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FEDERAL COURTS-APPEALS-FINALITY OF DECREE DISMISSING INTERVENOR'S CLAIM AFTER TRIAL

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FEDERAL COURTS—APPEALS—FINALITY OF DECREE DISMISSING INTERVENOR'S CLAIM AFTER TRIAL—Dickinson, a promoter of Petroleum, sued Lloyd, his fellow promoter, to impress an equitable lien on certain stock in Lloyd's possession. Petroleum and some of its shareholders known as the "Rinke subscribers" intervened, seeking to have the stock issue canceled because of fraud, and to recover damages for secret profits gained through breach of fiduciary duty to the corporation. In 1947, after trial, a decree was entered. Claims of both Dickinson and Lloyd were dismissed. Judgment against them was entered in favor of the class of subscribers, the decree providing that the several claims of the individual subscribers be liquidated for the purpose of fixing the share of each in the recovery. The corporation was given judgment for certain shares of stock in the hands of Lloyd's administrators. The remainder of the corporation's claims were dismissed, but the court retained jurisdiction for the purpose of supervising certain stock distributions by the corporation. In 1948, in a "final decree," so labelled, apportionment of the recovery among the "Rinke subscribers" was made. The corporation now seeks to appeal from the 1948 decree. *Held,* appeal dismissed. The 1947 decree was final as to the corporation, and appeal should properly have been taken from that decree. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 70 S. Ct. 322 (1950).

Jurisdiction of the court of appeals extends to appeals from "final decisions,"[1] with certain statutory exceptions.[2] In several cases, it has been held that the denial of the right to intervene, when that right is absolute, is "final" for purposes of the statute.[3] On the other hand, when intervention is discretionary,

[1] 62 Stat. L. 929 (1948), 28 U.S.C.A. (1949) §1291. Deciding what decisions are final has been a source of considerable judicial confusion and despair. Clark v. Taylor, (2d Cir. 1947) 163 F. (2d) 940, 945 (dissent); McGourkey v. Toledo and Ohio Central R. Co., 146 U.S. 536, 13 S.Ct. 170 (1892). See also, Crick, "The Final Judgment as a Basis for Appeal," 41 YALE L.J. 539 (1932); 49 YALE L.J. 1476 (1940); 56 YALE L.J. 141 (1946); 47 COL. L. REV. 239 (1947); comment, 47 MICH. L. REV. 233 (1948).

[2] 62 Stat. L. 929 (1948), 28 U.S.C.A. (1949) §1292.

[3] Brotherhood of Railroad Trainmen v. B. & O. R. Co., 331 U.S. 519, 67 S.Ct. 1387 (1947); Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 61 S.Ct. 666 (1941).

such a ruling does not meet the finality test.[4] In the principal case, the actual allowance of intervention is equated to possession of an absolute right to intervene, at least when subsequent dismissal on the merits takes place. There is, of course, little difference from the standpoint of the intervenor between dismissal based upon the pleadings and dismissal based on the evidence.[5] In either situation, important substantive rights are affected. The conclusion of the Court in the principal case is consistent with the theory underlying the original view taken toward the question of appeal from an order refusing intervention.[6] Revision of rule 54(b) of the Federal Rules of Civil Procedure,[7] dealing with actions in which more than one claim for relief is presented, was recently undertaken to eliminate some uncertainties on the question of finality.[8] Because the decree here in question was handed down prior to adoption of the revision, the problem was considered without reference to it. Some doubt has been expressed as to whether the statutory requirements for appeal can be altered by revision of rules relating to the district courts.[9] Does a decision final for purposes of appeal remain so, regardless of the revision?[10] In situations similar to the principal case, it will be necessary under rule 54(b) to determine whether the decree "adjudicates less than all the claims." The problem of finality faced in the principal case is therefore not necessarily solved under the provisions of rule 54(b), although the question must be posed in a new aspect as a result of its adoption.

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[4] United States v. California Canneries, 279 U.S. 553, 49 S.Ct. 423 (1929); City of New York v. Consolidated Gas Co., 253 U.S. 219, 40 S.Ct. 511 (1920); Mullins v. De Soto Securities Co., (5th Cir. 1943) 136 F. (2d) 55.

[5] See the opinion of Judge Learned Hand in the principal case in the lower court: Dickinson v. Mulligan, (2d Cir. 1949) 173 F. (2d) 738 at 740.

[6] See cases cited note 3 supra. Various judicial theories and tests are set forth in 56 YALE L.J. 141 (1946) and 47 MICH. L. REV. 233 (1948).

[7] The revised rule: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but 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. 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 claim. As amended Dec. 27, 1946, effective March 19, 1948."

See 49 YALE L.J. 1476 (1940) for the earlier rule 54(b) and decisions under it, 56 YALE L.J. 141 (1946) and 47 MICH. L. REV. 233 (1948).

[8] Note to Rule 54(b), Advisory Committee's Report of Proposed Amendments to Rules of Civil Procedure (1946).

[9] Hunteman v. New Orleans Pub. Serv., (5th Cir. 1941) 119 F. (2d) 465.

[10] See the dissent of Judge Frank in Amer. Mach. and Metals, Inc. v. De Bothezat Impeller Co., (2d Cir. 1949) 173 F. (2d) 890 at 892.