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Federal Procedure - Interlocutory Appeals - Appealability of Stay of Proceedings Under Section 1292 of the Judicial Code

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FEDERAL PROCEDURE—INTERLOCUTORY APPEALS—APPEALABILITY OF STAY OF PROCEEDINGS UNDER SECTION 1292 OF THE JUDICIAL CODE—Plaintiff brought an action for an accounting of the profits of a joint adventure. The defendant moved to stay proceedings pending arbitration pursuant to section 3 of the United States Arbitration Act.[1] This motion was denied

[1] 9 U.S.C. (1952) §3.

and defendant appealed the ruling, claiming as justification for the appeal that an interlocutory order denying a stay was a denial of an injunction under section 1292 of the Judicial Code.[2] The court of appeals dismissed the appeal. On certiorari to the Supreme Court, *held,* affirmed, two justices dissenting. A stay of proceedings in a suit where plaintiff's action is equitable in nature is not an injunction but only a decision as to how to try the one suit pending before the court. *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 75 S.Ct. 249 (1955).

A basic limit on federal appellate jurisdiction is that appeals will be allowed only from final judgments.[3] By express statutory exception, review of interlocutory orders is permissible, but only if the order fits within the narrow classifications provided by Congress in section 1292. The question of whether a district court's stay of all or part of the proceedings before it is an injunction within the meaning of section 1292 has caused considerable discussion.[4] The principal case seems to make clear that, despite the merger of law and equity in federal procedure,[5] the Supreme Court will look to the legal or equitable nature of the claims involved to determine whether such a stay is appealable. When the plaintiff's suit is of the common law type and the defendant moves for a stay on the basis of an equitable defense, the district court's action on the motion will be the granting or denial of an injunction.[6] This result is reached by analogy to common law practice where the defendant in a law action would go into equity as a plaintiff and ask the chancellor to enjoin the law proceedings in order to hear first the law defendant's equitable claim.[7] On the other hand, appeal before final judgment is not allowed if the defendant's motion for a stay is based on a claim which would have been within the jurisdiction of the law court.[8] Nor will it be allowed where the original suit is of an equitable nature, regardless of whether the defense interposed is legal[9] or equitable.[10] The use of this historical

2 "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ." 28 U.S.C. (1952) §1292.

3 28 U.S.C. (1952) §1291. See Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631 (1945).

4 See MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 492 (1949); 48 MICH. L. REV. 358 (1950).

5 Rule 2, Federal Rules of Civil Procedure, 28 U.S.C. (1952).

6 This was the result reached in Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310 (1935), and Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 63 S.Ct. 163 (1942), cases involving a stay of plaintiff's right to a jury trial in order to hear first the equitable defense. To the effect that a defense setting up an arbitration agreement is equitable in nature and that a motion to stay plaintiff's legal action pending arbitration is an injunction, see Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 55 S.Ct. 313 (1935); Gatliff Coal Co. v. Cox, (6th Cir. 1944) 142 F. (2d) 876.

7 See the concurring opinion of Justice Frankfurter in Morgantown v. Royal Ins. Co., 337 U.S. 254, 69 S.Ct. 1067 (1949).

8 See American Airlines, Inc. v. Forman, (3d Cir. 1953) 204 F. (2d) 230; Dowling Bros. Distilling Co. v. United States, (6th Cir. 1946) 153 F. (2d) 353, cert. den. 328 U.S. 848, 66 S.Ct. 1120 (1946).

9 Morgantown v. Royal Ins. Co., note 7 supra.

10 This was the situation in the principal case.

analogy to allow interlocutory appeals from some stay orders may be criticized on several grounds. Divorced as it is from the factual reality that there is only one form of action in the federal system, its effect is to place another stumbling block in the path of effective merger of law and equity.[11] Furthermore, allowing some stay orders to be appealed disregards the well guarded policy against piecemeal appeals.[12] It is true that there has been some liberalization of the final judgment rule both by judicial interpretation[13] and by the interlocutory appeals statute, but this has been in cases where requiring one of the parties to delay appeal until final disposition of the case would cause irreparable harm.[14] In most cases involving a stay of proceedings the rights of the parties can be effectively protected by an appeal following final judgment. The only hardship suffered is the expense and delay of going through a trial before being able to appeal. This has not yet been recognized as sufficient reason to disregard the rule against piecemeal appeals, although legislation has been urged which would allow appeals where the decision of a debatable pre-trial question might prevent long and expensive litigation.[15] It has also been suggested that the prerogative writs[16] may be used to allow review where postponement of appeal until final judgment would cause undue hardship and expense.[17] This points up another weakness of the reasoning employed in the principal case; it makes no allowance for the hardship which might be caused by delay in individual cases. Rather it allows or disallows appeal strictly on the basis of the technical arrangement of the claims. It is clear, however, that the Court itself realizes the fallacies of employing this historical distinction.[18] Thus the principal case may be regarded only as an example of the Court's reluctance to overrule a line of precedent. One thing seems certain; any change in the criteria used in determining the appealability of stay orders will have to be initiated by Congress.

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11 48 MICH. L. REV. 358 (1950). See also Beaunit Mills, Inc. v. Eday Fabric Sales Corp., (2d Cir. 1942) 124 F. (2d) 563.

12 CLARK, CODE PLEADING, 2d ed., 124 (1948).

13 For an analysis of the judicial exceptions to the final judgment rule see 28 N.Y. UNIV. L. REV. 203 (1953); Underwood, "Appeals in the Federal Practice from Collateral Orders," 36 VA. L. REV. 731 (1950).

14 Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949). For an impressive showing that this was the reason for the statute allowing appeals from interlocutory injunctions see Porter, "Appeals from Interlocutory and Final Decrees in the United States Circuit Courts of Appeal," 19 BOST. UNIV. L. REV. 377 (1939).

15 See REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Sept. 24-25, 1953, p. 27; Moore and Vestal, "Present and Potential Role of Certification in Federal Appellate Procedure," 35 VA. L. REV. 1 at 45 (1949).

16 See 28 U.S.C. (1952) §1651.

17 See 5 MOORE, FEDERAL PRACTICE, 2d ed., 743 (1951).

18 "The incongruity of taking jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations." Principal case at 184.