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The Revisory Power of Courts over Judgments by Default in Third Party Practice - Associated Transport v. Bonoumo

THE REVISORY POWER OF COURTS OVER JUDGMENTS BY DEFAULT IN THIRD PARTY PRACTICE

Associated Transport v. Bonoumo[1]

Appellant's tractor-trailer and appellee's automobile collided. Passengers in appellee's car were injured and later brought suit against appellant in Baltimore City. Appellant, before pleading, moved for leave to make appellee a third party defendant. Leave was granted and appellant filed a third party complaint under Section 27 of the Uniform Contribution Among Tortfeasors Act,[2] now superseded by the General Rules of Practice and Procedure.[3] Appellee, a resident of Philadelphia, was served under Art. 66½, Sec. 106, by service on the Secretary of State and notice by registered mail, but he failed to make his defense within the time required and on October 8, 1947, a judgment by default was entered against him and in favor of the appellant. On December 3, 1947, more than thirty days after the entry of the judgment by default, appellee filed a petition to strike out said default judgment, and on December 24, 1947, after a hearing, an order was entered which granted appellee's petition. On February 18, 1948, verdicts were rendered, one for the passengers against appellant and the other in favor of appellee on the third party complaint. On February 24, 1948, judgments were entered thereon. An appeal was entered on March 17, 1948, by appellant, from the judgment in favor of appellee, on the ground that the order of December 24, 1947, striking out the judgment by default, was improper since it was rendered after the judgment by default had become enrolled and beyond the discretionary powers of the court.

The ordinary rule that after the term at which a judgment is rendered, or after thirty days in Baltimore City, the judgment becomes enrolled and cannot properly be stricken out in the absence of fraud, surprise, deceit or irregularity applies to judgments by default.[4] Thus, if a

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[1] 62 A. 2d 281 (Md. 1948).

[2] Md. Laws (1941) Ch. 344, Md. Laws (1947) Ch. 717, Md. Code Supp. (1947) Art. 50, Sec. 27.

[3] General Rules of Practice and Procedure, Part Two, III, Joinder of Parties and Claims; Third Party Practice, Rule 7(4), Md. Code Supp. (1947) 2044.

[4] Armour Fertilizer Works v. Brown, 185 Md. 273, 277, 44 A. 2d 753 (1945); POE, PRACTICE (Tiffany Ed.) Secs. 392, 393.

motion to strike a default judgment is made during the period before enrollment and is granted, since it was still within the discretionary power of the court, the plaintiff may not appeal;[5] but, if the motion is not made until after the default judgment has become enrolled, then plaintiff may appeal "and the propriety of the order appealed from will be determined by the existence or not, in point of fact, of the fraud, surprise, deceit or irregularity complained of".[6] However, if the motion to strike is denied, defendant may appeal whether the motion was made before or after enrollment.[7] When the court in the instant case said, "from an order striking out a judgment by default (not made final by inquisition) a plaintiff 'undoubtedly has a right of appeal',"[8] it doubtless meant to limit this statement to apply only to cases where the motion was made after enrollment. In both cases upon which the court relied in stating this rule, the motions were made after enrollment.[9]

However, the court held that the ordinary rules do not apply to the instant case saying, "a 'judgment by default' in a third party action for contribution cannot become enrolled, or beyond the discretionary powers of the court to strike it out, before judgment in the original action". If the ordinary rules apply to this case, reasoned the court, then appellant's appeal, which was not filed until more than thirty days from the order striking the enrolled judgment by default, would have been too late. The court then pointed out that the purpose of Section 27 is to prevent a multiplicity of suits and to this end it allows a defendant to litigate his action for contribution together with the original action and makes it unnecessary for him to seek contribution in a separate proceeding after the termination of the original action. But it does not intend to permit a party to receive a contingent judgment for contribution, before judgment in the original action — "a complete inversion of the former order of procedure" is not allowed.

What would have been the disposition of the case had it been instituted after the effective date of the General Rules of Practice and Procedure relating to "Third Party Practice"?[10] The Rules provide in part:

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[5] Townshend v. Chew, 31 Md. 247 (1869); Craig v. Wroth, 47 Md. 281 (1877); POE, *supra*, n. 4, Secs. 389, 391.

[6] POE, *supra*, n. 4, Sec. 390.

[7] Eddy v. Summers, 183 Md. 683, 689, 39 A. 2d 812 (1944); POE, *supra*, n. 4, Sec. 391.

[8] *Supra*, n. 1, 283.

[9] Armour Fertilizer Works v. Brown, *supra*, n. 4, 278; Henderson v. Gibson, 19 Md. 234, 238 (1862).

[10] January 1, 1948.

"Judgment Upon Multiple Claims.

"(a) *When Entered.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. *In the absence of such determination and direction any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.*[11]

"(b) *Stay of Judgment.* When a court has ordered a final judgment on some but not all of the claims presented in the action, the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."[12]

Thus, it appears the new Rules expressly require the same result as that reached in the instant case. Furthermore, the provision which allows the court to "direct the entry of a final judgment upon one or more but less than all the claims . . ." does not seem to be susceptible of application to cases, such as this one, where the liability as well as the extent thereof is dependent upon the outcome of the original proceedings.

It is appropriate here to note that the period of time preceding enrollment has been changed by the new Rules. Formerly a judgment, including a judgment by default, became enrolled at the end of the term at which it was entered or in thirty days in Baltimore City, but the new Rule was meant to provide that a judgment, decree, or any other judicial act, does not become enrolled until the expiration of the term at which it was entered or thirty days, whichever time is longer. No differentiation is made between Baltimore City and the rest of the state. The Rule reads:

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[11] Italics supplied.

[12] *Supra*, n. 3, Rule 6, Md. Code Supp. (1947) 2043.

"Revisory Power of Courts Over Judgments, Orders and Decrees.

"Courts shall have for a period of thirty (30) days after the doing of any act or thing in any cause the same revisory power and control over such act or thing which they have had under the practice heretofore existing, or which they had under practice existing prior to the adoption of a special provision of any Public Local Law herewith superseded, during the term at which it was done, and no more; and after thirty (30) days from the doing of any such act or thing or after the expiration of the term at which it was done, whichever time is longer, courts shall have the same revisory power and control as they have had under practice heretofore existing, or which they had under practice existing prior to the adoption of a special provision of any Public Local Law herewith superseded, after the term at which it was done, and no more."[13]

The rule as written requires clarification since a literal interpretation of the language used means that if a term had more than thirty days to run after the entry of judgment, then as to the period between thirty days after judgment and the end of the term the rule fails to provide the courts with any revisory power of any kind. Obviously this is not intended. The purpose of the Rule, as described in the Reporter's notes,[14] could be clearly stated with the above ambiguity avoided, as for example:

For a period of thirty (30) days after the doing of any act or thing in any action, or during the term at which it was done, whichever time is longer, the court shall have the same revisory power and control over

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[13] *Supra*, n. 3, VI, Revisory Power of Courts Over Judgments, Orders, and Decrees, Rule 1. Md. Code Supp. (1947) 2047. This rule purports to apply in both law and equity and contains a provision stating its effect on existing laws and rules, yet no mention is made of General Equity Rule No. 48 which provides that all final decrees and orders in the nature of final decrees are considered enrolled from and after thirty days from date. This is inconsistent with the instant rule which purports to say that final decrees do not become enrolled until after the expiration of the term or thirty days, whichever period of time is longer. *Quaere:* Is General Equity Rule No. 48 revoked by part 2 of the instant rule which expressly states that it supersedes "any other statutes and rules of court to the extent inconsistent with this rule"?

[14] General Rules of Practice and Procedure, Explanatory Notes, Second Report, III, Revisory Power of Courts Over Judgments, Decrees and Orders, Md. Code Supp. (1947) 2117.

such act or thing as it had during the term at which it was done under the practice existing before adoption of this rule or before the enactment of any Public Local Law herewith superseded; thereafter, the court shall have the same revisory power and control over such act or thing as it had after expiration of the term at which it was done under the practice existing before the adoption of this rule or before the enactment of any Public Local Law herewith superseded.