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Federal Procedure—Appealability of Denial of Motion for Summary Judgment

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whether or not for the purpose of attacking the credibility of the witness, since the effect was to prejudice the minds of the jurors. *Grenadier v. Surface Transportation Corp. of New York,* 271 App. Div. 460, 66 N. Y. S. 2d 130 (1st Dep't 1946).

To impeach a witness' credibility, much is allowed. However, the above cases indicate a trend towards limiting the extent of cross-examination for impeachment. This restriction is two-fold. First, certain areas have been banned, *e. g.* previous negligent acts, whether or not affecting credibility. *Grenadier v. Surface Trans. Corp. of N. Y., supra.* Second, from a position of leaving complete control in the hands of the trial judge, the courts in *People v. Bilanchuk, supra,* and the instant case, have taken it upon themselves to decide whether the cross-examination was a legitimate attack on credibility.

It is the writer's opinion that where an appellate court limits a trial judge's discretionary area in allowing cross-examination for impeachment purposes by forbidding certain subjects, it is acting within its proper sphere. However, where the appellate court, as in the instant case, substitutes its opinion for that of the trial judge as to whether or not the cross-examination was for the purpose of attacking credibility, it is not acting properly and is seriously interfering with the right of cross-examination.

Alan H. Levine

FEDERAL PROCEDURE — APPEALABILITY OF DENIAL OF MOTION FOR SUMMARY JUDGMENT

Plaintiff's motion for summary judgment under Federal Rule of Civil Procedure 56 (a) (c) (e) on his complaint praying for both a temporary and permanent injunction to prevent defendants from copying plaintiff's trade name and corporate title was denied by the District Court. *Held:* The order denying the motion was appealable under 28 U. S. C. A. 1291, 1292(1). *Federal Glass Co. v. Loshin,* 217 F. 2d 936 (2d Cir. 1954).

Finality has been the historic characteristic of federal appellate procedure ever since it was written into the first Judiciary Act. (Now 28 U. S. C. A. 1291). *Cobbledick v. United States,* 309 U. S. 323 (1940). The basis for this policy is not only to protect judicial administration from piecemeal litigation but also to eliminate delays and avoid obstruction of just claims which would otherwise be jeopardized by harassment and the cost of the various successive appeals before final judgment. *Catlin v. United States,* 324 U. S. 229 (1945).

The rule is subject to statutory qualification: 28 U. S. C. A. 1447 creates a further restriction by forbidding review in any manner of a district court order remanding a case to a state court, but the bonds are relaxed somewhat by Section 24 of the Bankruptcy Act, 11 U. S. C. A. 47, which allows interlocutory appeal of proceedings in bankruptcy and 28 U. S. C. A. 1292(1) where certain interlocutory injunctions may be appealed from.

The principle of finality has been treated by the courts with great liberality. 6 *Moore, Federal Practice* 113 (2d ed. 1948) (hereinafter cited as *Moore*). Thus a denial of a petition to prohibit the use of certain documents before a grand jury because of a constitutional privilege was held to be a final order. *Perlman v. United States,* 247 U. S. 7 (1918), though an order denying a motion to quash a grand jury's subpoena *duces tecum* on other grounds is non-appealable. *Cobbledick v. United States, supra.* Similarly a decree directing the delivery of deeds and property was held to be final because of its irreparable effect even though an accounting was still to be had, *Forgay v. Conrad,* 6 How. 201 (U. S. 1848), while the accounting was held to be a necessary ingredient for finality in condemnation proceedings since an adequate award might result in acquiescence in the disposition of the earlier issues. *Republic Natural Gas Co. v. Oklahoma,* 334 U. S. 62 (1948). See also, *United States v. 243.22 Acres of Land,* 129 F. 2d 678 (2d Cir. 1942), *cert. denied* 317 U. S. 698 (1943). Under the collateral order theory, the denial of a motion to require security for costs and expenses in a shareholder's derivative action was held appealable even though it was not directly involved in the merits of the claim. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U. S. 541 (1949). However, the special rule of finality involved in the multiple claim provision of Rule 54(b) of the Federal Rules of Civil Procedure provides that an adjudication of one or more but less than all of the multiple claims is interlocutory unless the District Court issues a certificate of finality. *Republic of China v. American Express Co.,* 190 F. 2d 334 (2d Cir. 1951). Additional review may be had under 28 U. S. C. A. 1651 (All Writs Statute) when an order is otherwise not appealable, whenever the Supreme Court or other federal courts deem it necessary or appropriate in aid of their respective jurisdictions. 6 *Moore* 58-109.

The result has been unsatisfactory, since the uncertainty of finality can deprive a litigant of his opportunity to appeal if he fails to do so within the prescribed time. *Dickinson v. Petroleum Conversion Corp.,* 338 U. S. 507 (1950).

This confusion has been caused by the vacillation of the courts in balancing the sound policy behind the general rule of finality

against the claim of the individual case that justice demands immediate review. 6 *Moore* 68. For an excellent analysis see 6 *Moore* 45-286.

The problem of finality becomes even more vexing when the courts are interpreting 28 U. S. C. A. 1292(1). 5 *Moore* 734-747. One interpretation permits appeal from an order staying an action at law pending the determination of an equitable claim, the order being tantamount to an interlocutory injunction within the scope of 28 U. S. C. A. 1292 (1). *Ettelson v. Metropolitan Life,* 317 U. S. 188 (1942). However the doctrine seems to be overruled by *City of Morgantown W. Va. v. Royal Ins. Co.,* 337 U. S. 254 (1949); but see Mr. Justice Frankfurter's concurring opinion. Even the extension of a temporary restraining order has been held to be an interlocutory injunction that is appealable. *Sims v. Greene,* 160 F. 2d 512 (3d Cir. 1947).

The instant case presents a slightly different aspect of the problem. As pointed out in the majority opinion, the denial falls within a literal interpretation of the statute. This has been considered so clear that no analysis of the problem was deemed necessary in *Raylite Electric Corp. v. Noma Electric Corp.,* 170 F. 2d 914 (2d Cir. 1948); and the Fifth Circuit so held in *International Forwarding Co. v. Brewer,* 181 F. 2d 49 (5th Cir. 1950). However, the Third Circuit after a thorough review of the problem felt that such a denial would not be appealable, for if based on the facts shown, it merely postpones decision until the trial and is not considered as an application for a preliminary injunction. *Morgenstern Chemical Co. v. Schering Co.,* 181 F. 2d 160 (3d Cir. 1950). A summary judgment, however, does not depend only on the absence of a genuine issue as to any material fact. As Judge Hand recognized in the majority opinion, it also requires the moving party to be entitled to such judgment as a matter of law under Federal Rule 56(c). Since there was some indication that the denial was on this latter basis, Judge Hand felt that the order was final and hence appealable. Nevertheless, he also held that the denial in itself should be appealable. It is from this latter contention that Judge Clark vigorously dissented.

It is the writer's opinion that Judge Clark's dissent is the better position. There is nothing in the denial of a summary judgment which has an irreparable effect or precludes further review at a later time. If the basis of denial is that no claim to relief exists as a matter of law, summary judgment should be granted for the opposing party under a procedure comparable to that used under Rule 12 (Judgment on the Pleadings), where the court, on its own motion, may grant whatever relief it deems proper. This type of judgment has always been considered ap-

pealable. 6 *Moore* 2321-2322. However, since the courts do not always follow this procedure, it would be better practice for either party to move explicitly for an interlocutory injunction under 28 U. S. C. A. 1292(1). *Morgenstern Chemical Co. v. Schering Co.,* 181 F. 2d 160 (3d Cir. 1950). Judge Frank, in the instant case, indirectly arrives at this result by treating the order as such a denial since part of the complaint asked for such temporary relief, but the fundamental difficulty of uncertainty of review remains. The need for reform has been recognized by the Supreme Court. *Dickinson v. Petroleum Conversion Corp.,* 338 U. S. 507 (1950) (particularly Mr. Justice Black's dissent). It is hoped that the Supreme Court or Congress will make it clear what procedure should be followed.

Leonard F. Walentynowicz

INCOME TAX — DIVIDENDS HELD TAXABLE INCOME IN YEAR OF ACTUAL RECEIPT

Taxpayer, on a cash basis, received dividends on his federal savings and loan association shares by mail in 1950. They were declared and payable on December 31, 1949 at which time taxpayer had the right to appear personally at a company office and demand payment. *Held:* The dividends were not constructively received during 1949, but constituted 1950 income. *Commissioner v. Fox,* 218 F. 2d 347 (3d Cir. 1954).

INT. REV. CODE OF 1939, § 42(a), 53 STAT 47 (now INT. REV. CODE OF 1954, § 451(a) provides, "The amount of all items of gross income shall be included in the taxable year in which received by the taxpayer . . .." The Commissioner contended that the fact that the taxpayer could have gone to a company office and demanded payment on December 31 made the income taxable in 1949 under the doctrine of constructive receipt. This treats as taxable income which is unqualifiedly subject to the demand of a taxpayer on a cash basis, whether or not such income has been actually received in cash.

In *Avery v. Commissioner,* 292 U. S. 210 (1934), it was held that when it is the practice of the corporation to pay dividends by mail, it cannot be said that the dividends are "cash or other property unqualifiedly subject to the taxpayers demand" until the checks are actually received by the stockholders. Prior to the *Avery* decision, the Commissioner maintained and lower courts frequently decided that dividends were taxable to taxpayers on a cash basis in the year in which they were declared and mailed. See *Schearman v. Commissioner,* 66 F. 2d 256 (2d Cir. 1933).