AMANDA STUBBLEFIELD, et al., Appellants, *v.* ANTOINE A. NASSEH, Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued March 22, 23, 1976. Decided April 23, 1976.

1. A ruling on a motion for a new trial becomes an interlocutory order and consequently cannot be appealed.
2. A motion for relief from judgment does not suspend the operation of a final judgment, or prevent the issuance and execution of final process on it; and the filing of such a motion does not toll the time for announcing an appeal from the original judgment and filing a bill of exceptions.

The appellee instituted an action to cancel a lease. A final decree in his favor was rendered October 20, 1975, to which appellants excepted and gave notice that a motion for a new trial would be made. They filed the motion on October 23, 1975, and, on October 29, they filed a motion for relief from judgment. The court denied both motions on November 7, to which appellants excepted and announced an appeal therefrom and from the final decree, as well. A bill of exceptions was filed on November 17, 1975. Appellee moved to dismiss the appeal from the final decree, on the ground that no announcement of appeal had been made prior to November 7, 1975.

The Court ruled that appellee was correct in his contention, holding that time is not tolled when a motion for relief from judgment is made, and appellants had not announced an appeal from the final decree at the time it was rendered. The Court emphasized that the effect of a final decree is not suspended pending the ruling on a motion for relief from judgment. The motion to dismiss the appeal from the final decree was, therefore, *granted,* leaving the Court with the appeal from the motion for relief from judgment pending before it, for such appeal had properly been brought before the Supreme Court.

Nete-Sie Brownell, M. Fahnbulleh Jones, Toye C. Barnard and *Moses K. Yangbe* for appellants. *Samuel Pelham* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

The appellee, seeking to cancel a lease agreement, instituted this action in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County. A final decree was rendered in his favor on October 20, 1975, to which appellants excepted and gave notice that they would file a motion for a new trial. They filed this motion on October 23, 1975, and on October 29, 1975, filed a motion for relief from judgment. The trial judge ruled against the appellants on both motions on November 7, 1975, to which they excepted and announced an appeal to this Court embracing the final decree as well, and filed their bill of exceptions on November 17, 1975.

When this case was called for hearing before us, it was seen that the appellee had filed a motion to dismiss the appeal on the following grounds:

1. That the appellants did not announce an appeal from the final decree which was rendered on October 20; instead they filed a motion for a new trial and a motion for relief against judgment, and announced their appeal from what appellee regards as interlocutory rulings on these motions. The appellee contended that since no appeal was announced at the rendition of the final decree, the appellants had violated a section of law which states that: "an appeal shall be taken at the time of rendition of the judgment by oral announcement in open court." Rev. Code 1:51.6.

2. That appellants neglected to announce an appeal from the final decree, but filed a motion for a new

trial in a nonjury case contrary to sec. 51.5 of the Code, which provides that: "before announcing the taking of an appeal, a party in a jury case shall move for a new trial after a verdict, and, in any case, shall except to the judgment." The appellee contends that the appellants were without legal authority to file a motion for a new trial in a nonjury case, hence they should have announced an appeal from the decree of October 20.

3. That appellants had failed to file their bill of exceptions within the statutory time of ten days, because the final decree was rendered on October 20, and they should have done so not later than October 30.

The appellants countered these contentions by arguing that the lower court's decree was not final until the trial judge had disposed of the motions for a new trial and for relief from judgment which were filed before the expiration of the ten days allowed for filing a bill of exceptions; that their announcement of appeal was timely made when the judge disposed of the motions on November 7; that the time for filing their bill of exceptions commenced from November 8, up to and including November 18, 1975, and, therefore, their filing of the bill of exceptions on November 17 was within the statutory time. In essence, the appellants contended that the motion for relief against judgment suspended the final decree of October 20, until the motion had been disposed of on November 7, 1975, and, therefore, it would have been improper for them to announce an appeal or file a bill of exceptions before the judge had ruled on the motions for relief from judgment.

The issues raised by both parties can be synthesized: (1) Was the bill of exceptions filed within the statutory ten-day period? (2) Was the announcement of appeal after the disposition of the motion for relief from judgment instead of at the rendition of the final decree on October 20 untimely, so as to render the appeal dismissible

on the ground that no announcement of an appeal was made from the final decree? (3) Were the rulings on the motions for a new trial and for relief against judgment interlocutory and, therefore, no appeal should be taken from them?

We shall traverse these issues in the reverse order. Taking the last issue first, it seems necessary that a distinction be made between an interlocutory and a final ruling. Basically, an interlocutory ruling is one that is made in the progress of a law suit, or between the commencement and the end of the suit and, therefore, it does not finally determine or complete the suit; while a final ruling puts an end to the litigation between parties and leaves nothing to be done but to enforce by execution that which has been determined. See *Halaby* v. *Farhart,* 7 LLR 124, 125 (1940).

It is clear that in our practice a ruling on a motion for a new trial is interlocutory because, in a jury case, such a motion is made and ruled upon during trial or after a verdict has been brought in and before judgment is rendered. Rev. Code 1:26.3, 26.4, 51.5. Our Civil Procedure Law makes no provision for a motion for a new trial in a case tried without a jury. The instant case being one in equity, the motion for a new trial after the court's decree was irregular. Furthermore, the ruling on such a motion is interlocutory, from which no appeal can be taken.

However, a ruling on a motion for relief from judgment is final, from which an appeal can be taken, because in order to vacate or set aside a judgment there must be a direct proceeding for that purpose, not a mere incident to the progress of the cause or to the execution of the judgment, and one which is appropriate to the relief sought. 49 C.J.S., *Judgments,* § 286(a) (1947), but in most jurisdictions, ours included, relief from a judgment is done by a simple motion. See also 46 AM. JUR. 2d, *Judgments,* § 770 (1969).

The statute on relief from judgment is contained in our Civil Procedure Law:

"*1. Common law writs to secure relief from judgment abolished.* Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review are abolished for use in civil proceedings, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in this section or by an independent action.

"*2. Grounds.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment for the following reasons:

"(a) Mistake, inadvertence, surprise, or excusable neglect;

"(b) Newly discovered evidence which, if introduced at the trial, would probably have produced a different result and which by due diligence could not have been discovered in time to move for a new trial under the provisions of section 26.4 of this title;

"(c) Fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

"(d) Voidness of the judgment; or

"(e) Satisfaction, release, or discharge of the judgment or reversal or vacating of a prior judgment or order on which it is based, or inequitableness in allowing prospective application to the judgment.

"*3. Time for motion.* A motion under this section shall be made within a reasonable time after judgment is entered.

"*4. Effect of motion.* A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from a judgment or to grant relief to a defendant under section 3.44.

"5. *Restitution.* Where a judgment is set aside, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal." Rev. Code 1:41.7.

Our research reveals that this is the first instance in which the motion for relief from judgment has been raised as an issue on appeal, though provision for such relief is found in the former Civil Procedure Law, 1956 Code 6:890. That statute and the present statute are almost similar, except that in the older statute it is provided that "the motion shall be made before the bill of exceptions is approved by the trial court. If jurisdiction of the case has already been taken by the appellate court, then the party who seeks relief shall by motion request the appellate court to order the trial court to resume jurisdiction and take appropriate action." Also under section 990 of the same Civil Procedure Law, the court may stay the execution of any proceeding to enforce a judgment, pending the disposition of a motion for relief from judgment. These provisions do not appear in the new Civil Procedure Law.

Since this is the first time that this Court is reviewing this issue, we shall deal lengthily with it in order to minimize the confusion which could arise in our practice with respect to the applicability of the statute.

A motion for relief from judgment when timely made, is another means by which litigants can gain relief from an erroneous or unwarranted judgment. It is in the nature of a review, and is a separate proceeding from the action sought to be reviewed. According to 46 AM. JUR. 2d, *Judgments,* § 674 (1969), "it is a new action, not a further step in the former action. Review is said to be equivalent to a new trial after judgment. However, the original judgment is not set aside, but stands until the judgment is reviewed." The motion does not suspend the operation of the final judgment, or prevent the issu-

ance and execution of final process on it. 49 C.J.S., *Judgments,* § 298 (1947). The judgment in review "may affirm, reverse or modify the former judgment, in whole or in part, or may make such other disposition of the case as may be necessary to secure the just and legal rights of all parties." 46 AM. JUR. 2d, *Judgments,* § 679 (1969). The motion for relief from judgment, which must be made within a reasonable time, is applicable only to final judgments and is addressed to the sound legal discretion of the court, and its action will not be disturbed on appeal unless there is a clear showing that the trial court has abused its discretion.

A motion for relief from judgment, which is analogous to a petition to vacate judgment, "should set forth the judgment, the nature of the cause of action on which it was rendered, the grounds on which relief is sought and, if the party making the application is the defendant, the defense to the action. In some instances it may be necessary to allege facts showing diligence and freedom from fault. If the party making the application is the plaintiff, it is generally held that the application should contain allegations as to a valid cause of action." 46 AM. JUR. 2d, *Judgments,* § 773 (1969).

Where a judgment is vacated or set aside by a valid order or judgment, it is as though no judgment has ever been entered and, therefore, no further steps can be legally taken to enforce the vacated judgment. However, the action is left still pending and undetermined, and further proceedings may be had and taken therein. The case stands again for trial or for such other disposition as may be appropriate to the situation. The remedy of a party aggrieved by the denial of a motion to open or vacate a judgment is by appeal. 49 C.J.S., *Judgment,* § 306 (1947).

Where a final judgment is absolutely vacated after it has been satisfied by execution or by possession of the property in controversy, under our Civil Procedure Law

the party benefiting by it should be ordered to make restitution. Rev. Code 1:41.7(5); 49 C.J.S., *Judgments*, § 307 (1947).

Where the effect of an order vacating or setting aside a judgment, or refusing to vacate or set aside a judgment, is to terminate the litigation or proceeding, or finally to dispose of the matter that is before the court, or where the order affects or determines substantial rights, the order may be appealable. 4 C.J.S., *Appeal and Error*, § 132 (1957). Generally, an appeal will not lie where the matter raised by the appeal from the ruling on the motion could have been raised by an appeal from the prior judgment.

A proceeding for relief from judgment calls for a delicate adjustment between the desirability of finality of judgments and the prevention of injustice; but the statutory provision for such relief was not intended as, and is not a substitute for, a direct appeal from an erroneous judgment; nor was it designed to circumvent the law limiting the time for the taking of an appeal. Moreover, the statute does not contemplate that a party can subvert the appellate process by announcing appeal from a judgment, and then within his time to appeal move the trial court for relief; for once an appeal is announced the trial court loses jurisdiction over the cause and cannot grant relief from the judgment from which an appeal is taken. But as to the appealability from a ruling on a motion for relief from judgment, there is no doubt.

With respect to the third issue, since according to the statute the motion for relief does not affect the finality of the decree or suspend its operation, it was incumbent upon the appellants to announce their appeal at the time of the rendition of the decree, on October 23, in order for the appeal to operate as a supersedeas to the enforcement of the judgment. Moreover, since the motion for relief is regarded as a separate proceeding, the filing of such a motion does not toll the time for announcing an appeal

and filing a bill of exceptions. In view of the foregoing, the only appeal before this Court is that from the ruling denying the motion for relief. In this instance the appeal was perfected and, therefore, we can properly review whether or not the trial judge erred in denying appellants' motion for relief from judgment.

In support of this position, we cite *Sutherland* v. *Fitzgerald,* 291 F 2d 846 (1961), decided by the United States Court of Appeals, Tenth Circuit. In that case, the trial court rendered judgment for plaintiff, and the defendant filed, but did not serve, a motion for a new trial. Later the defendant moved under Rule 60(b), Federal Rules of Civil Procedure, for relief, which is almost identical to our statute for relief from judgment. The trial court refused to grant relief, and the defendant filed his notice of appeal from the original judgment and from the order denying relief. The plaintiff-appellee moved for dismissal of the appeal for lack of jurisdiction due to untimely taking of appeal. The defendant-appellant contended that even though the period for taking an appeal had expired, the motion for relief served to effectuate the motion for a new trial and thereby extend the time for taking an appeal. The Court of Appeals, in dismissing the appeal from the original judgment, held that even though Rule 60(b) vests the trial court with broad equitable powers to grant relief from a final judgment, "it does not authorize the court to vitalize a defective motion for new trial so as to extend the statutory time for taking an appeal. For a 60(b) motion 'does not affect the finality of a judgment or suspend its operation' unless of course relief is granted. . . . *Sutherland* v. *Fitzgerald, supra,* p. 847. In the event relief is granted, the time for taking an appeal becomes moot."

The court then granted the motion to dismiss the appeal from the original judgment; and although the appeal from the ruling denying relief was properly before it, affirmed the ruling because the appellant had not asserted

any of the grounds enumerated under Rule 60(b), for relief from the original judgment.

In like manner, the motion to dismiss the appeal from the original decree in the case at bar is hereby granted. Now the only appeal before this Court is that from the ruling denying the motion for relief. The appeal having been perfected, we must confine ourselves to reviewing whether or not the trial judge erred in denying appellants' motion for relief from judgment. Costs to abide final determination of this matter. And it is hereby so ordered.

Motion granted.