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JUDGMENTS--CRITERIA OF FINALITY OF STATE COURT DECREES FOR THE PURPOSE OF FEDERAL REVIEW

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JUDGMENTS—CRITERIA OF FINALITY OF STATE COURT DECREES FOR THE PURPOSE OF FEDERAL REVIEW—At the suit of the plaintiff, an incorporated religious organization, a permanent injunction issued from a lower state court enjoining the enforcement of certain ordinances of the defendant City of Los Angeles on the ground that they violated the plaintiff's religious liberty under the Constitutions of California and the United States. The case was appealed to the Supreme Court of California which sustained the ordinances as Constitutional and entered a judgment which provided ". . . the Judgment . . . in the above cause . . . is hereby reversed." On plaintiff's appeal, defendant questioned the jurisdiction of the Supreme Court of the United States on the

ground that in California a simple reversal without direction to the trial court does not dispose of the case but remands it for a new trial. *Held*, appeal dismissed; the decree of the California Supreme Court was not a final judgment which might be appealed under section 237 of the Judicial Code. *The Gospel Army v. The City of Los Angeles*, (U.S. 1947) 67 S. Ct. 1428.

To be final for purposes of review under the federal Judicial Code the judgment of a state appellate court must fully determine the rights of the parties and put an end to the litigation so far as the state courts are concerned.[1] For a considerable period of time the "face of the judgment" was the sole test of this finality and resort to criteria aliunde the judgment was rigidly precluded.[2] Argument that the inquiry should also embrace the accompanying opinion[3] finally prevailed, when it was held that both it as well as the judgment might be examined to determine whether there was the requisite finality.[4] Expectations that this relaxation of the former rule would be confined to cases wherein the decree expressly incorporated the opinion proved unfounded.[5] It was determined that if a judgment not final on its face[6] actually set litigation at rest under local practice, it was reviewable.[7] In the instant decision local rules of procedure were examined to determine that the judgment did not end the litigation, and was therefore not reviewable.[8] In this and a companion case,[9] the Court has completely departed from the old rule, and there would seem to be no limitation, beyond their pertinence, on the circumstances which may be introduced to establish or disprove the finality of a judgment.[10] However, since state practice and procedure, while they may be examined, are not controlling, but only a

[1] 28 U. S. C. (1940) § 344; Dept. of Banking v. Pink, 317 U. S. 264, 63 S. Ct. 233 (1942). See generally, 3 MOORE, FEDERAL PRACTICE, c. 107 (1938).

[2] This rule evolved in a series of cases where the state court "reversed and remanded the cause for further proceedings," such a judgment being deemed conclusively to be not final. Haseltine v. Central National Bank, 183 U. S. 130, 22 S. Ct. 49 (1901).

[3] Louisiana Navigation Co. v. Oyster Commission, 226 U. S. 99, 33 S. Ct. 78 (1912).

[4] Clark v. Williard, 292 U. S. 112, 54 S. Ct. 615 (1934).

[5] ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 54-57 (1936).

[6] Brady v. Terminal Railroad Association, 340 Mo. 841, 102 S. W. (2d) 903 (1936), certiorari denied for lack of final judgment, 302 U. S. 688, 58 S. Ct. 24 (1937).

[7] Brady v. Terminal Railroad Association, 340 Mo. 841, 102 S. W. (2d) 903 (1936). Rehearing and certiorari granted "it appearing that the judgment of the Supreme Court of Missouri is a final judgment under the decisions of that Court cited by petitioner in his petition for rehearing." 302 U. S. 678, 58 S .Ct. 134 (1937).

[8] See also, Rescue Army v. Municipal Court, (U.S. 1947) 67 S. Ct. 1409.

[9] Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156 (1947), where a judgment in the same form as the Gospel Army case was held a final judgment of the California Supreme Court.

[10] "This Court will examine both the judgment and the opinion as well as other circumstances which may be pertinent." Justice Rutledge delivered the opinion of the Court in the instant case.

guide to the Supreme Court in determining finality,[11] a litigant may find that a judgment denominated final by his state courts, is not so for purposes of federal review.[12] Whether a litigant, who fails to appeal a first judgment under the mistaken impression it was not final, may be precluded from raising the federal question by the state court's disposal of the second appeal on non-federal grounds, is not yet definitely settled.[13] Whatever force remains in the old rule persists in the requirement that the litigant, who desires the Court to consider extrinsic factors to determine finality, must affirmatively bring them to the Court's attention in his petition or find it denied for want of jurisdiction, since the Court is slow to undertake independent inquiry outside the judgment.[14]

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[11] Dept. of Banking v. Pink, 317 U. S. 264, 63 S. Ct. 233 (1942).

[12] Dept. of Banking v. Pink, 317 U. S. 264, 63 S. Ct. 233 (1942); Wick v. Superior Court, 278 U. S. 574, 49 S. Ct. 94 (1928). Conversely, a decree not thought of as final under state practice may be so classified for purposes of federal review. Cole v. Violette, 319 U. S. 581, 63 S. Ct. 1204 (1943); Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156 (1947).

[13] If the first decree of the state court is found to be final, review may be precluded by lapse of the statutory appeal period; Dept. of Banking v. Pink, 317 U. S. 264, 63 S. Ct. 233 (1942), or the second appeal may not present a federal question. An argument may be made that the state court in the second decision, when it rests its ruling "on the law of the case" as decided on the first appeal, has not passed on a federal right and so there are no grounds for review. See Boskey, "Finality of State Court Judgments Under the Federal Judicial Code," 43 COL. L. REV. 1002 at 1016 (1943). A contrary position is taken in ROBERTSON and KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §94 (1936). Consideration of this problem undoubtedly had some bearing on the decision in Radio Station WOW v. Johnson, 326 U.S. 120, 65 S. Ct. 1475 (1945), that a state decree was final, although it left a number of matters to be determined by the trial court.

[14] Brady v. Southern Railway Co., 222 N. C. 367, 23 S. E. (2d) 334 (1943). Certiorari denied since "it does not appear from the record . . . that the judgment is final." 318 U. S. 792, 63 S. Ct. 995 (1943). On petition for rehearing it was shown the judgment was a final judgment by North Carolina decision; certiorari granted, 319 U. S. 777, 63 S. Ct. 1028 (1943). There is greater likelihood that the state decree will be found final when the Supreme Court is more anxious to pass on the federal question. See Radio Station WOW v. Johnson, 326 U. S. 120, 65 S. Ct. 1475 (1945). As a practical matter the California Supreme Court had disposed of all issues likely to arise between the litigants in the present case, see the dissenting opinion in Rescue Army v. Municipal Court, (U. S. 1947) 67 S. Ct. 1409 at 1427.