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FEDERAL COURTS — THE SCOPE OF THE REVIEW OF INTERLOCUTORY ORDERS AND DECREES UNDER SECTION 129, AS AMENDED, OF THE FEDERAL JUDICIAL CODE¹ — In early English appellate practice, the appealability of orders and decrees from a court of equity turned upon a single arbitrary test—whether or not they were enrolled. If an order or decree of the chancellor was enrolled, an appeal could be taken. But in the United States the case was different. In considering

¹ 44 Stat. L. 233, c. 102 (1926), 28 U. S. C. (1940), § 227. The scope of this comment is limited to the problems of injunctions and receivers, all those specially pertaining to admiralty being ignored.

whether or not an order or decree could be appealed from, the appellate court looked to see whether it was interlocutory or final, and it was only the latter which could be appealed.² Thus in the United States if it is found desirable to have an appeal of interlocutory orders or decrees, it is necessary to provide specifically for such appeal by statute.³ Section 129, as amended, of the Federal Judicial Code is such a statute. It provides for the appeal of certain interlocutory orders and decrees from the federal district courts to the circuit courts of appeals.

In 1891, when the circuit courts of appeals were created, section 7 of the creating act⁴ was included to provide for the appeal of an interlocutory order or decree which "granted or continued" an injunction. This was soon found to be inadequate in that it protected only the defendant, and so in 1895, section 7 was amended⁵ to include the situations where an injunction was "refused or dissolved," thus giving the plaintiff a remedy as well. Then it was discovered that receivers could be appointed without an accompanying injunction and that appellate relief from this order was equally necessary, so in 1900 Congress expanded the statute to cover the case of the appointment of a receiver.⁶ These essential provisions have now been incorporated into the present statute, section 129 of the Judicial Code. Appeal, within a limited period of thirty days, from these interlocutory orders and decrees is permitted to the circuit courts of appeals. The statute is limited to cases involving injunctive relief or the appointment of a receiver, and there can be no review of a merely administrative order.⁷

Under the wording of the original statute, the presence of a constitutional issue would have barred the appeal of these orders and decrees.⁸ In order to be appealed, they had to be orders which, if they had been final, could have been taken to the circuit courts of appeals. As the federal statutes then stood, the presence of constitutional issues made the case appealable only to the Supreme Court. This difficulty was resolved in the 1906 amendment which permitted the appeal "in any cause."⁹ Under the present statute the presence of a constitutional question will not bar the appeal, but the constitutional question will not be considered if the appeal can be decided any other way,¹⁰ and it will

² BARTON, *HISTORY OF A SUIT IN EQUITY*, rev. ed., 174, note 1 (1877); *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 S. Ct. 407 (1897).

³ *Dreutzer v. Frankfort Land Co.*, (C. C. A. 6th, 1895) 65 F. 642.

⁴ 26 Stat. L. 828, c. 517, § 7 (1891).

⁵ 28 Stat. L. 666, c. 96 (1895).

⁶ 31 Stat. L. 660, c. 803 (1900).

⁷ *Red Star Laboratories Co. v. Pabst*, (C. C. A. 7th, 1940) 100 F. (2d) 1.

⁸ H. REP. 542, 59th Cong., 1st sess. (1906); *Green v. Mills*, (C. C. A. 4th, 1895) 69 F. 852.

⁹ 34 Stat. L. 116, c. 1627 (1906).

¹⁰ *Allen v. Omaha Live Stock Commission Co.*, (C. C. A. 8th, 1921) 275 F. 1.

not be considered at all where the order is only *ex parte* and there has been no ascertainment of facts.¹¹

The appeal of these orders and decrees at an interlocutory stage of the suit is not made compulsory by the statute, and failure of the parties to take action will not prohibit a later appeal from the final orders and decrees of the suit.¹² But, on the other hand, should the parties wait until the decrees become final, there can be no appeal under this statute, the courts considering that the interlocutory decree has merged with the final one and thus the issues as to the former must be considered moot and not appealable.¹³ Where the issues to be raised on appeal have become moot for any other cause, then appeal can no longer be taken under this statute;¹⁴ but where only a part of the case is moot and there still exists a need for the type of relief afforded by this appeal, the courts have made an exception and deny an appeal as to the moot part only, and thus the rest is appealable.¹⁵

The scope of the review on appeal to the circuit courts of appeals from these interlocutory orders and decrees presents a troublesome problem. Just how far can the circuit court of appeals go in its review? Is it limited to the decree or order only, or may other parts of the suit come up on the appeal? Just what can be done after the order or decree is brought up? May the circuit court of appeals dismiss the whole bill, or only the order or decree? Can it affirm the whole bill, or only the order or decree? In looking for answers to these questions, to gain some meaning from the confusion which appears to be in the cases, it is most convenient to separate interlocutory orders and decrees into two kinds: (1) those which are "permanent" and are granted after a full hearing but before a final order, and (2) those which are temporary and *ex parte*. The problems suggested are to be considered as they relate to each of these particular kinds of orders.

¹¹ *Cone v. Rorick*, (C. C. A. 5th, 1940) 112 F. (2d) 894.

¹² *Chapman v. Yellow Poplar Lumber Co.*, (C. C. A. 4th, 1906) 143 F. 201; *Victor Talking Mach. Co. v. George*, (C. C. A. 3d, 1939) 105 F. (2d) 697; cert. den. *George v. Victor Talking Mach. Co.*, 308 U. S. 611, 60 S. Ct. 176 (1940), rehearing den. 308 U. S. 638, 60 S. Ct. 294 (1940); *Bingham Pump Co. v. Edwards*, (C. C. A. 9th, 1941) 118 F. (2d) 338.

¹³ *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 587, 46 S. Ct. 408 (1926); *Howard Bros. Mfg. Co. v. Gibbs Loom Harness & Reed Co.*, (C. C. A. 1st, 1907) 157 F. 676.

¹⁴ For example: granting of a preliminary injunction against a strike which has terminated at the time of appeal, *O'Brien v. Fackenthal*, (C. C. A. 6th, 1922) 284 F. 850; denial of an injunction prohibiting a condemnation suit which has gone to judgment at the time of appeal, *Texas & N. O. R. R. v. North Side Belt Ry.*, (C. C. A. 5th, 1927) 16 F. (2d) 782.

¹⁵ *Jackson v. Denver Producing & Refining Co.*, (C. C. A. 10th, 1938) 96 F. (2d) 457.

I.

The "permanent" interlocutory order comes late in the trial of the chancery suit, shortly before the time for a final decree. The "permanent" interlocutory injunction is granted after answer and replication have been filed, a full hearing has been had upon the pleadings and proofs, and only minor details remain to be completed, such as reference of the case to a master to make an accounting of any profits and damages.¹⁶ Here then, there is really little difference, as far as the activity of the parties is concerned, between the final decree and the interlocutory decree. Both parties have fully presented their evidence and arguments for the position they have taken in regard to the decree. As a result it is not surprising to find the courts quite liberal in defining the scope of the review of these orders on appeal, and practically the same relief is granted as can be secured on appeal from similar final orders.

In the case of *Smith v. Vulcan Iron Works*¹⁷ the Supreme Court held that on appeal from an interlocutory order or decree under the early statute the circuit court of appeals had authority to consider and decide the case upon its merits, that the statute contemplated an appeal to be taken from the whole of such interlocutory order or decree, and not from just the part which granted or continued the injunction. Here the Supreme Court felt that the appellate court could look at the whole order: the determination of the validity of the patent, its infringement and the granting of the injunction; and if the order was without equity at any of these points the whole bill could be dismissed. The court felt that the manifest intent of the statute was to save the expense of needless protracted litigation¹⁸ and so the appellate court should be able to cut off the suit at this stage.

Although the circuit courts of appeal are reviewing the interlocutory order on its merits, that does not mean that the order can thereby be made final. The affirmance of an interlocutory order on appeal does not prohibit the district court from amending the order at a later date.¹⁹ Appeal on the merits means that the circuit court of appeals can consider the whole order and dismiss the case, but it does not mean that the court can affirmatively dispose of the suit at this stage. In this regard the courts feel that there is still too great a difference between

¹⁶ *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 S. Ct. 708 (1900). But see *Caterpillar Tractor Co. v. International Harvester Co.*, (C. C. A. 3d, (1941) 120 F. (2d) 82.

¹⁷ 165 U. S. 518, 17 S. Ct. 407 (1897).

¹⁸ In *Marden v. Campbell Printing-Press & Mfg. Co.*, (C. C. A. 1st, 1895) 67 F. 809, the court also emphasized the idea of saving expenses: that there was no purpose in continuing a case which had no merits and thus it should be dismissed even though the order was but interlocutory.

¹⁹ *A. D. Howe Mach. Co. v. Dayton*, (C. C. A. 4th, 1913) 210 F. 801.

final and interlocutory orders, and if affirmative disposition of the case is desired the parties must wait until the decree has become final.

The whole order is reviewed on appeal, not just the injunctive portion, and the whole record, or at least that part justifying or alleging to justify the decree made, must come up with the appeal.²⁰ Where jurisdiction for the order is in issue, that may be considered at any stage of the suit.²¹ Every order is considered to be based upon a proper finding of jurisdiction and if the order or decree is made appealable, then the finding of jurisdiction must be considered a matter for review. But review of the whole order does not mean a review of the whole case. Where there are separable parts of a suit, and injunctive appealable orders run only to part, the remainder cannot be considered on the appeal nor can the separate parts be made appealable by cross-appeal.²² Review on the merits is limited to review of the order, and the remainder of the suit must not be disturbed unless it can be found to have an independent appellate jurisdiction under the statute.

2.

The situation is radically different in the case of a temporary interlocutory order or decree. Here the order is usually made *ex parte* on a *prima facie* showing, using only affidavits, the other extreme from a final order. Therefore, review of such orders should be expected to be quite unlike the case of the review of a final decree, and in fact is quite narrow.

The general rule laid down for the scope and extent of the review of *ex parte* temporary interlocutory orders under section 129 is that the appellate court will look only to see if there was an improvident exercise of discretion, or an abuse of discretion, and if there is none then the order will be upheld.²³ The feeling is that since the duration

²⁰ *Linde Air Products Co. v. Morse Dry Dock & Repair Co.*, (C. C. A. 2d, 1917) 246 F. 834.

²¹ *Supreme Council of Royal Arcanum v. Hobart*, (C. C. A. 1st, 1917) 244 F. 385.

²² *Ex parte National Enameling & Stamping Co.*, 201 U. S. 156, 26 S. Ct. 404 (1906).

²³ *Mayor, etc., of Knoxville v. Africa*, (C. C. A. 6th, 1896) 77 F. 501; *Harding v. Corn Products Refining Co.*, (C. C. A. 7th, 1909) 168 F. 658; *Dimick v. Shaw*, (C. C. A. 8th, 1899) 94 F. 266; *Murray v. Bender*, (C. C. A. 9th, 1911) 109 F. 585; *Hart v. Buckner*, (C. C. A. 5th, 1892) 54 F. 925. Where a preliminary injunction was granted restraining the enforcement of a rate statute on the ground of unconstitutionality, the court on appeal refused to be satisfied with looking only to see whether there was an improvident exercise of discretion, but reversed the order on the ground that the statute needed actual application to be tested and a bond would be no protection. *Railroad Commission v. Central of Georgia Ry.*, (C. C. A. 5th, 1909) 170 F. 225. Contra, see *City of Owensboro v. Cumberland Telephone & Telegraph Co.*,

of the order is for but a short period, the granting of it should lie within the discretion of the judge.²⁴ The question is entirely whether or not the case presented is one of the classes of cases in which such an order may be granted,²⁵ not whether the merits are present to justify it.²⁶ The circuit court of appeals considers the order in the same light as the district court to determine its correctness,²⁷ the district court's findings of fact being accepted as conclusive for the purposes of this appeal.²⁸ As the scope of the review of these orders is so narrow, the appellate court is usually hesitant about considering important questions of the suit on this appeal, preferring that they be postponed until the case is finally determined.²⁹

The circuit courts of appeals are quite liberal in construing the decree on appeal so that it will be upheld. On this appeal the order or decree will not be completely construed but the court will only look to its "fairly certain meaning."³⁰ To determine the validity of the order, or to interpret it, the court is limited to the language of the order and cannot look to see what was said with reference to it in the district court,³¹ but after a "fairly certain meaning" is derived from such

(C. C. A. 6th, 1909) 174 F. 739. In *Caterpillar Tractor Co. v. International Harvester Co.*, (C. C. A. 3d, 1941) 120 F. (2d) 82, the circuit court of appeals modified the preliminary injunction as granted by the district court.

²⁴ *Deckert v. Independence Shares Corp.*, 311 U. S. 282, 61 S. Ct. 229 (1940); *Mayor, etc., of Knoxville v. Africa*, (C. C. A. 6th, 1896) 77 F. 501. The rationalization given is that if the injury to the moving party is immediate and certain and little harm will be done to the opposite party, or if such harm can be fully protected against by providing for a bond, then the complaining party's rights are really not jeopardized. *Lehman v. Graham*, (C. C. A. 5th, 1904) 135 F. 39.

²⁵ *Arizona Edison Co. v. Southern Sierras Power Co.*, (C. C. A. 9th, 1927) 17 F. (2d) 739.

²⁶ *Harding v. Corn Products Refining Co.*, (C. C. A. 7th, 1909) 168 F. 658; *Dimick v. Shaw*, (C. C. A. 8th, 1899) 94 F. 266.

²⁷ *F. C. Austin Mfg. Co. v. American Wellworks*, (C. C. A. 7th, 1902) 121 F. 76.

²⁸ *Gasaway v. Borderland Coal Corp.* (C. C. A. 7th, 1921) 278 F. 56; *New Albany Waterworks v. Louisville Banking Co.*, (C. C. A. 7th, 1903) 122 F. 776.

²⁹ The court would not consider such an important question as one involving water rights in Alaska on appeal from an interlocutory order denying a preliminary injunction. *James v. Wild Goose Mining Co.*, (C. C. A. 9th, 1906) 143 F. 868. The court would not consider the constitutionality of a statute restrained by a temporary injunction but only whether there was sufficient equity for the injunction. *Mayo v. Lakeland Highlands Cann'g Co.*, 309 U. S. 310, 60 S. Ct. 517 (1940).

³⁰ "We are not called upon to construe the order completely, nor to say whether all the conduct of the defendants would or would not be within its prohibition, but only to ascertain whether the language of the order, restricted to its fairly certain meaning, is justified by the record." *Turnstall v. Stearns Coal Co.*, (C. C. A. 6th, 1911) 192 F. 808 at 811.

³¹ *Red Star Laboratories Co. v. Pabst*, (C. C. A. 7th, 1938) 100 F. (2d) 1.

a construction the court must look to the record to see if the order is justified.

However, there is authority that even in the case of temporary interlocutory orders and decrees the circuit court of appeals may review and decide the case upon its merits.³² These cases are quite exceptional, for in such a situation the district court has not had an opportunity for a full hearing on the case, and a decision of the case on the merits on this appeal affords no method of correction of errors. But when the legal questions are presented by the record in such a manner that justice can be done the litigants and fruitless delay and a second appeal avoided, the court may dismiss the bill even at this stage.³³ The objection to this action is avoided where the record is sufficient, but whether this broad a review will be granted must be determined from the circumstances of the particular case.³⁴ Even though dismissal of the bill is permitted in these narrow circumstances,³⁵ the court will not use its authority to decide the case upon the merits for the purpose of making an affirmative disposition of the case.³⁶ To decide a defendant's rights finally upon the mere statements of his adversary, supported only by *ex parte* affidavits, is not within the contemplated purpose of the statute. Complete lack of equity so as to afford dismissal may possibly be shown at this stage,³⁷ but an affirmative showing of its presence so as finally to

³² On the theory that the court could review the case on its merits on appeal from an order granting an injunction *pendente lite* the circuit court of appeals also passed upon the propriety of an order admitting a new plaintiff. *Goldwyn Pictures Corp. v. Howells Sales Co.*, (C. C. A. 2d, 1928) 287 F. 100.

³³ *Mayor, etc., of Knoxville v. Africa*, (C. C. A. 6th, 1896) 77 F. 501.

³⁴ "If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case, it should not have been granted, or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon the pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed." *Mast, Foss & Co. v. Stover Mfg. Co.*, 177 U. S. 485 at 495, 20 S. Ct. 708 (1900).

³⁵ *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 38 S. Ct. 80 (1917).

³⁶ *Meccano, Limited v. John Wanamaker*, New York, 253 U. S. 136, 40 S. Ct. 463 (1919). The circuit court of appeals refused to determine who was entitled to proceeds of an insurance policy on the reversal of an interlocutory order refusing to vacate an injunction requiring the defendant to substitute beneficiaries, on the ground that the record did not sufficiently disclose the proceedings in the district court and the determination would require the circuit court of appeals to anticipate the issues to arise at the trial. *Red Star Laboratories Co. v. Pabst*, (C. C. A. 7th, 1938) 100 F. (2d) 1.

³⁷ The question is raised whether the dismissal should be final where there is only a pleading error, and it is suggested that the rule would be more equitable if the dismissal is without prejudice.

dispose of the case is not possible until all the parties have had their day in court.

The question whether or not the court had jurisdiction to make the order can always be raised on appeal, no matter what the nature of the order.³⁸ It is a fundamental concept of our judicial system that a court must have authority to issue an order, and if an appeal from the order is permitted the issue of jurisdiction must be reviewable. It does not matter when the determination was made, for the issue is reviewable even though the determination was made in a completely separate decree.³⁹ It is considered that this determination is incorporated into each order and so the lower court can do nothing to preclude review.

Keeping in mind, then, that there are different kinds of interlocutory orders, the apparent confusion in the cases disappears. At the initial stages of the suit the scope of review must naturally be narrow so that the parties may later be afforded full opportunities of hearing; but as the trial advances and the orders more closely approach finality, there is little difficulty or harm in allowing review on the merits as the rights of the parties have been given practically all the protection our legal system affords.

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³⁸ *Deckert v. Independence Shares Corp.*, 311 U. S. 282, 61 S. Ct. 229 (1940); *Soler v. Scoville*, (C. C. A. 1st, 1918) 253 F. 932.

³⁹ *Lake Street El. R. R. v. Farmers' Loan & Trust Co.*, (C. C. A. 7th, 1897) 77 F. 769.

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