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Federal Procedure - Mandamus - Power of Courts of Appeal

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FEDERAL PROCEDURE—MANDAMUS—POWER OF COURTS OF APPEALS—In two related antitrust actions instituted in the District Court for the Northern District of Illinois, an order was entered under rule 53(b) of the Federal Rules of Civil Procedure[1] referring the cases to a master for trial because of the "extremely congested calendar" then facing the court. All parties to the action moved to vacate the order and these motions were denied by the district judge. After appearing before the master to object to the reference, the defendants petitioned the Court of Appeals for the Seventh Circuit praying that a writ of mandamus issue to compel the district judge to vacate the order of reference. The petitions were granted.[2] On certiorari to the United States Supreme Court, *held,* affirmed, four justices dissenting. Since the court of appeals could at some stage of the proceedings have entertained an appeal in these cases, it had the power in proper circumstances to issue writs reaching them. The order of reference was an abuse of discretion and the exceptional circumstances of the case justified issuance of the writ. *LaBuy v. Howes Leather Co.,* 352 U.S. 249 (1957).

The power of the courts of appeals to issue extraordinary writs is derived from the All Writs Act, which provides: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[3] The jurisdiction of the courts of appeals is

1 Rule 53(b) provides: "(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

2 Howes Leather Co. v. LaBuy, (7th Cir. 1955) 226 F. (2d) 703.

3 62 Stat. 944 (1948), as amended, 28 U.S.C. (1952) §1651(a). This provision is a lineal descendant of §§13 and 14 of the Judiciary Act of 1789, 1 Stat. 81. Section 13 of that act granted to the Supreme Court the power to issue ". . . writs of mandamus, in cases warranted by the principles and usages of law. . . ." This section was substantially re-enacted in Rev. Stat. §688 (1873), and in §234 of the Judicial Code of 1911, 36 Stat. 1156. Section 14 of the Judiciary Act of 1789 granted to the circuit and district courts of the United States the power to issue certain specific writs (not including mandamus) ". . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions. . . ." This provision was substantially re-enacted in Rev. Stat. §716 (1873) and in §262 of the Judicial Code of 1911, 36 Stat. 1162. The separate sections were consolidated with

solely appellate.[4] The writ of mandamus which they may issue is thus analogous only to the common law writ,[5] as it may be employed only in cases over which the court of appeals has present or potential jurisdiction on appeal. Even within this limited area the use of the writ has been rigorously limited by the requirements of the final judgment rule,[6] because the granting of the writ may have the same practical effect as a preliminary review by appeal.[7] While in many of the cases denying applications for writs to review interlocutory orders it is not clear whether the basis for the decision was a lack of power to issue the writ, or merely that the remedy was inappropriate under the circumstances, a number of recent cases in the different circuits produced sharply conflicting decisions on the question of the power of the courts of appeals to review by mandamus interlocutory orders that would eventually be reviewable on appeal.[8] In the principal case the order of reference was clearly interlocutory and would in due course have been reviewable on appeal. The dissenting justices argued that to grant a review of the order by mandamus would violate the clear intent of Congress that only final judgments should be reviewed.[9] They adopted the view expressed in a line of cases in the First Circuit[10] that the language of the All Writs Act, when read in the light of the final judgment rule, confers on the courts of appeals nothing more than an

the passage of the present provision in 1948. For a more complete review of the history of these provisions, see the opinion of Judge Magruder in In re Josephson, (1st Cir. 1954) 218 F. (2d) 174.

4 28 U.S.C. (1952) §§1291 to 1294.

5 The common law prerogative writ of mandamus issued to any inferior court or government official ordering him to do something ". . . which the Court of King's Bench has previously determined, or, at least, supposes to be consonant to right and justice." 3 BLACKST. COMM. *110. Although originally the power to mandamus was given to the Supreme Court without limitation, note 3 supra, it was early decided in the famous case of Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), that the writ could not issue except in aid of that Court's appellate jurisdiction.

6 "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. (1952) §1291. In addition to final judgments, the courts of appeals may entertain appeals from a few specified types of interlocutory orders. 28 U.S.C. (1952) §1292. Because of the harsh results of a strict application of this rule, several types of orders have come to be treated as final judgments for purposes of appeal even though they do not fit the generally accepted definition of a final judgment. See Crick, "The Final Judgment as a Basis for Appeal," 41 YALE L. J. 539 (1932).

7 Numerous cases have affirmed the proposition that the courts of appeals should not, by use of extraordinary writs, circumvent the intention of Congress that only final judgments should be reviewable. See, e.g., Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943); United States Alkali Export Assn. v. United States, 325 U.S. 196 (1945).

8 Compare the views expressed by the First and Eighth Circuits in In re Josephson, note 3 supra, and Carr v. Donohoe, (8th Cir. 1953) 201 F. (2d) 426, with those adopted by the Second, Third, and Seventh Circuits in Ford Motor Co. v. Ryan, (2d Cir. 1950) 182 F. (2d) 329, cert. den. 340 U.S. 851 (1951); Paramount Pictures v. Rodney, (3d Cir. 1950) 186 F. (2d) 111, cert. den. 340 U.S. 953 (1951); and Chicago, R.I. & P.R. Co. v. Igoe, (7th Cir. 1954) 212 F. (2d) 378.

9 Principal case at 263.

10 In re Josephson, note 3 supra; In re Sylvania Electric Products, (1st Cir. 1955) 220 F. (2d) 423; In re Narragansett Pier Amusement Co., (1st Cir. 1955) 224 F. (2d) 231.

auxiliary power to aid and protect their appellate jurisdiction; and a court of appeals, therefore, has no power to correct actions of district judges by mandamus unless such actions would tend to frustrate an eventual review by appeal.[11] The majority rejected this interpretation and held that the courts of appeals have the *power* to issue writs reaching any case over which they have potential appellate jurisdiction, and therefore the only proper question in the principal case was the appropriateness of the remedy under the given facts.[12] They decided that the writ was properly granted on the basis that, (1) even though the order complained of rested in the sound discretion of the district judge, it was an abuse of discretion to deprive the parties of a trial before the court solely on the ground of a crowded docket; and (2) although use of the writ should be restricted to cases where exceptional circumstances exist in order not to violate the spirit of the final judgment rule, the facts of the principal case justified its use.

It is difficult to assess the significance of the principal case. On the question of the power of the courts of appeals to issue writs in cases where their appellate jurisdiction will not be defeated by the order complained of, the First and Eighth Circuits will be the only courts directly affected, because all of the other circuits that have faced the problem decided that they had full power to mandamus when appropriate circumstances called for it.[13] It is doubtful that the decision will be of much value as a precedent, except on the question of bare power, because the Court's opinion failed to spell out the particular facts which constituted the required "exceptional circumstances." The insufficiency of the reasons given by the district judge for the order of reference, the expense to the parties of a useless trial before a master, and the fact that the order was entered under

[11] As an example of the type of case that would properly call for the writ to issue, the dissenting opinion cited the decisions in which mandamus was used to review an order transferring a case to another circuit under the "forum non conveniens" provision, 28 U.S.C. (1952) §1404(a). But see note 15 infra. Although such orders are interlocutory, the appellate jurisdiction of the court of appeals would be defeated if review were not had by mandamus. See In re Josephson, note 3 supra; Wiren v. Laws, (D.C. Cir. 1951) 194 F. (2d) 873; Gulf Research & Development Co. v. Harrison, (9th Cir. 1950) 185 F. (2d) 457.

[12] Principal case at 254, 255. The only cases cited by the Court on the question of the power of the courts of appeals to mandamus were Roche v. Evaporated Milk Assn., note 7 supra, a case in which the Supreme Court reversed the Ninth Circuit which had issued a writ, and Banker's Life and Casualty Co. v. Holland, 346 U.S. 379 (1953), where the Supreme Court affirmed the Fifth Circuit's dismissal of a petition for mandamus. All of the other Supreme Court cases cited in the majority opinion dealt with the issuance of writs by the Supreme Court rather than a court of appeals, and all of them were decided before 1948 when the Supreme Court had the power to issue extraordinary writs unencumbered by the phrase "in aid of their respective jurisdictions." See note 3 supra. With all deference, the statement of the Court that "the question of naked power has long been settled by this Court" is not supported by any decisions in point.

[13] Ford Motor Co. v. Ryan, note 8 supra; Paramount Pictures v. Rodney, note 8 supra; Chicago, R.I. & P. R. Co. v. Igoe, note 8 supra; Shapiro v. Bonanza Hotel Co., (9th Cir. 1950) 185 F. (2d) 777.

a provision of the federal rules which it is the Supreme Court's duty to enforce, all seemed to contribute a share to the ultimate finding of "exceptional circumstances." In addition, the Court cited language in recent opinions of the Seventh Circuit to the effect that the practice of referring cases to masters was ". . . all too common in the Northern District of Illinois . . . ,"[14] and it may well be that the need to give the courts of appeals some means of exercising supervisory control over unauthorized actions of district judges was the prime consideration outweighing the policy which underlies the final judgment rule. It seems unlikely, however, that in a future case any of the above factors, standing alone, will justify a review by mandamus. While the decision does firmly establish the recently questioned power of the courts of appeals,[15] it gives no reason to doubt that in the future mandamus will continue to be, as it has historically been, an extraordinary remedy for extraordinary situations.

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[14] Principal case at 258. The quoted language appears in Krinsley v. United Artists Corp., (7th Cir. 1956) 235 F. (2d) 253 at 257.

[15] A recent decision, Great Northern R. Co. v. Hyde, (8th Cir. 1957) 245 F. (2d) 537 at 538, indicates that the Eighth Circuit still has some doubts as to its power. The decision involved the propriety of transferring a case under 28 U.S.C. (1952) §1404(a) from the District of Minnesota in the Eighth Circuit to the Northern District of California in the Ninth Circuit. Although admitting that the court had power to prevent a transfer "to a district which, as a matter of law, the case was not transferable," the court observed, "Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred. . . ." The court therefore held, one judge dissenting, "our power to issue writs under §1651(a) does not warrant us to command Judge Bell to vacate his order of transfer." Yet the order would never have become appealable in the Eighth Circuit, and even the dissent in the principal case approved the use of extraordinary writs on precisely these facts. See note 11 supra.