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Right to Control of Class Suits

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NOTES

RIGHT TO CONTROL OF CLASS SUITS

Most of the cases involving the right to control class suits are confined to the question of the right of the plaintiff to dismiss an action brought in behalf of himself and other persons. However, the present question is much broader than the mere right to dismiss or discontinue and involves, for instance, the right to compromise, the right to intervene and introduce new issues, control after intervention and the consequences for plaintiff's delay or neglect in the prosecution of the suit.

The usual statement is that original parties who bring a representative action have absolute control of the proceedings so that, until a decree is given or others intervene, they may dismiss or settle at their discretion unless the court orders otherwise or it is found that the suit is not being prosecuted in good faith.[1] Of course, this rule has no application to class actions pending in the federal courts because of the mandatory provision

1. Hallett v. Moore, 282 Mass. 380, 185 N.E. 474 (1933).

of The Federal Rules of Civil Procedure which states that, "A class action shall not be dismissed or compromised without the approval of the court."[2] However, it is important to note that this rule applies only to class actions pending in the federal courts and it does not authorize a federal district court to enjoin settlement of a class suit brought in a state court. Therefore, where a suit was originally brought in a Delaware Court but was settled by complainants before judgment was entered, the federal court, by application of Delaware law, held this settlement binding on all parties to the class in the absence of a showing of bad faith.[3]

The basis of the rule for allowing the original parties to a class suit to retain control of it stems from the proposition that there can be but one master of litigation for the plaintiffs. It has been reasoned, and logically so, that since the original plaintiffs assume the burden of prosecuting the cause to a conclusion and liability to costs if defeated, it would therefore be impracticable to permit litigation in these circumstances to be conducted by the independent action of several plaintiffs acting without harmony and according to divergent ideas as to the establishment of the liability of the defendant.[4] In a recent federal case,[5] this rule was applied in refusing to allow an intervenor to petition for the rehearing of a class suit after its dismissal had been affirmed and the twenty-five nominal plaintiffs considered it not to be in the best interests of the class to file the petition.

In *Keller v. Wilson & Co.*,[6] it was held that stockholders suing a corporation on behalf of themselves and other stockholders may dismiss the bill at any time so long as their position of *dominus litis* continues. It was also pointed out that the original parties may use the right to dismiss as a bargaining point in reaching a settlement with the defendant, thus reducing the time and the cost of the proceedings. The rule regarding the compromise of a class suit is substantially the same as that affecting dismissals. The only requirements being that the original parties are still *dominus litis* and that they effect the compromise in good faith.[7]

There have been a few cases contra to this general proposition. In *Honesdale Shoe Co. v. Montgomery*,[8] the nominal plaintiff instituted a creditor's suit against a corporation but before summons had been served on the defendant, the parties compromised and the corporation's motion to dismiss was granted. Subsequently, when other parties sought to intervene and have the case reinstated, the court refused to reinstate the case. On appeal, this ruling was reversed and it was held that the nominal plain-

2. Federal Rules of Civil Procedure, rule 23 (c).
3. Feldman v. Pennroad Corp., (C C A 3), 155 F (2d) 773 (1946).
4. See note 1, supra; Hirshfeld v. Fitzgerald, 157 N.Y. 166, 51 N.E. 997 (1898).
5. Schatte v. International Alliance, Etc., 183 F (2d) 685 (1950).
6. 22 Del. Ch. 175, 194 A. 45 (1937).
7. The Piedmont and Arlington Life Insurance Co. v. Maury and als., 75 Va. 508 (1881); Manning v. Mercantile Trust Co., 37 Misc. 215, 75 N.Y.S. 168 (1902).
8. 56 W.Va. 397, 49 S.E. 434 (1904).

tiff could not dismiss the suit at will to the prejudice of other creditors, because it was their suit no less than his. The basis for this holding was that to give the original party an unqualified right to dismiss or compromise the suit would be to allow the defendant debtor and the nominal plaintiff to collude in controlling the litigation. While the rule in itself may be satisfactory, the desired result could be reached by applying the majority rule. That is to say, if the dismissal or compromise was not in good faith, then it would be of no effect and would not bind other parties to the class. However, the general power given nominal plaintiffs to dismiss or compromise is always qualified in two respects. After a petition of intervention has been properly granted, or a decree entered, there no longer remains an absolute power to abandon, compromise and control the litigation. These qualifications will be discussed at a later time.

The right to intervene in a class action when the intervenor is a member of the particular class in question is so well settled that no authority need be cited. Such right, however, does not carry with it the privilege to inject new issues into the suit. An intervenor must abide by the pleadings as he finds them at the time of his entry; he cannot be heard to raise any new issues.[9]

The decision in *Bush v. Quick*[10] aptly illustrates the extent to which this rule may be carried and the effect it may have on a pending suit. In the *Bush* case a bill was brought by taxpayers attacking the constitutionality of a statute dividing a county into two taxing districts. Certain other parties sought to intervene, charging that the suit had been filed by collusion for purposes of delay. Upon appeal from the trial court's decision denying the intervention, it was held that the intervenor's remedy was by an independent bill and that they had no right to make a new case by a charge of collusion between the parties, thus presenting two distinct issues. Therefore, even though an original party cay lose absolute personal control of a class suit after intervention by other parties, as will later be pointed out, the case must proceed in accordance with his complaint if it constitutes a good cause of action and conforms to the various other statutory provisions regulating procedure.

As a general rule it may be stated that a nominal plaintiff's sole dominion of a class suit ceases as soon as other members of the class intervene and become parties.[11] After the coming in of new parties, they properly have a joint voice and management with the original plaintiffs in the further progress of the cause,[12] except so far as it may be necessary that one party shall to some extent be a sort of leader or general manager

9. Ebersbach Const. Co. v. Charles Ringling Co., 100 Fla. 1270, 131 So. 148 (1930).
10. 90 Miss. 32, 43 So. 70 (1907)
11. The Piedmont and Arlington Life Insurance Co. v. Maury and als., 75 Va. 508 (1881).
12. Thouron v. Tennessee V. & G. Ry. Co., 38 Fed. 673 (1889).

for all the parties to the suit.[13] The same rule applies after an account of debts is ordered taken in a general creditor's bill; the complainant then loses his sole dominion over the suit and other creditors share control even though it was the original plaintiff's suit before that time.[14] The reason for this rule in creditor's suits is perhaps obvious, for when a general account is ordered or some similar decree entered, it is then incumbent upon the various creditors to come in and prove their respective demands. This in itself necessitates the removal of sole control of the suit from the hands of the original party.

The control of the suit may be taken from the plaintiff because of his failure to prosecute with due diligence. This rule has been adopted and recognized by courts from times dating back to the recognition of the class suit itself.[15] In *Manning v. Mercantile Trust Co.*,[16] a representative action was brought to cancel a certain trust agreement. After considerable delay, an intervenor sought to force the cause on to trial on the alleged ground that the nominal plaintiff was dilatory in the prosecution of the action, this motion was denied by the court. However, after a further delay of two and one-half years another motion to this same effect was granted. Upon appeal from this ruling it was held that since the original plaintiff could not abandon or discontinue the action against the interests of his co-plaintiff, it was clear that he could not effect the same result by indefinitely refusing to prosecute it.

While no state court decisions have been found regarding the point, it has been held in England[17] that a subsequent party coming into the suit may be permitted to prosecute the same on account of plaintiff's delay, although he is only interested in a part of the decree, and not in the whole of it, as the original plaintiff was.

Various suggestions have been made from time to time advocating changes in the rules regulating class suits. For instance, it has been suggested that the Federal Rules of Civil Procedure should be amended to provide for the giving of notice of the suit to all members of the class, and that thereafter the suit should be binding on all members of the class.[18] This suggestion, however, would reduce the effectiveness of the class suit, especially where several relief is sought. Other members of the class, not knowing the parties bringing the suit, would feel compelled to intervene to protect their own interests. The problem of control of the suit would then become serious, with many parties represented by many attorneys demanding to be heard.[19] By permitting an individual or a

13. Lincoln v. Carroll, 70 Minn. 334, 73 N.W. 173 (1897).
14. Catron v. Bostic et al., 123 Va. 375, 96 S.E. 845 (1918).
15. Hallett v. Hallett, 2 Paige (N.Y.) 15 (1829).
16. 37 Misc. 215, 75 N.Y.S. 168 (1902).
17. Edmunds v. Acland, 5 Madd. Ch. 30, 56 Eng. Reprint 806 (1820).
18. Note, 46 Columbia L. Rev. 818 (1946).
19. 35 Cal. L. Rev. 447 (1947).

small group of the class to bring the action, practical difficulties can be minimized. There will be no necessity to canvass the group in advance of the action in an attempt to reach an agreement on attorneys, procedures of the action or control of the suit in general. However, this does not mean that a class suit should proceed without adequate representation, for it is a fundamental rule that those bringing such action must adequately represent the class.

The various rules formulated by the courts for regulating problems arising in control of class suits are, with very few exceptions, well settled and have been followed for many years in various jurisdictions throughout this country and in England. After a review of the above cases and the problems which they present, it seems safe to say that these rules have satisfactorily met the problems which will inevitably arise so long as the class suit itself is recognized.

HARRY L. HARRIS.

CLAYTON ACT AMENDMENT-LOOPHOLE CLOSED

This exposition is concerned mainly with the state of the law in regard to Section 7 of the Clayton Act[1] as it was formulated from 1914 to 1950 and the effect of the Amendment of 1950, passed in the closing days of the 81st Congress.[2]

Section 7 is a restraint on corporations; little doubt exists on that point.[3] It prohibits one corporation from eliminating another competitor corporation from the market by purchasing the stock of the latter where there may be a substantial lessening of competition.[4] The Supreme Court of the United States has planted several guideposts along the highway for use in construction of the statute. A strict construction should be given as the section is partly penal in nature and forced constructions will not be tolerated.[5] The section was designed for the protection of the public against the evils which are resultant from a substantial lessening of competition.[6] The basic issue is not merely stock acquisition but the effect of such acquisition upon commerce.[7]

1. 38 Stat. 731 (1914), 15 U.S.C., Sec. 18.
2. P. L. 899, Dec. 29, 1950.
3. Swift & Co. v. FTC, 8 F. (2d) 595 (C. C. A. 7th 1925), reversed on other grounds, 272 U.S. 554 (1926).
4. See note 1, supra.
5. Pennsylvania Railroad Co. v. I. C. C., 66 F. (2d) 37 (C. C. A. 3rd 1933), affirmed 291 U.S. 651.
6. International Shoe Co. v. FTC, 280 U.S. 291, 50 Sup. Ct. 89, 74 L. Ed. 431 (1930).
7. International Shoe Co. v. FTC, supra; V. Vivaudou, Inc. v. FTC, 54 F. (2d) 273 (C. C. A. 2nd 1931); Aluminum Co. v. FTC, 284 Fed. 401 (C. C. A. 3rd 1922), certiorari denied, 261 U.S. 616.