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Courts -- Appeals of Orders -- Stay of Action

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The instant case agrees with the views expressed by the majority of cases on point. They feel Indians are within a class of persons liable to be particularly injured by intoxicating liquors. The dissenters base their argument on the fact that this statute[12] was passed many years ago when Indians were lawless. The courts have never attempted, in recent years, to justify the conclusion that Indians are a class of people *peculiarly* liable to be injured by intoxicants.

It is obvious that the court, in the principal case, has not attempted to use any aggressiveness in pioneering a change in a law that is definitely outdated, but has been content to sustain this archaic legislation—on grounds which factually may no longer exist. The original reason for such Indian legislation was to protect the Indians, since they were considered savages, with no education, not used to living in the midst of modern civilization.[13] The status of Indians over one hundred years ago brought about prohibitive liquor legislation for their benefit; but there is perhaps, no reason for a court, at the *present* time, to rely on cases passed forty to one hundred years ago,[14] since Indians of today, remote from the tribal state, are as capable as any other race of coping with the vices of our modern civilization.

The trend today is toward a stricter interpretation of the word "reasonable," when a racial, or other irrational basis is involved, as has been evidenced by decisions against class legislation affecting negroes.[15] Judging by this trend and keeping in mind the transition Indians have made from a veritable savage state, to respected members of a civilized society, it seems likely that statutes denying Indians the privilege to buy liquor will come under direct challenge and be declared invalid in the near future, at least with reference to the sanction of the Federal Constitution.

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COURTS—APPEALS OF ORDERS—STAY OF ACTION

In an action for an accounting, the defendant moved for a stay of the action pursuant to Section 3 of the United States Arbitration Act.[1] The district court found that the agreement under which arbiration was sought did not constitute an agreement to arbitrate and entered an order

12. See note 1 *supra*.
13. 39 YALE L.J. 307 (1930).
14. See notes 3 and 6 *supra*.
15. Brown v. Board of Education of Topeka, 347 U.S. 686 (1954)(Denying negroes the right to attend the same schools as whites was "unreasonable" class legislation.); Shelly v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).

1. 9 U.S.C. § 3 (1947): "If any suit or proceedings be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . . ."

denying defendant's motion. An appeal taken from this order was dismissed by the Court of Appeals and the Supreme Court granted certiorari.[2] *Held*, such an order is not appealable as a final decision or as an interlocutory order refusing an injunction.[3] *Baltimore Contractors, Inc. v. Bodinger*, ——*U.S.*——, 75 S.Ct. 249 (1955).

Where an order is entered which clearly grants or refuses injunctive relief, no questions as to appealability arises.[4] However, the order must be conclusive as to its effect upon the substantive rights of the parties for the courts to deem it the granting or refusing of an injunction.[5] It is clear also, that an interlocutory order entered in a court of equity, staying temporarily or permanently the proceedings of another court, is appealable.[6]

Prior to the adoption of the Federal Rules of Civil Procedure, a ruling of a district court sitting in equity, pertaining to a matter on the law side of the court, had the same effect as being issued by a separate and distinct court.[7] In *Enelow v. New York Life Insurance Co.*,[8] suit at law was brought upon an insurance policy, and the defendant interposed as a defense an equitable counterclaim praying for rescission of the policy, and included a motion to try the equitable issue prior to the issue raised by the complaint. It was held that such an order requiring or refusing to require that an equitable counterclaim be heard first, in effect grants or refuses an injunction restraining proceedings at law precisely as if the order restrained or refused to restrain a suit at law in a separate court. Though the Federal Rules of Civil Procedure provided for only one form of action,[9] this distinction between law and equity still prevailed,[10] and the *Enelow* case was followed where similar facts were presented before the Court after adoption of the Rules.[11] It was held, shortly after the

2. Baltimore Contractors, Inc. v. Bodinger, 347 U.S. 942 (1954).

3. 28 U.S.C. § 1291 (1948): "The courts of appeal shall have jurisdiction of appeals from all final decisions. . . ." 28 U.S.C. § 1292 (1) (1948) permits "appeals from interlocutory order . . . granting, continuing, modifying, refusing, or dissolving injunctions. . . ."

4. General Electric Company v. Marcel Rare Metals Company, 287 U.S. 430 (1932); Stafford v. Wallace, 258 U.S. 495 (1922).

Since an order granting or denying a stay under Sec. 3 of the Arbitration Act is not a final decision (Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, (1935) this discussion will be limited to the application of the statute allowing appeals from interlocutory orders.

5. Morganstern Chemical Co. v. Schering Corporation, 181 F.2d 160 (3d Cir. 1950) (a denial of a motion for summary judgment in a suit to enjoin the use of a trademark, was not the refusal of an injunction).

6. John Hancock Mut. Life Ins. Co. v. Kraft, 200 F.2d 952 (2d Cir. 1953); *accord* Sullivan v. Title Guarantee and Trust Co., 167 F.2d 393 (2d Cir. 1948).

7. King Mechanism and Engineering Co. v. Western Wheeled Scraper Co., 59 F.2d 546 (7th Cir. 1932).

8. 293 U.S. 379 (1935).

9. Fed. R. Civ. P. 2.

10. Bereslavsky v. Kloeb, 162 F.2d 862 (6th Cir. 1947); Coca-Cola Co. v. Dixie-Cola Laboratories, Inc., 155 F.2d 59 (4th Cir. 1946); Commercial Nat. Bank in Shreveport v. Parsons, 144 F.2d 231 (5th Cir. 1944); Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943); Fitzpatrick v. Sun Life Assur. Co. of Canada, 1 F.R.D. 713 (D.N.J. 1941).

11. Ettelson v. Metropolitan Life Insurance Corp., 317 U.S. 188 (1942).

Enelow case, that an application for a stay pursuant to Section 3 of the Arbitration Act is in the nature of an equitable plea, and an order refusing to stay an action at law is appealable as it in effect refuses an injunction;[12] but an order staying an admiralty action and requiring the parties to submit to arbitration is not appealable.[13] In 1948, the Supreme Court held that an order granting or refusing a stay of an action, equitable in nature, is not an order granting or refusing an injunction.[14] To the same effect, where a district court has before it a matter cognizable at law, an order granting or refusing a stay in the proceedings to await the determination of matters pending elsewhere, has been held not to be an order granting or refusing an injunction.[15] In such cases, the action of the court is said to be a mere exercising of its inherent power to control the litigation before it.[16]

The rule laid down in the instant case has the effect of allowing an appeal to be taken from an order granting or denying a defendant's motion for a stay pursuant to Section 3 of the Arbitration Act, *only* if the action in which the order is entered is one cognizable at law. It is submitted that this rule does not lend itself towards attainment of the purpose of the Federal Rules of Civil Procedure, that is, "To secure the just, speedy, and inexpensive determination of every action."[17] It is unlikely that many litigants would take an appeal after final judgment in order to challenge a district court's order granting or denying a stay, due to the expense and delay involved. In practical effect then, the interpretation of alleged arbitration agreements and the determination of whether or not an issue in a controversy will be submitted to arbitration, is left completely in the hands of the trial judge. It has been suggested that "where the postponement of appellate review is wasteful or threatens the substantive rights of the parties, some procedure for prompt review should be devised."[18] If the action brought in the instant case had been one cognizable at law, an appeal would have been allowed. It seems odd to the writer, that appealability should rest

12. Shanferoke Coal and Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935); Markel Electric Products, Inc. v. United Electrical, Radio and Machine Workers of America, 202 F.2d 435 (2d Cir. 1953); Wilco v. Swan, 201 F.2d 439 (2d Cir. 1953); International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1948); American Locomotive Co. v. Chemical Research Corp., 171 F.2d 115 (6th Cir. 1947); Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944); Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1943). *But see*, Hudson Lumber Co. v. United States Plywood Corp., 181 F.2d 929 (9th Cir. 1950) (an appeal was allowed from an order granting a stay under the Arbitration Act in suit for injunctive relief).

13. Schoenamsgruber v. Hamberg American Line, 294 U.S. 454 (1935).

14. City of Morgantown v. Royal Insurance Co., 337 U.S. 254 (1948).

15. Bechard v. National Power and Light Co., 164 F.2d 199 (2d Cir. 1947); Dowling Bros. Distilling Co. v. United States, 153 F.2d 353 (6th Cir. 1946); United States v. Horns, 147 F.2d 57 (3d Cir. 1945); Triangle Conduit and Cable Co. v. National Electric Products Corp., 127 F.2d 524 (6th Cir. 1942); Cover v. Schwartz, 112 F.2d 567 (2d Cir. 1940).

16. *Ibid.*

17. FED. R. CIV. P. 1.

18. Note, *Proposals for Interlocutory Appeals*, 58 YALE L.J. 1186 (1949).

solely upon whether the action in which the order is entered is equitable or legal in nature. The court itself admits that "the incongruity of taking [appellate] jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations."[19]

ALVIN S. SHERMAN

TORTS—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE

Plaintiff brought an action for the wrongful death of her husband as a result of a head-on collision between the autos driven by the defendant and the deceased. The collision occurred as the defendant approached the deceased while the latter's auto was swerving from side to side on the highway. *Held*, defendant was faced with an emergency situation and the doctrine of last clear chance was not applicable. *Burdette v. Phillips*, 76 So.2d 805 (Fla. 1954).

Under the prevailing Florida law contributory negligence is a bar to recovery.[1] However, the doctrine of the last clear chance mitigates the harshness of this common law ruling, by allowing a negligent plaintiff to recover from a negligent defendant,[2] where the latter by exercising little care could prevent or avoid injuring the plaintiff, who by his own negligence has placed himself in a position of peril.[3] The doctrine of last clear chance is an extension of the rule of contributory negligence and is not an exception to it.[4] The contributory negligence of the injured party will not defeat recovery if the defendant, by exercising ordinary care, might have avoided the consequences of the injured person's negligence.[5] When a case arises where the facts are not in dispute and are absolutely conclusive, the

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19. Baltimore Contractors, Inc. v. Bodinger, ——— U.S. ———, 75 S. Ct. 249, 254 (1955).

1. The doctrine of contributory negligence is not modified by statute in Florida, and is a complete defense in an action for damages for personal injuries based on negligence. General Outdoor Advertising Co. v. Frost, 76 F.2d 127, 128 (5th Cir. 1935); Cornell v. First National Bank, 121 Fla. 192, 163 So. 482 (1935); Florida Southern Ry. v. Herst, 30 Fla. 1, 11 So. 506 (1892).

2. Consumer's Lumber and Veneer Co. v. Atlantic Coast Line Ry., 117 F.2d 329 (5th Cir. 1943); Lindsay v. Thomas, 12 Fla. 293. 174 So. 418 (1937).

3. White v. Hughes, 139 Fla. 54, 190 So. 446 (1939). Dunn Bus Service v. McKinley, 130 Fla. 778, 128 So. 865 (1937); Merchant's Transportation v. Daniels, 109 Fla. 496, 502, 149 So. 401 (1933).

4. Merchant's Transportation v. Daniels, 109 Fla. 496,502, 149 So. 401 (1933) "It [the doctrine] does not permit one to recover in spite of his contributory negligence, but merely operates to relieve the negligence of a plaintiff . . . which otherwise would be regarded as contributory, from its character as such."

5. A.B.C. Truck Lines v. Kenemer, 247 Ala. 543, 25 So.2d 511 (1946); Gardner v. Union Oil Co. of California, 216 Cal. 197, 13 P.2d 915 (1932); Baker v. Reid, 57 A.2d 103 (Del. 1948); Nagel v. Britthauer, 230 Iowa 207, 298 N.W. 852 (1941); Harrison v. Eastern Michigan Motor Bus Co., 257 Mich. 329, 241 N.W. 131 (1932); Schaaf v. Coen, 131 Ohio St. 279, 2 N.E. 2d 605 (1936).