RECENT CASES

APPEALABILITY OF DISTRICT COURT ORDERS UNDER FEDERAL RULES

The Attorney General of the United States, as successor to the Alien Property Custodian, brought suit in a federal district court against Deems Taylor, as president of the American Society of Composers, Authors and Publishers (ASCAP). He sought the turnover of sums allegedly due from that society to AKM, an Austrian organization of similar character. Henry M. Propper was joined as defendant. Propper had been appointed temporary receiver of the assets of AKM located in the state of New York. Before his appointment was made permanent in July 1941,[1] however, the President of the United States issued an executive order prohibiting the transfer of Austrian property unless authorized by the Secretary of the Treasury.[2] No authorization was ever given by the Secretary with regard to the property in question. In September 1943, the plaintiff's predecessor, Alien Property Custodian, vested in himself all assets held by ASCAP for AKM. Upon refusal of ASCAP to turn over the sums allegedly due, the present action was brought. The plaintiff claimed a right to the turnover of the sums and, in addition, sought a declaration that Propper had no interest in AKM's claim.

The district court granted summary judgment against Propper, denying his right to the funds. Propper appealed from this order to the Circuit Court of Appeals for the Second Circuit, the rest of the action remaining pending in the district court against Taylor. The circuit court, Judge Frank dissenting, held that the order was not final, and hence not appealable until the remainder of the suit was disposed of in the district court. *Clark v. Taylor*.[3]

The United States Judicial Code limits the appellate jurisdiction of the circuit courts to "final" decisions.[4] Seemingly simple, the rule presents considerable difficulty in application. By what criteria are the courts to determine whether a particular disposition of issues is "final" and hence appealable?

Under common law practice in England this same rule prevailed—that only a final judgment was appealable. The common law strictly defined finality and would not allow an appeal until every matter arising in the controversy had

[1] On this date Propper brought suit in a New York state court against Taylor to recover the same sums; the suit was still being adjudicated when the instant action was commenced.

[2] 3 Code Fed. Reg. 225 (1941 Supp.).

[3] 163 F. 2d 940 (C.C.A. 2d, 1947).

[4] 26 Stat. 828 (1891), 28 U.S.C.A. § 225 (1927).

been disposed of.[5] It is improbable that the common law interpretation of finality worked any real hardship; the severe restrictions which were placed on joinder of both parties and causes of action under common law practice limited the subject matter of an action to a few interrelated issues so that little inconvenience could result from delaying appeal until all issues had been determined.

Equity practice, however, allowed immediate appeal not only from final judgments but from interlocutory decrees and orders as well.[6] The more complicated nature of many equity actions, in which divers matters had to be disposed of in the same action, made such appeals necessary; for in many cases it was obvious that to postpone appeal might well prejudice some of the parties.

In the United States the first Federal Judiciary Act[7] limited appeal to "final" decisions, making no distinction between law and equity. Realization of the hardships which might result from applying the strict common-law interpretation of finality to all cases led the courts in many cases to adopt a more liberal interpretation. Appeals were permitted where the order appealed from settled matters distinct from the general subject-matter of the litigation.[8] In such decisions many rulings which under the English practice would have been classified as mere orders or interlocutory decrees were held to be final.[9] Where the delay of an appeal caused no apparent hardship, however, and where the issues disposed of were not entirely distinct from the general subject of litigation, the courts continued to deny appeal. Many courts in doing so failed to recognize the modification of finality made in the harsher cases and continued to assert that to be appealable a judgment must be final "not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."[10]

The confusion resulting from the varied interpretations of finality has been greatly increased by the Federal Rules of Civil Procedure for the District Courts, which allow extensive joinder of parties and causes.[11] Rule 54(b) per-

[5] Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539, 546 (1932).

[6] Ibid.

[7] 1 Stat. 72 (1789).

[8] United States v. River Rouge Improvement Co., 269 U.S. 411 (1926); Williams v. Morgan, 111 U.S. 684, 699 (1884); see Arnold v. Guimarin Co., 263 U.S. 427 (1923). Exception has also been made to the strict interpretation where it appeared that to deny appeal might work irreparable injury to the party seeking appeal were it to appear later that the order was erroneous. Perlman v. United States, 247 U.S. 7 (1918).

[9] Congress also recognized that harsh results might ensue in many cases from a strict interpretation of finality and amended the later Judicial Code by specifically excepting from the finality rule certain types of orders with respect to injunctions, orders denying or granting receiverships, and certain orders in admiralty cases. 26 Stat. 828 (1891), 28 U.S.C.A. § 227 (1927); 56 Stat. 272 (1942), 28 U.S.C.A. 227 (1947 Supp.).

[10] Collins v. Miller, 252 U.S. 364, 370 (1920); In re Prindible, 115 F. 2d 21 (C.C.A. 3d, 1940); Sheppy v. Stevens, 200 Fed. 946 (C.C.A. 2d, 1912).

[11] Rules 14, 18, 19(a), 20(a), 24(a), and 24(b), 28 U.S.C.A. foll. § 723 c (1941). These rules replaced the Conformity Act, 17 Stat. 197 (1872), 28 U.S.C.A. 724 (1934), under which district court practice conformed to that of the state courts.

mits the trial court "when more than one claim for relief is presented in an action" to "enter a judgment disposing of such claim." The rule further provides: "The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims." These rules apply only to procedure in the district courts and were not intended to affect appellate jurisdiction.[12] Yet it is obvious that the purpose of the rule, to minimize inconveniences arising in cases where numerous parties or causes are joined, would be frustrated if appeal were not allowed from judgments of the type provided for. The courts have realized that in order to effectuate the intent behind Rule 54, a liberal interpretation of the concept of finality must be adopted.[13]

Attempts to establish a satisfactory basis upon which to determine finality have been notably unsuccessful. The difficulties arising out of the problem have perhaps been best revealed in a series of decisions by the Circuit Court of Appeals for the Second Circuit. In *Collins v. Metro-Goldwyn Pictures Corp.*[14] the court considered the appealability of an order which dismissed a claim relating to an alleged infringement of a copyright and which left pending another count of the complaint concerning alleged unfair competition in using the title of the copyrighted material. The court held that, in view of the liberal joinder provisions of the federal rules, the decision as to finality had to be determined by the separability of the issues involved. Concluding that the two issues, although involving the same facts to a certain extent, were nevertheless distinct enough that each could be considered a separate "claim" under Rule 54(b), the court allowed the appeal. Judge Clark, concurring, elaborated on the decision. While contending that a claim should constitute the unit for appeal, he proposed that the definition of a claim should be flexible and should vary if desirable. Thus, a claim for purposes of appeal need not necessarily coincide with a claim for other purposes. With reference to the claims in that case he asserted, "... the evidence to support the first claim would to a considerable extent be different from, and in addition to, that for the second claim, and there would be little, if any, gain in forcing them always to be tried and adjudicated together."[15]

The decision in the *Collins* case was severely criticized.[16] One writer[17] argued vigorously that the application of the theory adopted in that case would result in an increased burden upon the appellate courts out of proportion to any benefit derived by litigants. Judge Clark's theory that the concept of a "claim"

[12] Audi Vision, Inc. v. R.C.A. Mfg. Co., 136 F. 2d 621 (C.C.A. 2d, 1943); 3 Moore, Federal Practice 3155 (1938); Clark, Code Pleading 529 (2d ed., 1947).

[13] Reeves v. Beardall, 316 U.S. 283 (1942); see Toomey v. Toomey, 149 F. 2d 19, 20 (App. D.C., 1945).

[14] 106 F. 2d 83 (C.C.A. 2d, 1939).

[15] Ibid., at 87.

[16] 3 Moore, Federal Practice 154–69 (1947 Supp.); 49 Yale L. J. 1476 (1940), noting Collins v. Metro-Goldwyn Pictures Corp., 106 F. 2d 83 (C.C.A. 2d, 1939).

[17] Moore, op. cit. supra note 16.

should vary with the purpose was also censured on the ground that it would make difficult the establishment of a body of precedent under the new rules. While approving the so-called "pragmatic" theory that a claim should be determined not by arbitrary rule, as under the old "legal-theory" method, but through considerations of practical trial convenience,[18] the writer nevertheless insisted that an efficient and consistent application of this theory demands that the concept of a "claim" be similarly defined for all purposes.

Subsequent to the *Collins* case, Judge Clark modified his position to conform to these suggestions, and has since consistently asserted that a claim constituting an appealable judicial unit must include all matters arising out of a single transaction or occurrence, or centered around the same "basic core" of facts.[19] This is the same test which has generally been applied in testing joinder of causes and of parties. The majority of the court, however, in a number of cases continued to allow a more liberal interpretation for purposes of appeal and adopted the view supported by Judge Frank in the instant case. Under this view an order is final and appealable where proof of the dismissed claim requires substantial evidence different from that required for proof of the claims remaining pending.[20]

In his dissenting opinion in the instant case Judge Frank denied that the definition of a "claim" should be standardized for all purposes. He vigorously objected to labeling such an approach "pragmatic," pointing out that a true pragmatic approach judges a use by its results. He forcefully pointed out the possible consequences of denying appeal in the instant case. The effect of the ruling denying title to Propper will be to prevent his further participation in the action. If, on appeal after the final determination of all the issues, it is found that the original order against Propper was erroneous, the entire cause will be remanded for a new trial with Propper as party plaintiff. If it should be determined that as between Propper and the plaintiff, Propper is the sole legitimate claimant, it will mean that the Attorney General will have conducted a lengthy and costly trial only to find that he really has no interest whatever. In addition, Propper may well find that he has been prejudiced by the proceedings in the first trial.[21]

[18] This theory is expounded in Clark, Code Pleading 137 (2d ed., 1947).

[19] Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., 154 F. 2d 814 (C.C.A. 2d, 1946), cert. den. 328 U.S. 859 (1946). Dissenting in Zarati S. S. Co. v. Park Bridge Corp., 154 F. 2d 377, 381 (C.C.A. 2d, 1946); Zalkind v. Scheinman, 139 F. 2d 895, 906 (C.C.A. 2d, 1943); Musher Foundation v. Alba Trading Co., 127 F. 2d 9, 11 (C.C.A. 2d, 1942); Sidis v. F-R Publishing Corp., 113 F. 2d 806, 811 (C.C.A. 2d, 1940). Concurring in Atwater v. North American Coal Corp., 111 F. 2d 125, 126 (C.C.A. 2d, 1940).

[20] Zarati S.S. Co. v. Park Bridge Corp., 154 F. 2d 377 (C.C.A. 2d, 1946); Zalkind v. Scheinman, 139 F. 2d 895 (C.C.A. 2d, 1943); Musher Foundation v. Alba Trading Co., 127 F. 2d 9 (C.C.A. 2d, 1942); Sidis v. F-R Publishing Corp., 113 F. 2d 806 (C.C.A. 2d, 1940).

[21] Judge Frank specifically refers to the possibility that important witnesses might be carelessly questioned by the plaintiff in the first trial and the answers used to impeach testimony on a more careful questioning in the later trial.

In further support of his argument that the appeal should have been allowed, Judge Frank cited a number of cases, decided both before and after the adoption of the federal rules, in which appeals were allowed under circumstances analogous to the situation in the instant case.[22] Analysis of these cases reveals that all of the orders appealed from had one characteristic in common: They all involved the complete disposition of the rights of one party to the action who had an alleged beneficial interest in the subject-matter, not of a joint character with the interests of the other parties. Such is the character of the order against Propper in the instant case; for, although joined as defendant, he is in the same position he would have been in had he interposed his own claim contesting the plaintiff's right to bring the action. Numerous cases, many cited by the majority in support of its conclusion, have held that an order dismissing one of several defendants jointly charged is not final.[23] These cases seem to be inappropriate as precedents in view of the more closely analogous cases in which appeals have been allowed. It is significant that in all of the cases denying appeal from an order dismissing one defendant, the courts were careful to point out that the liability alleged against the dismissed defendant was of a joint character. In cases where the alleged liability was not joint, dismissal of one defendant was held final.[24]

The arguments of Judge Frank seem persuasive. An order which completely eliminates a party claiming a beneficial interest in the subject-matter should be considered final.[25] It is true that the finality provision was designed to relieve

[22] Judge Frank classifies the cases as involving: 1) An order dismissing the claim of a creditor in a receivership, although the claims of other creditors remained undetermined. Hatch v. Morosco Holding Co., 19 F. 2d 766 (C.C.A. 2d, 1927), aff'd 279 U.S. 218 (1927); City and County of Denver v. Stenger, 295 Fed. 809 (C.C.A. 8th, 1924); American Brake Shoe & Foundry Co. v. New York Rys. Co., 282 Fed. 523 (C.C.A. 2d, 1922). 2) An order that one party to an interpleader has no claim against another, with the rights of other parties still undecided. Bank of Taiwan v. Gorgas-Pierie Mfg. Co., 273 Fed. 660 (C.C.A. 3d, 1921). 3) An order denying title of one of several claimants in a condemnation proceeding. State of Texas v. Chuoke, 154 F. 2d 1 (C.C.A. 5th, 1946), cert. den. 329 U.S. 714 (1946); State of Texas v. Harris County, 158 F. 2d 861 (C.C.A. 5th, 1946). 4) An order dismissing claims of only some of the plaintiffs in a trust accounting action, where the divers plaintiffs' claims were not joint. Crutcher v. Joyce, 134 F. 2d 809 (C.C.A. 10th, 1943). 5) An order denying intervention when it is a matter of right. Pipe Line Co. v. United States, 312 U.S. 502 (1941); Barrett v. Commercial Credit Co., 296 Fed. 996 (App. D.C., 1924); Cathay Trust v. Brooks, 193 Fed. 973 (C.C.A. 9th, 1912); Gumbel v. Pitkin, 113 U.S. 545 (1885). Frank also relies upon Withenbury v. United States, 5 Wall. (U.S.) 819 (1866).

[23] Hohorst v. Hamburg-American Packet Co., 148 U.S. 262 (1893); Photometric Products Corp. v. Radtke, 157 F. 2d 849 (C.C.A. 2d, 1946); Porter v. American Distilling Co., 157 F. 2d 1013 (C.C.A. 2d, 1946); Hunteman v. New Orleans Public Service Inc., 119 F. 2d 465 (C.C.A. 5th, 1941).

[24] Curtis v. Connly, 264 Fed. 650 (C.C.A. 1st, 1920), aff'd 257 U.S. 260 (1921).

[25] Other courts have recognized such orders as final. Bankers' Trust Co. v. Missouri K. & T. Ry. Co., 251 Fed. 789 (C.C.A. 8th, 1918); Morrison v. Burnette, 154 Fed. 617 (C.C.A. 8th, 1907), appeal dismissed 212 U.S. 291 (1909). In Bankers' Trust Co. v. Missouri K. & T. Ry. Co., supra, at 797, the court said, "A decision which completely deprives a party in a pending proceeding who is not jointly liable with others of a substantial right or equity is a final de-

the case-load of the appellate courts. But it is unwarranted to assume that it was intended that the provision be construed so strictly as to result in the denial of appeals from orders which might quite reasonably be deemed final, in cases where such denials might jeopardize one party, cause unnecessary expense to another, and greatly inconvenience both.

Finally, the argument that the "transaction" or "basic core" of facts test is desirable in the interest of maintaining precedential simplicity is open to question. It seems clear that the interests of the parties to the action should not be sacrificed to this object. One of the most valid criticisms of procedural development in the United States stems from the courts' inveterate tendency to look for an inflexible rule—a magic formula with which to solve every problem. The language of Rule 1[26] which states that the federal rules ". . . shall be construed to secure the just, speedy, and inexpensive determination of every action" indicates that the framers of the rules hoped to eliminate this practice.

Judge Frank's position is buttressed by the fact that the questions involved in the controversy between the plaintiff and Propper were in large measure distinct from the issues involved in the rest of the suit.[27] Thus, the appellate court even on an appeal of the entire case would be required to consider most of the issues separately; separate appeals would, therefore, not greatly increase the appellate court's burden.

In the light of the amendment to Rule 54(b) which became effective since the instant decision, there may be some question as to the significance of the case. The amended rule, drafted primarily for the purpose of simplifying the problem of appealability, provides that the district court may enter a final judgment on less than all of the claims ". . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." It further provides that "In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

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cision and reviewable. . . ." In interpreting the finality provision of the New York Civil Practice Act, the courts of that state have reached similar conclusions, and have held that an order which effectively eliminates a party from an action is final as to that party even though it might be considered interlocutory as to other parties. City Bank Farmers' Trust Co. v. Ernst, 261 N.Y. 82, 85, 184 N.E. 502, 503 (1933); Sinclair v. Purdy, 235 N.Y. 245, 139 N.E. 255 (1923); Brown v. Feek, 204 N.Y. 238, 97 N.E. 526 (1912).

[26] Rule 1, 28 U.S.C.A. foll. § 723 c (1941).

[27] Judge Clark, in the majority opinion, states that the controversy between the plaintiff and Propper involved two points: "(1) whether a temporary receiver under the controlling New York law . . . takes title or has merely a right to possession, and (2) if only the latter whether the Executive Order cited above prevented the devolution of title on the appointment of Propper as permanent receiver." It is clear that as to the rest of the controversy (the question as to the sums allegedly due from ASCAP to AKM), these points are only incidental, if relevant at all.

It has been suggested that this rule will reduce the determination of appealability to an objective test: whether the trial judge has chosen to label his ruling "final."[28] The exercise of some discretion on the part of the trial judge in this matter is, of course, desirable. Also, the provision that all orders not designated "final" shall be considered subject to revision will tend to minimize hardships arising from errors. Nevertheless, a blank acceptance by the appellate courts of such a test as the sole criterion for determining appealability would be unpardonable. It seems doubtful that the appellate courts would refuse to entertain appeals from orders of types previously held final and appealable, merely because the trial judge failed to recognize and label the orders "final." This would in reality be a system of discretionary appeal with the discretion resting entirely in the hands of the trial court.[29] It seems more likely that the amended rule will have little effect upon appealability, and the problem of determining finality in the difficult cases will continue to be the job of the appellate courts.

REVIEWABILITY OF SEC "ORDERS" UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT

The Pittsburgh Railways Company, though not a "public utility company" within the meaning of Section 2(a) (5) of the Public Utility Holding Company Act,[1] was a "subsidiary"[2] of a registered public utility holding company, the Philadelphia Company, and was therefore subject to the requirements of the Act, absent some exemption. On May 10, 1938 the Pittsburgh Company filed a voluntary petition for reorganization under Section 77B of the Bankruptcy Act[3] in the District Court for the Western District of Pennsylvania. Section 11(f) of the Public Utility Holding Company Act, which requires reorganization plans to be approved by the Securities and Exchange Commission prior to submission of such plans to the court,[4] did not at that time apply to the Pittsburgh Company because the company was then exempt by virtue of Commission Rule

[28] 56 Yale L. J. 141 (1946), noting Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., 154 F. 2d 814 (C.C.A. 2d, 1946), cert. den. 328 U.S. 859 (1946).

[29] Judge Frank comments at length on this problem. Clark v. Taylor, 163 F. 2d 940, at 951 n. 12 (C.C.A. 2d, 1947). In a concurring opinion in Audi Vision Inc. v. R.C.A. Mfg. Co., 136 F. 2d 621 (C.C.A. 2d, 1943), Judge Frank advocated statutory changes which would allow some type of discretionary appeal by the circuit courts. This suggestion is a result of a belief that the time spent by appellate courts in determining whether a ruling is final could be better spent in determining whether an appeal is desirable in the individual case, considering both trial convenience and justice to the parties.

[1] § 2(a)(5), 49 Stat. 804 (1935), 15 U.S.C.A. § 79b(5) (1941).

[2] § 2(a)(8), 49 Stat. 804 (1935), 15 U.S.C.A. § 79b(8) (1941).

[3] 48 Stat. 912 (1934), amended by 49 Stat. 664 (1935) and 49 Stat. 965 (1935).

[4] "... a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the [Securities and Exchange] Commission after opportunity for hearing prior to its submission to the court." § 11(f), 49 Stat. 820 (1935), 15 U.S.C.A. § 79k(f) (1941).