FEDERAL COURTS - APPEAL AND ERROR - DOES A STATUTE WHICH AUTHORIZES AN INTERLOCUTORY APPEAL REQUIRE SUCH APPEAL?

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Courts Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol38/iss4/14

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Federal Courts — Appeal and Error — Does a Statute which Authorizes an Interlocutory Appeal Require Such Appeal? — A bill seeking an injunction and an accounting was filed in a United States district court for alleged infringement by defendant of plaintiff’s rights in the words of a song. Defendant’s appeal from a decree enjoining further use of the song and directing an accounting for profits was denied, because the appeal had been taken more than thirty days after its entry and so the circuit court of appeals was without jurisdiction. The case proceeded to an accounting in the district court, and a final decree was entered from which defendant appealed again to the circuit court. Held, the statute which authorizes appeals from interlocutory decrees granting injunctions does not require an aggrieved party to take such an appeal and, where it is not taken, such failure does not impair the

---

1 Victor Talking Machine Co. v. George, (C. C. A. 3d, 1934) 69 F. (2d) 871. The circuit court, deeming the decree to be final, overruled it on the merits.

2 George v. Victor Talking Machine Co., 293 U. S. 377, 55 S. Ct. 229 (1934). The Supreme Court ruled that the decree was interlocutory.

3 Judicial Code, § 129, 26 Stat. L. 828 (1891), as amended by 43 Stat. L. 937 (1925); 28 U. S. C. (1934), § 227: “Where, upon a hearing in a district court, or by a judge thereof, in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit court of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof.”

Before this case was taken to the circuit court on appeal from the final decree, an article appeared in the Boston University Law Review dealing with the question whether, on the facts of the case, defendant could have the interlocutory decree reviewed on the appeal. The interpretation of the statute advocated by the author is opposed to that which was given by the third circuit when it subsequently faced the question. Among the circuits there is a conflict of views which eventually may have to be settled by the Supreme Court of the United States. Decisions in the seventh and ninth circuits indicate that those courts interpret the statute as denying a party who fails to appeal from an interlocutory decree within thirty days the right to be heard on the same issue upon appeal from the final decree. The principal case and others regard appeal from an interlocutory decree under the statute as permissive, so that an aggrieved party may await final determination of the case before raising the issue. The state courts of Pennsylvania and New Mexico in construing statutes similar to the federal statute adopt the permissive view. In Wisconsin, a statute is interpreted as making appeal from interlocutory decrees mandatory within the time stipulated, although here the particular language of the statutes relating to appeals aids the interpretation. Statutes of California and Montana clearly

---


5 O"Nate v. Bahr, (C. C. A. 9th, 1933) 67 F. (2d) 180; Computing Scale Co. v. Toledo Computing Scale Co., (C. C. A. 7th, 1921) 279 F. 648. In neither decision is there a full discussion of the point; and the latter case is weakened as authority, since the patent had expired before the interlocutory decree was entered and the statute prior to its extension by § 227a did not provide for appeal in patent infringement cases except where an injunction was issued.


7 Bracht v. Connell, 313 Pa. 397 at 401, 170 A. 297 (1934), in which the court said, "The statute provides a remedy where none theretofore existed. The provisions are permissive; not mandatory; while an appeal formerly was not allowed, the statute permits, but does not require, an aggrieved party to accept the advantages therein given him." Torrez v. Brady, 37 N. M. 105, 19 P. (2d) 183 (1932), noted in 19 Va. L. Rev. 736 (1933).

8 Richter v. Standard Mfg. Co., 224 Wis. 121, 271 N. W. 14, 914 (1937). Wis. Stat. (1937), § 270.54, authorizes appeals from any interlocutory decree substantially disposing of the merits of the case; § 274.01 provides that the time within which appeal can be taken from any judgment or order is limited to one year; § 274.09
require the mandatory view, by providing that intermediate orders which are appealable do not come within the scope of review on appeal from judgments. Looking at the federal statute against the background of the law before its passage, it seems proper to interpret the language as giving a party the option of appealing from an interlocutory decree within thirty days or awaiting final judgment before questioning the validity of the decree. Prior to the enactment in 1891 of the statute which gave a defendant the right to appeal from an injunction, the established rule of procedure was that the appellate court could consider a case only after the trial court had rendered a final decree. The statute was intended to remedy the obvious injustice of requiring a party against whom an injunction was erroneously decreed to suffer without relief until, after sometimes long and expensive proceedings for account, a final judgment was entered. Though a much needed change in procedure, allowing appeal from an interlocutory decree was a marked departure from the established practice, and without more definite language it is difficult to construe the statute as making appeal from the interlocutory decree mandatory. However, objectionable effects of the permissive view are seen in the principal case. The accounting proceedings constituted a needless waste of time and money. If a party aggrieved by an interlocutory decree, which will have a bearing on the final decree and from which the statute permits an appeal, wants to challenge its validity, the issue should be settled before the case proceeds. Though a decree granting an injunction after a full hearing is intermediate in time, it is final in deciding the merits of the case. On the appeal from an injunction the court may decide the case on the merits and render or direct a final decree dismissing the bill. A particularly undesirable result of the permissive view appears in cases where the interlocutory decree is partially in favor of each of the opposing parties, and only one party appeals from the decree. The case could be finally settled by the stipulates appeals may be taken from interlocutory judgments subject to the same limitations as from final judgments.


13 The case was remanded to the district court in 1934 (supra, note 2) and the final decree awarding the plaintiff $65,295.56 with interest was not entered until 1938.

14 The statute does not exclude appeals from preliminary injunctions granted upon a prima facie showing, but it is the decree determining the merits of the case upon a full hearing which the aggrieved party would want to question on appeal from the final decree. If courts are influenced to adopt the permissive view for the reason that the statute embraces interlocutory decrees which do not finally determine the merits of the case, they overlook the fact that such decrees would not be reviewed on appeal from the final decree anyhow.


court on the one appeal, but in the way the statute has been construed the
decree will have to be considered again upon the appeal from the final decree, if
the party which had not previously appealed raises the question. If the manda-
tory view cannot be read into the statute as it is now worded, an amendment
should be passed by Congress requiring a party aggrieved by an interlocutory
decree to appeal from the decree within thirty days or waive the right to raise
the question on appeal from the final decree.