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The Vanishing Right of a Plaintiff to Voluntarily Dismiss His Action, 9 J. Marshall J. Prac. & Proc. 853 (1976)

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COMMENTS

THE VANISHING RIGHT OF A PLAINTIFF TO VOLUNTARILY DISMISS HIS ACTION

INTRODUCTION

Section 52(1) of the Illinois Revised Statutes provides that any time before "trial or hearing" begins, a plaintiff may have his action dismissed without prejudice.[1] This would appear to be an absolute right precluding judicial discretion. The question then becomes, what constitutes a "trial or hearing" for purposes of a plaintiff's motion for voluntary dismissal? When *is* the motion addressed to the discretion of the judge? There is no consensus among Illinois courts. Each seems to treat the question as though it were one of first impression, resulting in a frequent denial of any absolute right to a voluntary dismissal, clearly contrary to the language of the statute.

This article examines the Illinois courts' treatment of motions for voluntary dismissal in order to show the various interpretations given to section 52(1).[2] The problem occurs when courts consider whether a "hearing" has taken place, thereby severing the plaintiff's absolute right to dismiss. In the present Illinois court system when a trial begins many hearings may have already taken place in the litigation; *i.e.*, in connection with a motion for a temporary restraining order, a defendant's motion to dismiss, a pretrial conference, discovery rulings, etc. Perhaps the broadest interpretation of the statute was

1. The entire text of ILL. REV. STAT. ch. 110, § 52 (1975) reads as follows:

> (1) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or his attorney, and upon payment of costs, dismiss his action or any part thereof as to any defendant, without prejudice, by order filed in the cause. Thereafter he may dismiss, only on terms fixed by the court (a) upon filing a stipulation to that effect signed by the defendant, or (b) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof. After a counterclaim has been pleaded by a defendant no dismissal may be had as to him except by his consent.
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> (2) Counterclaimants and third-party plaintiffs may dismiss upon the same terms and conditions as plaintiffs.

2. The only question to be examined will be as to when a "trial or hearing" is deemed to have commenced. The problem of whether plaintiff's right is reinstated after an appellate court reversal and remand for a new trial is beyond the scope of this article. No in-depth study of the costs which plaintiff must pay has been undertaken. There is no discussion of what factors a trial judge might take into account in considering plaintiff's motion when it is made after a trial or hearing has commenced.

recently applied in a trial court proceeding where plaintiff moved for a voluntary dismissal before the trial had commenced. The judge concluded: "I suppose I conducted two dozen hearings, at least four or five. The case does not fall within Section 52. There has been hearing upon hearing in the case."[3] As will be shown, courts have greatly differed in deciding which pretrial proceedings constitute hearings which under the terms of the statute preclude a plaintiff from asserting an absolute right to dismiss the action.

After examining the legislative history of section 52(1) it will be evident that the legislature may never have intended that any pretrial proceedings should constitute a "hearing." Given the current conflict of authority, it is imperative that the Illinois Supreme Court provide guidelines enabling trial courts to uniformly decide voluntary dismissal questions consistent with the intent of the legislature in enacting section 52(1).

The first part of this article will examine a history of Illinois law as to the plaintiff's right to a voluntary dismissal. An examination of the comments of the early commentators and a discussion of subsequent interpretative case law will follow. At the culmination of this study it will become apparent that there is no consistency between the different courts or their decisions.[4]

A History of Illinois Law

At common law in Illinois a plaintiff was allowed to take a voluntary nonsuit as of right at any time before a verdict was returned in court.[5] This was changed by the Practice Act of 1907 which provided:

> Every person desirous of suffering a non-suit shall be barred therefrom, unless he do so before the jury retire from the bar, or if the case is tried before the court without a jury, before the case is submitted for final decision.[6]

This provision created problems by giving plaintiffs a decided advantage in litigation. During the presentation of the evidence a plaintiff who felt the court was going to rule against him could request a nonsuit without prejudice and the judge would have no power to deny the motion. Thereafter the plaintiff could

3. Bukowski v. Lavezzorio, Cook County, 72 CH 3728, Transcript of Trial Court Proceedings of July 8, 1975, p. 2.

4. In other states there has been a great deal written on the rules as they exist in various jurisdictions. *See, e.g.*, Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice*, 37 Va. L. Rev. 969 (1951); Annot., 36 A.L.R.3d 1113 (1971); Annot., 1 A.L.R.3d 711 (1965); Annot., 126 A.L.R. 284 (1940); Annot., 89 A.L.R. 13 (1934).

5. Daube v. Kuppenheimer, 272 Ill. 350, 352 (1916).

6. Act of June 3, 1907, ch. 110, par. 70, [1908] Ill. Laws 1629 (repealed 1934).

refile the action within the statutory period and further burden the defendant with facing another law suit.[7]

In 1933 the Illinois legislature adopted the Civil Practice Act, and among the many changes to the law of practice and procedure, included the present language of section 52(1). The Act was first drafted by the Committee on Judicial Administration of the State Bar Association. The first copy of the proposed draft was sent to members of the Bar for comments and revisions in 1931. At this time the pertinent provision and notes provided that a plaintiff could dismiss a suit as of right any time before a defendant filed an answer or a motion attacking the complaint. The committee notes stated that this provision was intended to remedy the unfair common law situation.[8]

In 1932 the Committee on Judicial Administration presented to members of the Illinois Bar a revised draft which contained a voluntary dismissal provision essentially identical to the 1931 version.[9] The Senate approved the draft, but the House amended it to require that the motion for a nonsuit be brought "before trial or hearing begins."[10] The Bill was passed in that form. Evidently the intent of the legislature was to allow the plaintiff to dismiss an action after a defendant had answered, but before a "trial or hearing" commenced. Thus the Bill as

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7. In Chicago Title & Trust Co. v. County of Cook, 279 Ill. App. 462, 466 (1935), the court wrote:

> The practice under the common law that permitted a plaintiff to take a nonsuit at any time before the decision by walking out of the court room, and the practice under section 70 of the old Practice Act, which permitted plaintiff to take a nonsuit after the case has been heard by the court before it was submitted for final decision, often made the administration of justice a mere travesty. Evidence might be taken in a case for a number of days by both sides. Counsel might then argue at length and if, during the argument, it appeared from what the court had intimated that he was inclined to decide for the defendant, plaintiff had the absolute right to take a nonsuit. It was to remove this obvious defect in the law that the legislature enacted section 52 of the Civil Practice Act.

8. The first draft and the accompanying committee comments were as follows:

> Section 53. Voluntary Dismissal. (1) The plaintiff may, at any time, before the defendant has filed an answer or a motion attacking the sufficiency of the plaintiff's pleading, upon notice to the defendant or his attorney, and on the payment of costs, dismiss his suit or any part thereof without prejudice by order filed in the cause. . . .
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> * * *
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> Notes. As to paragraph (1) the common law rule allowing plaintiffs to discontinue at pleasure is unfair to defendants, who have no corresponding right. After the plaintiff has put the defendant to the trouble of preparing and filing his defense, he should be required to go through to judgment unless the defendant consents to a dismissal or the court permits dismissal on good cause shown.

Proposed Consolidated Civil Practice Act, Original Draft (1931), Committee on Judicial Administration, ISBA.

9. *Proposed Consolidated Civil Practice Act*, Amended Draft, (1932), Committee on Judicial Administration, ISBA.

10. Ill. H. Jour., 58th Gen. Assembly, 1933 Sess. at 1010.

passed represented a compromise between the common law rule, favoring plaintiffs, and the initial draft of the Bill which favored defendants.

INTERPRETATIONS OF SECTION 52(1)

Commentators

There has been a noticeable lack of critical commentary questioning when a "hearing" as opposed to a "trial" begins. In the years immediately following the adoption of the 1933 Civil Practice Act, a number of authorities discussed the impact of section 52(1). Albert Jenner and Walter Schaefer, who had worked closely with the various committees in preparing the drafts of the Civil Practice Act, wrote:

> Under the present Practice Act a plaintiff may take a non-suit at any time before the jury retires from the bar, or, if the case be tried without a jury, before the case is submitted for final decision. Plaintiffs often abuse this privilege by using it to harass defendants with several suits involving the same subject matter; inconvenience and expense are thus thrust upon defendants.
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> In remedying this situation the new Act restricts the plaintiff, in taking a non-suit to any time before the commencement of the trial or hearing, upon notice to the defendant or his attorney and upon the payment of defendant's costs. After the trial or hearing commences no non-suit may be taken unless the defendant agrees hereto by stipulation, or the court so orders on special motion setting out under affidavit the grounds therefore.[11]

It is surprising that while Jenner and Schaefer discussed other troublesome areas at length, apparently they thought it unnecessary to consider when a "hearing" begins.

Perhaps the leading work discussing the new Civil Practice Act is ILLINOIS CIVIL PRACTICE ACT ANNOTATED, edited by Oliver McCaskill.[12] During a long and detailed discussion of the entire section, McCaskill's only comment as to the time at which plaintiff's right to withdraw expires is, "[a]fter the trial has begun and defendant is prepared with his witnesses to meet the plaintiff's case, plaintiff should no longer have the right to withdraw from the trial without prejudice."[13] In a 1936 supplement to the above work, McCaskill declared:

> The right to a dismissal at any time between the bringing of the suit and entry upon the *trial* is retained, however, if the conditions as to notice and payment of costs are met. . . .

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11. Jenner and Schaefer, *The Proposed Illinois Civil Practice Act*, 1 U. CHI. L. REV. 49, 58 (1933) (footnotes omitted).
12. ILLINOIS CIVIL PRACTICE ACT ANNOTATED (McCaskill ed. 1933).
13. *Id.* at 131.

> Once the *trial* is started plaintiff loses all rights to a non-suit.[14]

Even McCaskill seems to ignore the word "hearing."[15]

E.W. Hinton has suggested that a "trial" begins when evidence is offered.[16] Once again there is no hint of any impact stemming from the legislature's use of the term "hearing" in addition to "trial."

The unanimous opinion of the early commentators appears to have been that a plaintiff has a right to take a voluntary dismissal without prejudice prior to a trial of the evidence.[17] There is not the slightest indication in any of the writings that a pretrial conference or a motion to dismiss the complaint would constitute a hearing, thereby precluding a plaintiff from asserting his right to dismiss.

Case Law

"Trial"

Generally it can be said that in a jury trial the "trial" commences with the interrogation of the jury; in a bench trial the "trial" begins when plaintiff begins his opening statement. In *Cosmopolitan National Bank v. Goldberg*[18] the motion for voluntary dismissal was made after a pretrial conference and after the jurors had been summoned, though neither interrogated nor sworn. The appellate court affirmed the granting of plaintiff's motion to dismiss stating:

> This indicates that preliminary discussions about the cause of action and the nature of the defense and the granting by the

14. ILLINOIS CIVIL PRACTICE ACT ANNOTATED (Supp. 1936) p. 144 (emphasis added).

15. There seems to be some basis for finding that the word "hearing" refers to proceedings before a master in chancery where evidence is produced. Perhaps McCaskill is assuming what he feels to be the obvious; that "hearing" is meant to refer to chancery proceedings and "trial" is meant to refer to law proceedings. *See, e.g.*, text accompanying notes 24-27 *infra*.

16. J. HARROW, ILLINOIS PRACTICE MANUAL 184 (1936):

> Sec. 52 presents two problems: When does a trial begin? And, secondly, What is a sufficient ground for permitting a non-suit at a later period? For some purposes a trial begins with the swearing of a jury. For example, on the question of jeopardy in criminal cases. Without any statute the New England states, Massachusetts, Maine, and New Hampshire (and one or two others) have a rule about non-suits very much like this Act, and their decisions may give us some analogies. You will find one of the most elaborate discussions of the New England rule in *Washburn v. Allen*, 77 Maine 344. Under the New England decisions they seem to assume that a trial begins when evidence is offered, and under those decisions a non-suit can be taken as a matter of right before any evidence is offered, and, thereafter, only as a matter of discretion. That is a New England rule and probably those decisions will give us a pretty fair analogy on the construction of this Act.

17. *See also* HINTON, ILLINOIS CIVIL PRACTICE ACT, 253-55 (1933).

18. 22 Ill. App. 2d 4, 159 N.E.2d 1 (1959).

> court of leave to file amended pleadings and for counsel to look up law in regard to their respective allegations does [*sic*] not constitute a beginning of the trial in the statutory sense.[19]

In *Wilhite v. Agbayani*[20] the counter-plaintiff presented his motion to dismiss after the jury had been sworn and impaneled. In reversing the granting of the motion to dismiss, the appellate court held that "there would seem to be no doubt that the trial had begun. Appellee was therefore not entitled to take a nonsuit without prejudice except upon compliance with Section 52 of the Civil Practice Act."[21] The court did state that "[n]o reason is advanced for appellee's failure to present his motion for voluntary dismissal at the pre-trial conference on March 16 when there could be no question raised as to its propriety,"[22] suggesting that even after a pretrial conference a plaintiff still has an absolute right to dismiss his suit.

"Hearing"

The real difficulty in interpreting section 52(1) appears where there have been pretrial proceedings and hearings before the court. The first case to consider section 52(1) was *Chicago Title & Trust Co. v. County of Cook.*[23] In this action the court applied section 52(1) in finding that after both sides had presented their evidence, a "trial" had commenced and plaintiff's motion to dismiss was directed to the sound discretion of the court. The court quite correctly denied plaintiff's motion since at this late time in the proceeding, a dismissal without prejudice would adversely affect the defendant.

Three years later the statute was again at issue. In *Menard v. Bowman Dairy Co.*[24] plaintiff brought suit for an injunction against a nuisance. The bill was filed in 1931 and after defendant had answered, the cause was referred to a master in chancery. The master heard testimony and recommended that the bill be dismissed for want of equity. On Nov. 3, 1934, objections to the master's report were filed by the plaintiff. On July 6, 1937, *six* years after the case was filed, the court denied a petition of plaintiff to dismiss upon plaintiff's costs but two days later dismissed for want of equity upon defendant's motion and with costs to defendant. The issue was presented as to whether

19. *Id.* at 8, 159 N.E.2d at 3.
20. 2 Ill. App. 2d 29, 118 N.E.2d 440 (1954).
21. *Id.* at 33, 118 N.E.2d at 442. *See also* Jost v. Hill, 51 Ill. App. 2d 430, 201 N.E.2d 468 (1964), where the court found that a plaintiff's motion to dismiss, made after extensive discovery and on the day of jury selection, was timely since selection of the jury had not yet commenced.
22. 2 Ill. App. 2d at 33, 118 N.E.2d at 442.
23. 279 Ill. App. 462 (1935).
24. 296 Ill. App. 323, 15 N.E.2d 1014 (1938).

plaintiff had a right to dismiss without prejudice after the master had heard testimony. The court held:

> We are of the opinion that the word 'hearing,' as used in the Civil Practice Act, and its bearing upon the question of the right to dismiss a proceeding, applies to hearings before a master in chancery, and that plaintiff here had no right to have her bill dismissed without a stipulation or a proper showing, supported by affidavit.[25]

Menard was the first case to expressly concern itself with the word "hearing" as being important, independent of the legal significance of the term "trial." The holding, however, was consistent with the commentators' conclusions and with the holding of *Chicago Title & Trust*. *Menard* held that a plaintiff had no right to take a voluntary dismissal without prejudice once testimony had been submitted in a case. The fact that the testimony was submitted to a master in chancery has the same effect as if the testimony was submitted to a trial court judge, in that a plaintiff no longer has an absolute right to dismiss.

Menard was followed in *Basinski v. Basinski*[26] where the court declared:

> We have held that the word 'hearing' as used in this section applies to hearings before a master in chancery and that once such a hearing has been commenced the plaintiff has no right to dismiss except in compliance with the statute. . . . In the instant case a hearing had been commenced and some 758 pages of testimony had been taken.[27]

The Illinois Supreme Court has never heard a case questioning when a "trial or hearing" begins, although in *Hitchcock v. Hitchcock*[28] section 52(1) was discussed in another regard. Plaintiff had been awarded a divorce over the defendant's objection that the dismissal of a previous divorce action on motion of plaintiff amounted to res judicata. In the prior action the plaintiff's bill had been dismissed by consent, for want of equity. The supreme court said:

> Nor is there merit to appellant's contention that the overruling of her motion to dismiss the complaint on the ground of *res judicata* was error. The record shows, without contradiction, that the dismissal of appellee's first bill for divorce was on his motion, before any evidence was heard. It is the rule in this

25. *Id.* at 326-27, 15 N.E.2d at 1015.
26. 20 Ill. App. 2d 336, 156 N.E.2d 225 (1959).
27. *Id.* at 340, 156 N.E.2d at 227-28. *Basinski* involved a complaint for separate maintenance. The court's order dismissing the suit provided that the dismissal was by agreement of the parties and the master's fees were to be apportioned equally between plaintiff and defendant. On appeal the court found that defendant had not agreed with the dismissal and since testimony had been taken by the master, a hearing had commenced. The court vacated the order of dismissal and also stated that the master must itemize his fees in order to apportion such costs.
28. 373 Ill. 352, 26 N.E.2d 108 (1940).

> State that a plaintiff may, on his own motion, dismiss his complaint at any time before trial or hearing, provided no cross-complaint or counter-claim has been filed. . . . The dismissal before the *hearing of evidence* or the filing of a cross-bill amounted to dismissal without prejudice.[29]

Obviously the court has determined that after the introduction of evidence a "trial or hearing" has commenced. It should be remembered, however, that this is a 1940 case. In view of the subsequent case law discussed below, it is uncertain whether the current supreme court would find that before evidence is introduced, plaintiff retains a right to a dismissal.

Basinski, Menard, Chicago Title & Trust Co. v. County of Cook, and *Hitchcock* stand for the proposition that before testimony is taken in a cause, the plaintiff has an absolute right to dismiss his suit without prejudice as long as notice is given to each party who has appeared and costs are tendered.[30] These cases agree with the commentators previously discussed to the extent that the determinative word in section 52(1) is "trial" and not "hearing." Another line of Illinois cases, however, has enlarged the interpretation of the word "trial" and treats the word "hearing" as an independent guideline.

Section 48 Motions as Constituting a Hearing

Bernick v. Chicago Title & Trust Co.[31] was the first case to depart from the previous case law and other authorities. *Bernick* held that a motion to dismiss due to res judicata constituted the commencing of a "trial or hearing," although, as will be shown, this appears to be contrary to authority and devoid of support.

Plaintiff brought a stockholder's derivative action against certain officers and directors of the defendant corporation. Defendants made motions under both sections 45 and 48 of the Civil Practice Act.[32] Hearings were held and the court entered

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29. *Id.* at 356, 26 N.E.2d at 109 (emphasis added).

30. Gilbert-Hodgman, Inc. v. Chicago Thoroughbred Enterprises, Inc., 17 Ill. App. 3d 460, 308 N.E.2d 164 (1974), in setting forth the applicable rule as to costs to be awarded, declared that attorney's fees are not to be taxed as costs against a plaintiff who dismisses the action pursuant to section 52(1).

31. 325 Ill. App. 495, 60 N.E.2d 442 (1945).

32. *Id.* at 498, 60 N.E.2d at 443. ILL. REV. STAT. ch. 110, § 45 (1975), reads in part:

> § 45. Motions with respect to pleadings.
> (1) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter

an order sustaining the motion to strike brought under section 45 with leave granted to file an amended complaint. The court reserved decision as to the section 48 motion to have the suit barred by a former judgment (another stockholder had previously brought the same cause of action, seeking the same relief, and that action was dismissed). Thereafter plaintiff moved for a voluntary dismissal without prejudice indicating his intention to refile the complaint. The trial court granted the motion, but on appeal the appellate court reversed and remanded with instructions to decide defendant's section 48 motion. The court held that not only did plaintiff have no absolute right to dismiss the action, but also that the trial court judge had abused his discretion in granting the nonsuit.

The reasoning of the appellate court is somewhat confusing, even in the face of their belief that "[t]he language of sec. 52 seems clear and unambiguous."[33] The court discussed section 52, stating that the motion made under section 45 to strike the complaint did not preclude plaintiff's right to a voluntary dismissal but that the motion to dismiss under section 48 due to res judicata presented a different question. The appellate tribunal concludes:

> The order appealed from recites that the defense of former adjudication has been presented and reserved for hearing. In so far as the defense of *res adjudicata* was concerned, the trial or hearing had not only begun but reached a stage where the trial judge had taken the matter under advisement. In fact, the trial had begun and ended.[34]

With these words the court plots a new course in interpreting section 52(1). For the first time, an Illinois court finds that the plaintiff's right to a voluntary dismissal ends when a hearing begins on a motion to dismiss due to res judicata. The opinion is devoid of any reference to earlier cases or secondary authorities with two somewhat questionable exceptions.[35]

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be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

ILL. REV. STAT. ch. 110, § 48(1)(d) (1975) reads in pertinent part as follows:

> § 48. Involuntary dismissal based upon certain defects or defenses. (1) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
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> * * *
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> (d) That the cause of action is barred by a prior judgment.

33. 325 Ill. App. at 500, 60 N.E.2d at 444.

34. *Id.* at 501-02, 60 N.E.2d at 444.

35. The court cites section 4 of the Civil Practice Act which says that "[t]his Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." This provision does not purport, however, to abridge rights given in other provisions. Section 52 gives a plaintiff the right

Bernick represents an unsupportable departure from previous authority to the extent that the court holds a hearing on a plea of res judicata to be a trial. Section 52(1) provides that plaintiff's absolute right to dismiss is lost as soon as a "trial or hearing begins." Therefore the court must have determined that the "trial or hearing begins" when the *hearing* on defendant's section 48 motion begins.

This is a confusing decision since no hearing is even guaranteed by the provisions of section 48. If a section 48 motion to dismiss by a defendant was decided *without* a hearing, would the *Bernick* court still find that a plaintiff's right to dismiss is lost? It is quite obvious that they are more concerned with the *making* of the section 48 motion than with an accompanying hearing. The court is actually finding that when a defendant brings the motion to dismiss due to res judicata, the plaintiff, *at this point*, loses the right to dismiss without prejudice. The fact that a hearing *might* occur in connection with the defendant's motion is really not of importance to the decision. By holding that the defendant's motion itself precludes plaintiff's right to a voluntary dismissal, the *Bernick* court is actually attempting to apply a provision quite similar to the original draft of section 52(1) which was rejected by the legislature.[36]

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to dismiss without prejudice before a trial or hearing begins. Just because there may be a speedy way of ending litigation by denying plaintiff's motion before trial in a given case does not give the court the power to act contrary to the terms of section 52(1). This is especially true in light of the legislative history of section 52, whereby the legislature expressly amended the proposed provision in order to allow the plaintiff to dismiss his suit after a defendant has filed his pleading. In this case the court is attempting to enact a provision that was expressly rejected by the legislature.

Relying on People v. Vitale, 364 Ill. 589, 592, 5 N.E.2d 474, 475-76 (1936), the *Bernick* court declares, "[a] hearing on the legal sufficiency of a plea which, if sustained, will terminate the litigation, is a trial." 325 Ill. App. at 502, 60 N.E.2d at 445. *Vitale* was a criminal case wherein the state brought a writ of error in connection with a trial court ruling. The court held that a conviction upon a guilty plea was a trial and had the same effect as if evidence had been heard, *i.e.*, principles of merger and bar apply. It is quite clear that this language can give no support for the holding in *Bernick* that a hearing on a motion to dismiss due to res judicata is a hearing for purposes of section 52(1).

36. The *Bernick* case was a shareholder's derivative action in which the plaintiff was acting in a representative capacity. The court observed that the defendant officers and directors held small amounts of stock in the defendant corporation and that none of them had any other pecuniary interest in the subject matter of the plaintiff's demand. 325 Ill. App. at 500, 60 N.E.2d at 444. Therefore it can be argued that the court's holding was due to the fact that the suit was a representative action and consequently plaintiff's duty to the corporation precluded his premature dismissal of the action. Today *Bernick* would be decided under the provision of Illinois law which provides that "[a]n action brought on behalf of a class shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct." ILL. REV. STAT. ch. 110, § 52.1 (1975). By enacting this provision the legislature has seen fit to view representative actions, such as *Bernick*, in a different light than other actions.

Bernick's Progeny

By applying the word "hearing," *Bernick* seems to have opened a new avenue for defendants to attack a plaintiff's motion to dismiss. In *Matthews v. Weiss*,[37] after defendant filed a motion for summary judgment with affidavits attached, plaintiff moved for a voluntary nonsuit before a hearing was begun on defendant's motion. The appellate court affirmed the trial court's granting of the voluntary dismissal. The court did state that *Bernick* "has no application to the record before us,"[38] however, it declared that "[u]ntil such time as the motion and showing in support thereof together with the counter showing, if any, had been presented to the court for consideration and determination, no hearing had begun."[39] Thus the court is suggesting that after both sides have submitted arguments on a motion for summary judgment, a hearing has commenced and the court would have discretion to deny a plaintiff's motion to dismiss.[40]

In a recent case, *City of Palos Heights v. Village of Worth*,[41] *Bernick* was once again relied upon as the basis of the decision. Plaintiff city sued to prevent a neighboring village from developing certain property as an oil storage facility. Several defendants filed motions to dismiss and to strike. The court granted the motions to strike but denied the motions to dismiss. Plaintiff filed an amended complaint joining individuals who had petitioned for leave to intervene. After defendant answered, plaintiffs learned that the plan to develop the oil storage facility had been withdrawn and therefore moved for dismissal of the action. The court granted plaintiffs' motion, and pursuant to plaintiffs' request, ordered the defendant to notify plaintiffs of any future applications to the village for development of the premises for oil storage facilities. Defendants appealed from the order imposing the notice requirement. The appellate court first determined that before a trial or hearing has begun the court has no power to fix such conditions on either party. In deciding that a "hearing" had begun, the court reasoned:

37. 15 Ill. App. 2d 530, 146 N.E.2d 809 (1958).
38. *Id.* at 532, 146 N.E.2d at 810.
39. *Id.*
40. A hearing upon a motion for summary judgment involves a determination of apparent issues of fact. As such the summary judgment hearing might be viewed as a mini-trial thereby precluding the right to a voluntary dismissal. However, the purpose of a summary judgment hearing is to make unnecessary a possibly long and expensive trial. Thus, by definition, the proceeding occurs before trial.

The question arises as to whether this court would hold plaintiff's right is reestablished (since the court determined that plaintiff's right is lost upon the completion of arguments by both sides) if a defendant's summary judgment motion is denied and trial has yet to commence.
41. 29 Ill. App. 3d 746, 331 N.E.2d 190 (1975).

> In the instant case, motions to strike and motions to dismiss the original complaint were filed by certain defendants. The motions included as grounds questions as to plaintiffs' standing and other affirmative matters to avoid the relief under the complaint, and other grounds as provided in sections 45 and 48 of the Civil Practice Act (Ill. Rev. Stat. 1973, ch. 110, pars. 45, 48). Since a motion under section 48 by a defendant to dismiss would terminate the litigation if sustained, a hearing within the meaning of section 52(1) had begun. (See *Bernick v. Chicago Title & Trust Co.* and *Matthews v. Weiss* (1958), 15 Ill.App.2d 530, 146 N.E.2d 809.) Therefore, the trial court was authorized to fix the terms of the voluntary dismissal.[42]

This is a highly controversial result. The court holds that a motion brought under section 48 constitutes a hearing, since the granting of the motion would terminate the litigation, and cites *Matthews* and *Bernick* as authority. But *Matthews* expressly stated that the case did not pertain to a section 48 motion[43] and the *Bernick* court limited its decision to the defense of res judicata. *Palos Heights* extends the *Bernick* holding to any section 48 motion. The most obvious objection to the *Palos Heights* decision is that the trial court had denied the defendant's motions to dismiss brought under section 48. Considering that defendant had obtained no favorable rulings which would be prejudiced by allowing the dismissal, it is hard to understand why the court chose to extend the *Bernick* ruling. The court did not even discuss the possibility that a plaintiff's absolute right to dismiss might be restored once the defendant's motions were denied and implied that a hearing begins as soon as the motion is made, thereby depriving a plaintiff of his nondiscretionary right.

The *Palos Heights* decision may have been a result of the unique factual situation, wherein plaintiff had to argue that a trial or hearing had taken place. If plaintiff had argued that no hearing had occurred, the appellate court would have held that the trial court had no power to impose the conditions on

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42. *Id.* at 749, 331 N.E.2d at 193-94. The appellate court found that since the purpose of section 52(1) was to protect a defendant, the imposition of conditions upon defendant was an abuse of the trial court's discretion.

43. Referring to *Bernick*, the *Matthews* court said:

> There a motion to dismiss had been filed under Sec. 48 of the Civil Practice Act setting up the defense of res adjudicata. The motion had been presented to the judge, argued by counsel and considered by the judge and taken under advisement. It was there held that a hearing had not only begun but had ended, with only the announcement of decision remaining. This case has no application to the record before us.
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> We are not called upon to decide whether a hearing on a motion for summary judgment falls within the same category as a hearing on a motion filed under Sec. 48 of the Civil Practice Act.

Matthews v. Weiss, 15 Ill. App. 2d 530, 532, 146 N.E.2d 809, 809-10 (1958).

defendant in conjunction with the granting of the motion to dismiss.[44] Because of these circumstances it is submitted that the case should not be used as authority for the proposition that after defendant makes a motion for dismissal under section 48, plaintiff has no absolute right to a voluntary dismissal.

Tucker v. Okey[45] is another case involving plaintiff's motion to dismiss made subsequent to a defendant making a section 48 motion. In *Tucker* plaintiff's complaint for a wrongful death action was met with an unverified motion to dismiss brought under section 48(1)(c) on the basis of there being a prior cause pending between the parties.[46] Before the court could rule on the motion, plaintiff presented a motion to dismiss the complaint which was granted. The appellate court affirmed:

> We are not here presented with a controlling defense such as *res adjudicata*, nor a case of adjudication in a former action; here it is not contended that the rights of the parties have been adjudicated and defendant has not obtained any substantial rights of which she was deprived by the trial court's action. Here the granting of defendant's motion would not end the litigation between the parties. As a result we do not find *Bernick*, *supra*, persuasive on the facts here present.[47]

This represents a compromise between *Bernick* and *Palos Heights* in that the court will consider whether the defendant would be deprived of a substantial right if the dismissal were allowed. It is not clear, however, exactly what would constitute a substantial right.[48] Of course, once a defendant's motion to dismiss is

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44. *See* Brief and Argument for Plaintiffs-Appellees at 10, Palos Heights v. Worth, 29 Ill. App. 3d 746, 331 N.E.2d 190 (1975):

> The defendant also assumes, erroneously we submit, that the matter before this court involves a motion for a voluntary dismissal before hearing. We do not believe the question of whether the motion for voluntary dismissal was made before or after hearing is the determinative issue in this case; we submit that even if deemed to have been made before hearing, the Court had ample authority under the statute and under the interpretations of its statutory predecessor to grant those terms which the plaintiff may request so long as the term is contained within the body of the order of dismissal. At the same time, we submit that the motion in the present case was in fact made after hearings had been conducted by Judge Covelli.

45. 130 Ill. App. 2d 903, 266 N.E.2d 121 (1970).

46. *Id.* at 904, 266 N.E.2d at 121-22. ILL. REV. STAT. ch. 110, § 48(1)(c) (1975) states:

> Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
>
> * * *
>
> (c) That there is another action pending between the same parties for the same cause.

47. 130 Ill. App. 2d at 906, 266 N.E.2d at 123.

48. The court distinguishes between a motion to dismiss due to res judicata and a motion on the basis of a prior cause pending. The court states that a res judicata defense is a controlling one. It is unclear what distinction the court is proposing. Under section 48 both defenses are grounds for dismissal of the action pending.

granted, the plaintiff no longer can voluntarily dismiss. But prior to this point what substantial rights may accrue to the defendant? Surely the court is not referring to rulings on discovery or to the mere filing of a motion to dismiss by the defendant. Thus it is not clear what "substantial rights" the court *is* referring to in developing its rule. The *Tucker* court attempted to develop a guideline for the allowance of a voluntary dismissal, but failed to develop a workable standard.

CONCLUSION

Section 52(1) has been interpreted differently by all courts which have had to decide the issue of when a trial or hearing begins. All that is clear is that once testimony has been presented the plaintiff no longer has an absolute right to dismiss his action. The *Bernick* decision has been limited by some courts to situations dealing with a motion to dismiss on the basis of res judicata and extended by others to include all section 48 motions. In one recent decision the trial court found that a motion by plaintiff to dismiss was not timely "and that there had already been a hearing in the case."[49] The court held that the hearing had taken place in connection with the denial of a motion for a temporary restraining order.[50] As previously mentioned, another court held that the holding of a pretrial conference constitutes a hearing precluding a plaintiff's nondiscretionary right to dismiss.[51] Given these various approaches it can be seen that no plaintiff may be secure in the knowledge that he has a right to a voluntary dismissal.

A private litigant has the right to bring an action and to control the eventual disposition of that action; part of the freedom to control a suit must be the right to voluntarily dismiss in the proper circumstances. This was an unrestrained right at common law but the legislature has deemed it necessary to impose certain limitations to prevent unjustified harassment of defendants. Still, the right of a plaintiff to dismiss his suit was left absolute before the "trial or hearing begins." No matter what administrative expenses are incurred by a court through pretrial proceedings, the plaintiff's right must be preserved. The tendency of the appellate courts in Illinois to develop their own standards for allowing a voluntary dismissal has resulted in a

49. Chicago Title & Trust Co. v. Robakis, No. 60806 (Ill. App., First District, August 8, 1975). Abstracted at 31 Ill. App. 3d 342, 333 N.E.2d 654 (1975).

50. Since the defendant did not appear on appeal, the appellate court reversed and remanded with directions to grant the voluntary dismissal, without reaching the question of whether a hearing in the sense of section 52(1) had taken place.

51. *See* text accompanying note 3 *supra*.

substantial injustice to a plaintiff. While in many cases a plaintiff will refile an action after a voluntary dismissal, it is also to be expected that in just as many situations, no suit will be refiled. Thus the court and the defendant will be spared the unnecessary expense and time involved in a trial by allowing a voluntary dismissal before the trial begins.

A plaintiff's present situation is particularly precarious. An attempt on his part to dismiss the action before trial begins may very well be met with a refusal due to pretrial proceedings. At this point no relief is available to a plaintiff in the reviewing courts; the order denying the voluntary dismissal request is interlocutory. A possibly long and costly trial must be undertaken before an appeal will be allowed. An appellate reversal may then leave the plaintiff with the opportunity to refile the action, but without the necessary funds. There must be a definitive ruling to protect a plaintiff and to fulfill the intent of the legislature in enacting section 52(1).

An authoritative statement on the issue may be reached only by examining the history of section 52(1) as well as the subsequent case law. The legislature expressly rejected a provision which would have limited a plaintiff's absolute right to dismiss to a time before defendant filed either his answer or motions attacking the complaint. It therefore cannot be expected that the legislature would enact a provision whereby plaintiff's right is lost after a hearing on a motion for a temporary restraining order. The enactment of the Civil Practice Act of 1933 was designed in part to provide one set of practice rules for both law and chancery proceedings.[52] As such it was only reasonable that the legislature would include the word "hearing" along with "trial" as the determinative time of the right to take a voluntary dismissal. It is also illuminating that the early commentators never questioned the importance of the word "hearing" and assumed the beginning of trial was the controlling point of time. The Illinois courts have generally ignored the obvious intent of the legislature and have imposed their own statutory rule of law by jumping on the availability of the word "hearing" to support the judges' own personal sense of equity. It is respectfully suggested that prior to the convening of a chancery hearing or a trial at law, the plaintiff should have an absolute right to dismiss his suit upon payment of costs and notice to the defendant. Any further restriction on the plaintiff's rights is exclusively within the province of the legislature.

Cary S. Fleischer

52. *See, e.g.*, ILL. REV. STAT. ch. 110, § 1 (1975): "The provisions of this Act apply to all civil proceedings, both at law and in equity. . . ."