RECENT DEVELOPMENTS

FEDERAL PROCEDURE: COURT OF APPEALS DIRECTS JUDGMENT ON MERITS FOR PLAINTIFF UPON INTERLOCUTORY APPEAL

IT HAS NOW been established by *Hurwitz v. Directors Guild*[1] that on an appeal from an order denying a preliminary injunction the appellate court may review the merits of the entire litigation and direct entry of a final judgment for the plaintiff. The plaintiffs in the instant case were members of a labor union which was in the process of merging with the defendant-union. As a part of the agreement, the surviving union sought to impose upon the combined membership its requirement that all members sign a non-communist oath. The plaintiffs, contending that the imposition of the oath constituted an unreasonable criterion under New York common law for expulsion from union membership and furthermore that the oath was an unconstitutional condition upon such membership, brought suit to direct the defendant to admit them as members in good standing without regard to the oath. They also moved for a preliminary injunction either delaying the merger pendente lite or requiring the defendant to admit them to membership pending the outcome of the litigation. The district court denied the motion, and the plaintiffs appealed. Sidestepping the constitutional issue, the court of appeals held that the loyalty oath was per se an unreasonable and unlawful requirement for union membership under the common law of New York, and thereupon directed entry of a final judgment on the merits for the plaintiff.

Generally upon appeal from an interlocutory order when permitted by section 1292 (a) (1) of the Judicial Code,[2] the appellate court will go no further into the merits than is necessary to decide the propriety of the order supporting the appeal.[3] This rule is con-

[1] 364 F.2d 67 (2d Cir. 1966), *cert. denied*, 35 U.S.L. WEEK 3201 (U.S. Dec. 5, 1966).

[2] 28 U.S.C. § 1292 (a) (1) (1964).

[3] *E.g.*, United States v. Brown, 331 F.2d 362 (10th Cir. 1964); Flight Eng'rs Ass'n v. American Airlines, Inc., 303 F.2d 5 (5th Cir. 1962), *appeal dismissed per stipulation*, 314 F.2d 500 (1963); Shearman v. Missouri Pac. R.R., 250 F.2d 191 (8th Cir. 1957); Loew's Drive-In Theatres, Inc., v. Park-In Theatres, Inc., 174 F.2d 547 (1st Cir.), *cert. denied*, 338 U.S. 822 (1949); Local 186, Food Workers Union v. Smiley,

sistent with the precept that the district court need not consider the case on its merits in order to determine if the movant is entitled to preliminary relief.[4] Since in many instances, therefore, the merits have not been fully explored prior to the appeal, a policy decision dictates that the appellate court should not consider any more than is essential to decide the procedural motion, for to do otherwise would be tantamount to rendering a decision without a full disclosure of the facts and legal arguments.[5] Equally, the rule derives from the desire to retain litigation in the district court until the case has been fully heard by it in order to prevent a party from securing a piecemeal trial as a delaying tactic or an advisory opinion from the higher court.[6]

Nevertheless, under a well-established exception to the general practice, an appellate court may reach the merits and direct a verdict for the *defendant,* thus dismissing the complaint, if its examination of the record upon an interlocutory appeal reveals that the plaintiff's position is entirely devoid of merit.[7] The exception operates to permit the court to dismiss the complaint and thereby terminate the litigation upon review of the questions which are determinative of the order supporting the appeal.[8] Similarly the court may consider, upon an interlocutory appeal, a prior motion to dismiss for failure to state a claim,[9] or for lack of jurisdiction,[10] or for improper venue[11] when such inquiry will be dispositive of the action.

164 F. 2d 922 (3d Cir. 1947); Sheldon v. Moredall Realty Corp., 95 F.2d 48 (2d Cir. 1938); see *Ex parte* National Enameling & Stamping Co., 201 U.S. 156, 162 (1906).

[4] Barnwell Drilling Co. v. Sun Oil Co., 300 F.2d 298 (5th Cir. 1962); see Meiselman v. Paramount Film Distrib. Corp., 180 F.2d 94 (4th Cir. 1950); see also FED R. CIV. P. 65. See generally 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1433 (Wright ed. 1958, Supp. 1965).

[5] See Mesabi Iron Co. v. Reserve Mining Co., 270 F.2d 567, 570 (8th Cir. 1959); Meiselman v. Paramount Film Distrib. Corp., *supra* note 4, at 96.

[6] Meiselman v. Paramount Film Distrib. Corp., *supra* note 4.

[7] *E.g.,* Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 (1900); Smith v. Vulcan Iron Works, 165 U.S. 518 (1897); Arizona Edison Co. v. Southern Sierras Power Co., 17 F.2d 739 (9th Cir.), *cert. denied,* 274 U.S. 757 (1927). See Meccano, Ltd. v. John Wanamaker, 253 U.S. 136, 141 (1920); Mansfield Hardwood Lumber Co. v. Johnson, 242 F.2d 45, 46 (5th Cir. 1957).

[8] 6 MOORE, FEDERAL PRACTICE ¶ 54.08[1] (2d ed. 1953); see Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Arizona Edison Co. v. Southern Sierras Power Co., *supra* note 7.

[9] See Deckert v. Independence Shares Corp., *supra* note 8, at 287; Greater Del. Val. F.S. & L. Ass'n v. Federal Home L.B. Bd., 262 F.2d 371, 372 (3d Cir. 1958). *But see, e.g.,* Local 186, Food Workers Union v. Smiley, 164 F.2d 922 (3d Cir. 1947).

[10] See Deckert v. Independence Shares Corp., *supra* note 8, at 287.

[11] See Riverbank Labs. v. Hardwood Prods. Corp., 220 F.2d 465, 466 (7th Cir. 1955), *rev'd on other grounds,* 350 U.S. 1003 (1956).

Several tests have been proposed to determine when dismissal is appropriate, including whether all issues can be disposed of at once without injustice to the parties[12] and whether the case involves a question of triable fact.[13] While this power to dismiss the case on the merits seems originally to have been assumed without explanation,[14] it was later justified as a means to conserve judicial time[15] and by construction of the act allowing appeals from interlocutory orders.[16]

The court recognized that *Hurwitz* is the first decision to permit a judgment on the merits in favor of the plaintiff upon an interlocutory appeal, a question upon which the Second Circuit previously had expressly refused to pass.[17] It explained the failure of any precedent by observing that very few cases present no question of fact, and even fewer would warrant a judgment for the plaintiff before a trial on the merits. The court, however, could find no reason why the exercise of such power would be undesirable, especially since it secures economy of litigation. This goal, it noted, is served as well when the court directs a verdict for the plaintiff as when it does so for the defendant.

Even though the instant case theoretically extends the law to allow an appellate court to direct the entry of a final judgment for the plaintiff as well as the defendant, the practical and precedential value of the decision is limited by the unique factual situation which produced the result. No triable issue of fact was present, and the application of the relevant legal principles to the defendant's required oath was seemingly clear. Thus the case was ripe for the result actually reached. However, the policy supporting the result, economy of litigation, must not be undervalued. The decision, as well as the analogous rule allowing appellate courts to decide the merits in favor of the defendant, alleviates the necessity, in appropriate cases, of repeated transfers of a case between the district court and the court of appeals. Thus, although the Interlocutory Appeals Act[18] is actually an exception to the final judgment

[12] Meccano, Ltd. v. John Wanamaker, 253 U.S. 136, 140 (1920).
[13] Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 495 (1900).
[14] See Smith v. Vulcan Iron Works, 165 U.S. 518, 520 (1897).
[15] Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 495 (1900).
[16] Smith v. Vulcan Iron Works, 165 U.S. 518 (1897).
[17] Meccano, Ltd. v. John Wanamaker, 250 Fed. 250 (2d Cir. 1918), *aff'd*, 253 U.S. 136 (1920).
[18] 28 U.S.C. § 1292 (1964).

rule,[19] the judicial economy policy of the latter is being served by intermediate appeals in conjunction with these court-made procedures which allow directed verdicts.

Although the holding of the *Hurwitz* case serves the function of economy, the court failed to lay down a clear test to be used to determine when the rule should be applied; however, it did intimate that the absence of any triable issue of fact is a major consideration. The court also suggested that the power to direct a verdict must be exercised cautiously. This notion is supportable because the particular procedural device in question is somewhat more drastic than that allowing the appellate court to dismiss the complaint. When the court decides on the merits in favor of the defendant, the plaintiff has at least filed his major pleading, the complaint. The defendant, on the other hand, has not always filed his answer before the interlocutory appeal is taken.[20] Thus the test should be stringent, and a directed verdict for the plaintiff should be permitted only in very rare cases, since the defendant is entitled to his day in court if there is any possibility that he may offer a meritorious defense. A seemingly workable standard, which incorporates the suggestion of the court in the instant case, would be whether it is apparent from the record that there is no triable issue of fact and that, on the facts as stated, any defense the defendant might raise would be clearly devoid of merit. Under the foregoing test, the salutary effect of the Second Circuit's formulation may be realized without sacrificing justice to the defendant for the mere convenience of the court.

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[19] 28 U.S.C. § 1291 (1964).

[20] *Compare* FED. R. CIV. P. 12(a) *with* Smith v. Vulcan Iron Works, 165 U.S. 518 (1897). See Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 (1900).