d 273 (1942); Sand v. Queen City Packing Co., 108 N.W.2d 448 (N.D. 1961); Mallory v. Taylor, 90 Va. 348, 18 S.E. 438 (1898); Marcus v. McClure, 63 W. Va. 215, 59 S.E. 1055 (1907). See also Dent v. Dolan, 220 Ore. 313, 349 P.2d 500 (1960). Note that some of these cases deal with voluntary rather than involuntary dismissal.

40 Grubbs v. Slater & Gilroy, Inc., 267 S.W.2d 754 (Ky. 1954); C.I.T. Corp. v. Teague, 293 Ky. 521, 169 S.W.2d 593 (1943); Gross v. Stone, 173 Md. 653, 197 Atl. 137 (1938); First Nat'l Bank of Jackson v. Graham, 242 Miss. 879, 137 So. 2d 193 (1962); Atkins v. Chamberlain, 164 Neb. 482, 82 N.W.2d 632 (1957); Hoffman v. Knaus, 135 N.E.2d 700 (Ohio Ct. App. 1952).

41 Thompson v. Searl, 76 Wyo. 264, 301 P.2d 804 (1956).

42 Corning Tunnel Co. v. Pell, 4 Colo. 184 (1878).

43 *Ibid.*