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Hyman & Co. v. Velsicol Corporation: What Is A Reviewable Judgment?

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(Editor's Note: This article was written by Mr. Perkins while he was a student at the University of Denver College of Law. From time to time, your Editor expects to publish other papers written by students in DU's course in "Legal Writing" conducted by Mr. Allen Mitchem.)

An interesting case, decided by the Colorado Supreme Court on December 6, 1948[1], raises an important problem in the field of appellate review. Perhaps a decision as to the reviewability of a judgment, decree or order is one of the most difficult for a court to hand down—a field in which almost invariably "hard cases make bad law." A litigant or his attorney may become down-hearted and justifiably disconsolate after losing a case on a close point of substantive law. But how much more dissatisfied must be the litigant or attorney whose case is not heard on the merits at all because of a seeming pedantic application of the technical law of procedure.

Although the facts in the *Hyman* case are highly complicated as to the merits—upon which final decision now remains open—they are relatively simple as bearing on the procedural question. The Velsicol Corporation brought suit against Julius Hyman & Co., seeking a sweeping injunction against defendant's manufacture and sale of insecticides by reason of alleged misuse of confidential information received by defendant Julius Hyman at a previous time when he was an officer of plaintiff corporation, and for an accounting in regard to the use thereof and the sales already made. As an interesting sidelight, the principal insecticide in question was chlordane, a revolutionary new product which has been extremely helpful in the fight against agricultural pests, and of which plaintiff and defendant have been the only two manufacturers.

The case came on for trial, and, after hearings, the record of which fills some three to four volumes of typewritten transcript, and in which all the issues of fact and the general equities among the parties were found in favor of the plaintiff, the court decreed the broad injunctions sought by plaintiff in perpetual form. The court further decreed that the matter be referred to a special master for an accounting. How involved a matter this will be may be suggested by the fact that defendant's gross sales of the products in question had amounted by March, 1948, to approximately $1,400,000. At this juncture defendant sought and obtained a stay of execution as to the injunction, for a short period, and proceeded to sue out a writ of error on supersedeas for a review of the propriety of the

[1] *Julius Hyman & Co. et al. v. Velsicol Corporation,* No. 16084, 201 P. (2d) Adv. 380. Rehearing denied January 3, 1949.

issuance of the injunction and of the findings of fact which led to the decree. Defendant in error, plaintiff below, moved the Supreme Court to dismiss the writ of error, and in a four to three decision defendant in error's motion was granted.

The majority opinion was written by Mr. Justice Hilliard, with the then Chief Justice, Haslett P. Burke, and Justices Jackson and Stone dissenting without opinion. The court's reasoning on the point in question begins with the observation that under our rules a writ of error lies only to a final judgment. The opinion then cites *Dusing v. Nelson*, 7 Colo. 184, 2 P. 922 (1883), for the statement: "If the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are to be determined, it is interlocutory, and not final." The *Dusing* case involved the question of whether a judgment for costs only in an ejectment action is final in the sense that the trial court may not reopen the case upon later application. Whether the facts or the holding in this case justify the sweeping nature of the quoted statement is somewhat questionable.

The remainder of the court's reasoning on the point is taken from that of a Missouri intermediate court in *Godefroy Mfg. Co. v. Lady Lennox Co.*, 110 S.W.(2d) 803 (1937). While that case is authority for the Colorado court's holding, it states the rule rather baldly, with no reasoning or rationale in support of it.

In summation the Colorado court says: "Since there was no judgment for money against them, plaintiffs in error had but to observe the injunction against them, desist from manufacturing and selling the product, and await final judgment . . . . We cannot give countenance to the unprecedented procedural methods sought to be invoked by plaintiffs in error."

Weight of Authority to Contrary

In spite of the court's confessed inability to find support for such "unprecedented procedural methods", there are cases which support the position of plaintiff in error.[2] Their reasoning may best be illustrated by reference to the facts of the *Hyman* case. Here the primary issues between the parties were as to defendant's right to continue business, manufacturing and selling insecticides. In a determination of these issues highly involved questions of law and fact were presented to the trial court, and were resolved by that court in favor of plaintiff. Plaintiff's principal prayer for

[2] See, for example, *Smith v. Walker*, 57 Mich. 456, 22 N.W. 267 (1885). Cf. *Wilson v. Wilson*, 64 Mont. 533, 210 P. 896 (1922); *Allison v. Drake*, 145 Ill. 537, 32 N.E. 537 (1892); *McMurray v. Day*, 70 Iowa 671, 28 N.W. 476 (1886); *O'Rear v. O'Rear*, 227 Ala. 403, 150 So. 502 (1933); *Peterson v. Lightfoot*, 47 Cal. App. 646, 191 P. 48 (1920); *Lewis v. Hickok*, 149 Ohio St. 253, 78 N. E. (2d) 569, (1948); *Altschuler v. Altschuler*, 399 Ill. 559, 78 N.E. (2d) 225, 3 A.L.R. (2d) 333 (1948); *Sacramento Valley Irr. Co. v. Lee*, 15 N.M. 567, 113 P. 834 (1910); *Ashton v. Thompson*, 28 Minn. 330, 9 N.W. 876 (1881).

relief was for an injunction which by its terms would put defendant out of business. This injunction was granted. Plaintiff also sought the additional relief of an accounting for profits. Without regard to the question of whether an accounting before a master is a ministerial or a judicial matter, it is clear that in this case it was completely ancillary to and dependent upon the principal relief demanded, and upon the findings of fact and of law made in the determination of the principal issue. At this point defendant sought review of the trial court's decision of the main portion of the case, that portion which represented the basic legal conflict between the parties.

The relative positions of the parties is well stated by the Supreme Court of Michigan in a case which should be hoary with precedence . . . . . . *Smith v. Walker*,[3] decided in 1885: "The decree grants to the complainant the principal relief prayed for in his bill, and gives him the immediate benefit of the judicial action by an injunction that in effect puts an end to defendant's business. The only ground suggested for a contrary view is that hereafter, when the accounting is completed, there must be a further decree. But it is not unprecedented that there should be two decrees in the same case which are final, in the sense of finally determining rights; and when the effect is such that the party obtaining the decree is immediately put in possession of the right adjudged to him, the right to appeal ought not to be questionable. Any other view would sometimes, in a case like the present, inflict irreparable injury, with no means in the law for redress."

In effect, the decree of injunction here is one "settling the equities between the parties",[4] "the final determination of a substantial right for which the action was brought"[5]. "The question, as affecting the right of appeal, is not what the form of the order may be but what is the legal effect"[6]. In the view of these courts the decree in question would be a final judgment in the sense of being an appealable one.

Supporting Precedent and Rules in Colorado

Is there nothing in the Colorado cases which would indicate a tendency toward liberality in such matters? It is interesting to note that the following quotation from an early California case[7] had such an effect upon Colorado judges that it is quoted in full in three different Colorado cases[8]: "A final judgment is not necessarily the last one in an action. A

[3] 57 Mich. 456, 22 N.W. 267 (1885).
[4] *O'Rear v. O'Rear*, supra, 150 So. 502, at 505.
[5] *McMurray v. Day*, supra, 28 N.W. 476, at 477.
[6] *Peterson v. Lightfoot*, supra, 191 P. 48.
[7] *Sharon v. Sharon*, 7 P. 456 (1885).
[8] *Daniels v. Daniels*, 9 Colo. 133, at 139 and 140, 10 P. 657 (1886); *Standley v. Hendrie & Bolthoff* Mfg. Co., 25 Colo. 376, at 379, 55 P. 723 (1898); *Durst v. Haenni*, 23 Colo. App. 431, at 438 and 439, 130 P. 77 (1913).

judgment that is conclusive of any question in a case is final as to that question. The code provides for an appeal from *a* final judgment, not from *the* final judgment in an action." One might note that Rule 111(a) uses the words "*a* final judgment." One Colorado court[9] is sufficiently moved by the gospel from California to add: "So that the real test to apply is, that if the judgment pronounced is in the nature of a final one, and is such upon the question adjudicated, then it becomes such; or, otherwise stated, where the judgment pronounced is final of the rights of the parties on the questions therein involved, and settled, and separable from any other that may be rendered in the action, it is as to such questions a final judgment." After all, it was a Colorado court which said[10]: "The rule is well established that where doubt exists as to the right of review, such doubt should be resolved in favor of a review where substantial rights are involved." This seems to be the simplest manner for disposing of the problem.

There are other possibilities. Rule 111 (a) (3) provides for a writ of error to a temporary injunction. It is clear that if the judgment appealed from is not a final injunction, then it is an interlocutory one. A question might be asked: Is it possible for an interlocutory order or decree to contain any injunction other than a temporary one? It would seem that since an interlocutory order may always be modified or rescinded pending that which the court would consider a final judgment, the injunction must be in effect re-promulgated in the final decree, until which time it is merely a temporary injunction, and as such appealable by writ of error under Rule 111 (a) (3). Although there is authority which would seem to indicate that there can be a judgment which is res judicata on the point determined without being final in the sense of subject to review[11], the Colorado court has taken a contrary view[12]. However, at best this is simply an alternate route toward the same conclusion, and one which is probably less desirable from the standpoint of precedent.

Another possibility would be for the appellate court to construe the decree of injunction as a separate judgment under Rule 54 (b). Such a possibility was rejected by the Colorado court in regard to a judgment of dismissal as against one of several defendants in a decision prior to the Rules, in which Justice Hilliard dissented[13]. However, it may be noted that Rule 54 (b) of the Federal Rules has been completely amended in

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[9] *Standley v. Hendrie & Bolthoff Mfg. Co.*, supra.

[10] *Ellis v. Gibbons*, 26 Colo. App. 454, at 460, 145 P. 285 (1914). This case was subsequently reversed upon a different point. *Gibbons v. Ellis*, 63 Colo. 76, 165 P. 783 (1917).

[11] *Bannon v. Bannon*, 270 N.Y. 484, 1 N.E. (2d) 975, 105 ALR 1401 (1936).

[12] *Rockwell v. District Court*, 17 Colo. 118, at 129, 29 P. 454 (1891): "The doctrine of res judicata is applicable only to those judgments, decrees, orders or rulings of record which are so far material and final that a review thereof may be had through the ordinary procedure provided, such as appeals or writs of error."

[13] *Boxwell v. Greeley Union National Bank*, 89 Colo. 574, 5 P. (2d) 868 (1931).

the direction of a more conservative approach to the problem of the piecemeal appeal.

A factor which might be borne in mind is that, in general, foreign decisions carry less weight in procedural matters than in fields of substantive common law[14]. Procedural law by its very nature is local law, law fashioned to meet the needs of the particular jurisdiction, and dependent upon codified presentation, either by legislative enactment or by rules of court. A state court should feel less constrained by the weight of foreign precedent in matters of its own practice and procedure, and more free to decide such questions on a rational and open-minded basis. With this suggestion in mind, it would be desirable to discuss the practical effect of the decision in the *Hyman* case.

Accounting is Subsidiary Matter

An accounting, when sought as additional relief rather than as an end in itself, is in its very nature a subsidiary remedy. It may arise in a partition suit. *A* sues *B* contending that Blackacre, which has been occupied solely by *B*, is actually held by them in common. *A* demands a decree of sale, with division of the proceeds, and, in addition, that *B* be required to account for the rents and profits of Blackacre during his occupancy. The court finds in A's favor, decrees a partition and sale, and turns the matter over to a master for an accounting. If *B* may not have an appeal pending the accounting, of what value is his appeal? If the trial court should be reversed, Blackacre has been sold, and *B's* chances of getting it back are at least doubtful and will involve action against the purchaser. The substantive rights, the crucial rights, of the parties were settled at the time of the partition decree.[15] If the trial court were in error in its decision, no accounting would ever be necessary. From the standpoint of prompt justice and of economy *B* should have his appeal at that stage in the proceedings.

Similarly in the case of the injunction in an action such as the present. *A* sues *B* for an injunction and an accounting. *A* gets the injunction, at which point *B* goes out of business pending the outcome of the accounting. While it may not be a fact subject to judicial notice, it is nevertheless obvious to anyone familiar with the practical side of the law that *A* is in a position to be able to delay and prolong the accounting almost indefinitely through various procedural and practical techniques, knowing that the longer he can delay, the more chance he has of eliminating *B* permanently from the picture, and perhaps of avoiding the defense of an appeal.[16]

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[14] "Appeals are creatures of statute, and hence decisions regarding the appellate practice of other states are not generally regarded as of value as precedents." 14 Am. Jur., Courts, Section 86, page 300.

[15] *Peterson v. Lightfoot, Allison v. Drake,* and *Wilson v. Wilson,* supra, note 2.

[16] *Sacramento Valley Irr. Co. v. Lee,* supra, note 2.

In *Boxwell v. Greeley Union National Bank, supra,* Mr. Justice Hilliard dissented in these words:

"Which brings me to the principle which I conceive should be our guide, namely, that lawyers be advised within the limits of the law; and that in considering those limits the practical things that confront attorneys should receive our consideration at least as readily as refined points of procedure."

To this quotation perhaps only one thought might be added . . . that in considering the practical things confronting attorneys the court should also bear in mind those for whom our courts of justice exist, the litigants. Judicial temperament is reputed to be slow to welcome innovation, and in the history of our jurisprudence we have seen equity and administrative agencies arise to fill a need which has not been met by the common law courts. A greater awareness on the part of both the judiciary and the profession that their reason for being is the public need will go far toward preserving public confidence in the courts and the bar.[17]

Letter to the Editor

In the May, 1949, Dicta, on page 125, there appears this statement: "Negro lawyers are not accepted for membership in the American Bar Association". This statement is susceptible to two interpretations. One is that no Negroes are accepted for membership in the American Bar Association, and the other is that some Negroes are not accepted for membership in the American Bar Association. The context would seem to indicate that the author intended the first interpretation that no Negro lawyers are accepted for membership in the American Bar Association. If this was intended, it is incorrect, because the American Bar Association does have Negro members.

This matter was very vigorously debated in the 1943 meeting of the American Bar Association, as will be seen from the American Bar Association Journal of October, 1943. The following resolution was adopted:

> "Resolved, that it is the consensus of this meeting that membership in the American Bar Association is not dependent upon race, creed or color."

It is my understanding that the American Bar Association had Negro members at the time this resolution was adopted and has since admitted other Negroes to membership.

HUBERT D. HENRY

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[17] The reader's attention should be called to an extensive annotation on the general subject here discussed, to be found in 3 A.L.R. (2d) 342. It is regretted that the annotation appeared too late to be considered in the preparation of this article.