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RECENT ILLINOIS DECISIONS

APPEAL AND ERROR—DECISIONS REVIEWABLE—WHETHER ORDER DISMISSING SUIT, ENTERED AT REQUEST OF PLAINTIFF AFTER MOTION TO STRIKE HIS COMPLAINT HAS BEEN SUSTAINED, IS AN APPEALABLE ORDER AT INSTANCE OF THE PLAINTIFF—After a motion to quash service,[1] to strike a complaint,[2] or to deny a request for a new trial[3] has been granted, it does not follow that the disappointed litigant is thereupon free to appeal from the adverse ruling for the cause would still stand without the necessary "final judgment, order or decree" essential to support proceedings on appeal.[4] The successful party could, of course, follow up his motion with a further request to the court to dismiss the suit. If he does not, the holding in *McDavid* v. *Fiscar*[5] would indicate that the unsuccessful party, wishing to stand on his record without waiving any error that may have been committed, is entitled to apply for the entry of a final judgment without becoming involved in a possible claim that the judgment, because entered by consent, lacks the quality of an appealable order.[6] In that case, plaintiff's complaint to recover, as administrator, for the wrongful death of his decedent had been stricken in the trial court on motion for failure to state a cause of action since it showed that the only heir at law was an adopted child of the decedent.[7] Neither the defendant nor the court took any further action[8] so the plaintiff, to protect a right to appeal, moved the court to enter judgment against him and judgment was so entered. The Appellate Court for the Third District, refusing to dismiss the appeal which followed upon that action, said it would be "too narrow and tech-

1 Brauer Machine & Supply Company v. Parkhill Truck Company, 383 Ill. 569, 50 N. E. (2d) 836 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 207.

2 Gould v. Klabunde, 326 Ill. App. 643, 63 N. E. (2d) 258 (1945).

3 Anderson v. Samuelson, 340 Ill. App. 528, 92 N. E. (2d) 343 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 59-60.

4 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 201.

5 342 Ill. App. 673, 97 N. E. (2d) 587 (1951).

6 Nelson v. Nelson, 340 Ill. App. 463, 92 N. E. (2d) 534 (1940), noted in 29 CHICAGO-KENT LAW REVIEW 58-9, illustrates the effect to be given, on motion to dismiss an appeal, to an "approved" decree entered by consent of parties.

7 In that regard, the court found that the phrase "next of kin," as used in Ill. Rev. Stat. 1949, Vol. 1, Ch. 70, § 2, was not limited to blood relatives of the decedent but encompassed all those who would, by the laws of descent, fall within the class of "heirs at law" as defined by Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 162, hence permitted suit for the benefit of the adopted child. The result achieved was obtained by analogy from the holding in Security Title & Trust Co. v. West Chicago St. R. R. Co., 91 Ill. App. 332 (1900), permitting recovery in a wrongful death case by the mother of an illegitimate child, and in Cleveland, C. C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328, 36 N. E. 965 (1894), allowing recovery for the benefit of a surviving husband, neither of whom would have been classed as "next of kin" according to the common law.

8 The judge would have inherent power to dismiss for failure to prosecute.

nical a construction of the rules of law and procedure" to treat such a judgment as being one entered by consent. An undesirable over-liberality on the part of reviewing courts, straining to sustain the right to appeal, previously noticed,[9] may now become unnecessary if the unsuccessful party will remember to make a suitable motion to secure an unquestionable final order in the case.

APPEARANCE—WITHDRAWAL—WHETHER OR NOT A GENERAL APPEARANCE MAY BE WITHDRAWN, AFTER DELAY GRANTED AT DEFENDANT'S REQUEST, AND A SPECIAL APPEARANCE BE ENTERED—The defendant in *Athens* v. *Ernst*,[1] after entering a general appearance, obtained several extensions of time within which to plead to the complaint. Seven months later, the defendant filed a petition praying leave to withdraw the general appearance and praying that he be given leave to substitute a special appearance. He also sought leave to file a motion to quash the service and to dismiss the suit on the ground that the plaintiff had failed to exercise that degree of diligence in obtaining service required by Rule 5 of the Illinois Supreme Court.[2] It appeared that the plaintiff had sued to recover damages for personal injuries as well as property damage resulting from a boiler explosion in premises owned by the defendant and leased to the plaintiff. Summons was returned by the sheriff as "not found," as was also true of an alias summons. Some five years later, a *pluries* summons was issued and, according to the return, was personally served. Following service and general appearance, the attorney for the defendant obtained several extensions of time upon the ground that there was a question as to whether the defendant's insurance carrier would accept or decline responsibility. Thereafter, and upon proceedings taken as above indicated, the trial court granted defendant's several motions and dismissed the cause for want of prosecution. The Appellate Court for the First District, on appeal by plaintiff, reversed the decision on the ground that advantage had to be taken of formal defects and irregularities in process or service at the first opportunity, and before any other step had been taken in the cause, otherwise the same would be deemed cured.[3]

It is quite apparent that courts possess inherent power, in the interest of the efficient administration of justice, to dismiss suits for want of prosecution,[4] and it would appear that the plaintiff had been guilty of a

9 See note in 22 CHICAGO-KENT LAW REVIEW 207, particularly p. 208.

1 342 Ill. App. 357, 96 N. E. (2d) 643 (1950).

2 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.5(2), provides that: "Where the plaintiff fails to show reasonable diligence to obtain service through the issuance of alias writs, the action may be dismissed on the application of any defendant or on the court's own motion."

3 42 Am. Jur., Process, p. 101, § 116.

4 See O'Dea v. Throm, 332 Ill. 89, 163 N. E. 390 (1929).

want of diligence in the prosecution of the cause.[5] The law is also well settled that the entry of a general appearance is to be treated as a waiver of irregularities with respect to process and service, particularly where the defendant has obtained an extension of time or has taken some other step inconsistent with a special appearance.[6] The instant case, however, would seem to be one in which, for the first time, an Illinois court of review has been called upon to decide the precise question involved.[7] The court did not condone plaintiff's lack of diligence but did think that it would be unjust to permit the defendant to have the advantage of a general appearance and then, months later, be able to question the jurisdiction of the court. Keeping in mind the fact that it is the spirit of the Illinois Civil Practice Act that controversies should be speedily and finally determined according to the substantive, rather than the technical, rights of the parties,[8] the decision achieved in the instant case would seem to be sound.

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—WHETHER STATUTORY AMENDMENT AUTHORIZING SUBSTITUTED SERVICE OF PROCESS ON RESIDENT MOTORIST WHO DEPARTS FROM STATE POSSESSES RETROACTIVE EFFECT—A serious defect existing in the Illinois statute relating to substituted service on motorists in connection with suits growing out of accidents arising from the use of the highways of the state[1] was corrected by an amendment thereto enacted in 1949.[2] As amended, the statute was made applicable not simply to non-resident motorists, as had previously been the case, but also to residents who, subsequent to the events giving rise to the cause of action, became non-residents.[3] The earlier case of *Glineberg* v. *Evans*[4] had indicated that service upon a resident

[5] The motion to dismiss recited that the defendant had, at all times between the commencement of the action and the service of the *pluries* summons, been openly and notoriously a resident of the county.

[6] See People v. United Medical Service, 362 Ill. 442, 200 N. E. 157, 103 A. L. R. 1229 (1936).

[7] The opinion cites only the case of Raymondville Paper Co. v. St. Gabriel Lumber Co., Ltd., 140 F. 965 (1905), to the point. The defendant there had appeared generally and considerable time was spent in negotiations regarding a settlement. Four months later, the defendant raised the question of want of authority of its attorney to file a general appearance. The court held that the application for leave to file a special appearance came too late.

[8] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 128.

[1] See comment on the case of Carlson v. District Court, 116 Colo. 330, 180 P. (2d) 525 (1947), appearing in 26 CHICAGO-KENT LAW REVIEW 159-62.

[2] Laws 1949, p. 1134, H. B. 235; Ill. Rev. Stat. 1949, Vol. 2, Ch. 95½, § 23.

[3] Technical objection to the application of the statute, prior to amendment, had also been voiced in Rompza v. Lucas, 337 Ill. App. 106, 85 N. E. (2d) 467 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 249.

[4] 341 Ill. App. 332, 93 N. E. (2d) 520 (1950), abst. opin.

motorist, by leaving a copy of the process with a member of his family, was permissible prior to the time such resident had effectively established a domicile elsewhere.[5] The recent case of *Sanders* v. *Paddock*,[6] however, discloses that the amendment in question may not be given retroactive effect. In that case, a defendant who had been a resident of the state at the time of a highway collision, but who had, prior to suit and attempted service, become an unquestioned resident of another state, was successful in his challenge directed against a purported service had on the Secretary of State as his supposed agent when it appeared that the accident had occurred prior to the passage of the 1949 amendment to the state statute, although service was not attempted until after that date. The Appellate Court for the Third District indicated that it would be "illogical to conclude that an Illinois motorist could conclusively appoint . . . an attorney by action of law, at a time when no such law was in existence."[7] Since the appointment of a statutory agent goes to the essence of the statutory scheme, and is not merely a procedural question,[8] the refusal to give retroactive application to the change in the statute would seem proper.[9]

DAMAGES—GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGE—WHETHER OR NOT PAYMENT FOR A COVENANT NOT TO SUE, MADE BY ONE AGAINST WHOM TORT LIABILITY WOULD LIE, MAY BE USED TO MITIGATE DAMAGE IN SUIT AGAINST ANOTHER WHOSE TORT LIABILITY ARISES FROM THE SAME CIRCUMSTANCES—In the recent case of *New York, Chicago & St. Louis Railroad Company* v. *American Transit Lines, Inc.*,[1] plaintiff sought damages for the destruction of freight cars wrecked when a motor truck operated by the defendant collided with a railroad train. Among other issues, the trial court was asked to decide whether a deduction should be made, from the amount of the verdict for plaintiff, of a sum equal to

5 The headnote in that case would indicate that the defendant had left Illinois, and was en route to California by automobile, two days before the process server arrived at what had been his "usual place of abode" within the meaning of Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 137.

6 342 Ill. App. 701, 97 N. E. (2d) 600 (1951).

7 342 Ill. App. 701 at 705, 97 N. E. (2d) 600 at 602.

8 A change in the manner of conveying notice to the non-resident motorist was held to be no more than a procedural change in Duggan v. Ogden, 278 Mass. 432, 180 N. E. 301, 82 A. L. R. 765 (1932), hence could be given retroactive effect. See discussion in 28 CHICAGO-KENT LAW REVIEW 347-54 as to the effect to be given to a statute authorizing suit against the non-resident administrator of a deceased non-resident motorist's estate.

9 See Hartley v. Utah Construction Co., 106 F. (2d) 953 (1939); Paraboschi v. Shaw, 258 Mass. 531, 155 N. E. 445 (1927); Ashley v. Brown, 198 N. C. 369, 151 S. E. 725 (1930); Schaeffer v. Alva West & Co., 53 Ohio App. 270, 4 N. E. (2d) 720 (1936); Kurland v. Chernobil, 260 N. Y. 254, 183 N. E. 380 (1932).

1 408 Ill. 338, 97 N. E. (2d) 264 (1951), in part reversing 339 Ill. App. 282, 89 N. E. (2d) 858 (1949). The cause for reversal pertained to matter not here important.

that received by the plaintiff for executing a covenant not to sue in favor of another joint tort feasor who had been involved in the same harm. Because the trial court ruled favorably on defendant's motion to deduct such sum, plaintiff appealed to the Appellate Court for the Third District, which affirmed. The Supreme Court, on leave to appeal, also held that such payments could be used in mitigation of damages, although it reversed and remanded the cause for other reasons.

The decision of the Appellate Court for the Second District in *Aldridge* v. *Morris*[2] seems to have initiated a movement to permit such mitigation, although the question of the effect of such a covenant was not directly before the court for it found that the plaintiff there concerned actually had no right of recovery whatsoever. Without a right of recovery, of course, there could never be an assessment of damages against a defendant from which deduction could be made of money paid to a plaintiff for such a covenant. The issue was squarely raised in *Curtis* v. *City of Chicago*,[3] however, and the Appellate Court for the First District approved and applied the reasoning of the Aldridge case. The possibility of a conflict in decision in one of the other appellate districts has now been removed by the Supreme Court holding in the instant case, for that court not only examined the Aldridge case view on the subject but also noted its approval thereof by stating that the rule therein had been properly applied to the situation before it.

INFANTS—ACTIONS—WHETHER OR NOT MINOR, UNABLE TO RETURN BENEFITS RECEIVED, RATIFIES HIS DEED BY FAILURE TO TAKE AFFIRMATIVE ACTION TO REPUDIATE WITHIN SEVEN MONTHS AFTER ATTAINING MAJORITY—In the recent case of *Shepherd* v. *Shepherd*,[1] the plaintiff, when seventeen years of age, joined with an older brother in a conveyance of a life estate to their mother, without consideration, reserving a remainder in the property to themselves. Plaintiff joined the military service at eighteen, received his discharge in January, 1946, while still a minor, and returned to the farm with his wife and child, working for his mother as a salaried employee until June of that year. He attained his majority on May 2, 1946. Late in June, 1946, plaintiff moved to Chicago with the intention of attending a trade school. About this time, the older brother died testate leaving a will devising a life estate in his portion of the property to his wife with a remainder to plaintiff's minor son. In December, 1946, plaintiff began a suit to cancel the deed, naming his mother and his sister-in-law as

[2] 337 Ill. App. 369, 86 N. E. (2d) 143 (1949), discussed in 27 CHICAGO-KENT LAW REVIEW 313.

[3] 339 Ill. App. 61, 89 N. E. (2d) 63 (1949).

[1] 408 Ill. 364, 97 N. E. (2d) 273 (1951).

defendants. The chancellor denied relief so the plaintiff appealed directly to the Supreme Court, a freehold being involved. That court affirmed the decree on the ground the plaintiff had ratified the deed given during minority by failure to repudiate promptly on becoming of age.[2]

It is unquestionably the law that a deed executed by a minor is not void but voidable only, so the transaction can become valid and effective if ratified by the grantor after he attains his majority.[3] It has also been held in Illinois that a minor, after becoming of age, has no more than a reasonable time in which to disaffirm, subject always to the requirement that he refrain from any distinct or decisive act in the meantime evidencing an intention to affirm his deed, for if he has, by conduct, ratified the deed he cannot, thereafter, avoid it.[4] The thing which makes the instant case noteworthy is (1) the shortness of the period of time intervening between the coming of age and the suit to disaffirm, and (2) the character of the acts regarded as being decisive. The court seems to have placed reliance on the fact that (1) plaintiff acquiesced in the grantee's control of the land and even worked for his mother after reaching his majority; (2) that he suggested that she rent the farm to a tenant; and (3) that plaintiff's older brother had made a will and had died before plaintiff had disaffirmed, thereby irrevocably fixing the nature of the interest of certain of the parties concerned. As the opinion does not fix the exact date when plaintiff suggested the renting of the farm, other than to say the suggestion was made in the spring of 1946, it is possible the remark may have been made before the plaintiff attained his majority. If so, such fact should have no force in the decision.[5] It is equally unsound to impute the conduct of the older brother, in making the will he did, to plaintiff as being a distinct and decisive act of the latter. True, estoppel could operate to prevent

[2] The nature of the holding is revealed more sharply by the following quotation from the opinion: "When Robert [plaintiff] attained his majority, his mother was in the exclusive possession and control of the farm and *Robert was in her employ.* This was the setting when Charles Shepherd, on June 21, 1946, made his will, devising his interest in the farm to his wife for life, with the remainder to Robert's young son. The evidence warrants the conclusion that *this disposition of Charles's interest in the farm was made in the belief that the family settlement would remain undisturbed* and that his mother had the right to stay on and operate the farm so long as she lived . . . *Robert recognized and acquiesced in her control* and management of the land and ratified her action *by working as her employee* on the farm *after May 2, 1946, his twenty-first birthday* . . . [Robert] did not disaffirm within a reasonable time, considering the facts and circumstances described, particularly when the evidence discloses that *he suggested to his mother she rent the property to a tenant.* . . ." 408 Ill. 364 at 378-9-81, 97 N. E. (2d) 273 at 280-1-2. Italics added to emphasize what might be considered to be the only evidence of an implied ratification on plaintiff's part.

[3] Schlig v. Spear, 345 Ill. 219, 177 N. E. 730 (1931).

[4] Rubin v. Strandberg, 288 Ill. 64, 122 N. E. 808 (1919).

[5] Mandell v. Passaic National Bank and Trust Co., 18 N. J. Misc. 455, 14 A. (2d) 523 (1940).

disaffirmance,[6] but there is nothing in the opinion to indicate that the plaintiff induced the making of the will or even knew its terms prior to his brother's death. Nor did he accept any personal benefit under the will, for the testator devised his interest to plaintiff's minor child. There is, then, only one other fact left, to-wit: plaintiff worked for his mother for a period of less than two months after becoming of age. Can it be said that this was a distinct and decisive act enough to show an intention to ratify the deed? As he had been working for his mother for some four months while still a minor, it would be irrational, if not downright unfilial, to expect him to quit on the day he became of age, during a period of heavy farm work.

After the removal of these elements, the case boils down to one in which the minor failed to repudiate his deed until seven months after having attained his majority. The legislature has indicated its belief that a minor who has been harmed during his minority should have at least two years after becoming of age in which to maintain any suit,[7] such period being deemed a "reasonable" time within which to learn of, and to assert, his cause of action. Should not the court have been at least as liberal in making allowance for the immaturity of youth, particularly when those who should have given counsel were the ones most likely to withhold advice?

[6] Lewis v. Van Cleve, 302 Ill. 413, 134 N. E. 804 (1922).

[7] Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 22.