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Federal Civil Procedure -- The Appealability of Interlocutory Orders: 28 United States Code § 1292

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*Federal Civil Procedure*THE APPEALABILITY OF INTERLOCUTORY ORDERS: 28 UNITED STATES
CODE § 1292.*Introduction*

What is an appealable interlocutory order in the federal courts? Attempts to resolve this question have led to considerable litigation and numerous contrary opinions have been spawned. The substantive law involved is section 1292 of the United States Code, Title 28, Judiciary & Judicial Procedure¹, providing for appeals of interlocutory orders. The procedural difficulty is centered upon the interpretation of rule 54 (b) of the Federal Rules of Civil Procedure, which outlines the necessary requirements for an appeal before final order. The split lies in the determination of what actually constitutes an interlocutory order that is appealable and has manifested itself in a conflict among the various federal courts of appeal as to the interpretation of section 1292.

Section 1292 provides for exceptions to the general rule stated in section 1291², Final Decisions of District Courts, that appeals may be had only from final judgments.³ Four exceptions are al-

¹ 28 U.S.C. § 1292 (1952). "The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting."

² 28 U.S.C. § 1291 (1952). "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

³ *St. Louis, Iron Mountain & So. R.R. v. Southern Express Co.*, 108 U.S. 24, 28 (1883).

lowed by section 1292: (1) injunctions; (2) receiverships; (3) admiralty cases; and (4) patent infringements. The principle underlying these few exceptions is the prevention of irreparable damages to the rights of the parties.⁴ The major area of diversification lies in the first exception—injunctions. The courts of appeals are in utter disagreement as to what motions constitute the granting or refusing of an injunction. The problem area is focused in the opinions of the Second and Third Circuits and is even more closely magnified by the split in the Second Circuit itself.⁵ The conflict is spotlighted by the controversy over whether a denial of a summary judgment is a denial of an injunction and thus a final order appealable under section 1292 (1). The Second Circuit permits the appeal;⁶ the Third Circuit refuses it.⁷

The arguments on both sides are telling. The Third Circuit is supported by the greater number of other circuits and has a firm entrenchment in history. The proponents of the Third Circuit present the often used arguments of the evil of piecemeal appeals,⁸ undue delay,⁹ and the heavy costs incident to many appeals.¹⁰ Finally, the advocates of no review point to the already overburdened court calendars.¹¹ On the other side, the equity cry of irreparable damages is most frequently used as the basis for the Second Circuit's view of allowing appeal.¹²

Development of Interlocutory Appeal

The Federal Judiciary Act of 1789¹³ provided for appeals from final judgments or decrees only. This limitation applied to ap-

⁴ *Albert v. School District of Pittsburgh*, 181 F.2d 690 (3d Cir. 1950).

⁵ *Mackey v. Sears, Roebuck & Co.*, 218 F.2d 295, 297-298 (7th Cir. 1955).

⁶ *Federal Glass Co. v. Loshin*, 217 F.2d 936 (2d Cir. 1954).

⁷ *Morgenstern Chemical Co. v. Schering Corp.*, 181 F.2d 160 (3d Cir. 1950).

⁸ *Coskery v. Roberts & Mander Corp.*, 189 F.2d 234, 236 (3d Cir. 1951).

⁹ *Catlin v. United States*, 324 U.S. 229, 234 (1945).

¹⁰ *Federal Glass Co. v. Loshin*, 217 F.2d 936, 940 (2d Cir. 1954) (dissenting opinion).

¹¹ "Trials ought not to be delayed and appellate dockets crowded by appeals from interlocutory orders. . . ." *Morgantown v. Royal Ins. Co.*, 169 F.2d 713, 715 (4th Cir. 1948).

¹² ". . . the property of defendant could be seized and sold in satisfaction. Defendant's right of review . . . would be of doubtful value." *Biggins v. Oltmer Iron Works*, 154 F.2d 214, 217-218 (7th Cir. 1946).

¹³ 1 Stat. 73 (1789).

peals from the highest state courts to the Supreme Court; from district courts to circuit courts; and by implication from circuit courts to the Supreme Court.¹⁴ The provision for interlocutory appeal was first introduced in 1891 when the circuit courts of appeal were established as intermediate appellate courts.¹⁵ Section 7 of the 1891 Act allowed appeals from interlocutory orders in equity "granting or continuing" injunctions, but from these only. In 1895, section 7 was amended to permit an appeal from interlocutory orders refusing or dissolving injunctions.¹⁶ A further amendment was made in 1900 to include orders in receivership.¹⁷ This amendment had the effect of repealing the 1895 provision. However, the latter section was restored in section 129 of the Judicial Code of 1911.¹⁸

The amendment of 1925¹⁹ made two changes. First, it embraced orders modifying injunctions and expanded the number of orders in receivership which were appealable. Second, it dropped the words "in equity" from the phrase, "where upon a hearing in equity in a district court . . ." which had been employed since the original enactment of section 7 in 1891. No change was intended by the omission.²⁰ In 1927, provision was made for interlocutory appeals in patent cases which are final save for accounting.²¹ (Interlocutory appeals in bankruptcy cases are covered by section 24 of the Bankruptcy Act.)²² Finally, on June 25, 1948, the present section 1292 was passed.²³

This lengthy and active history of interlocutory appeals indicates an ever present awareness of Congress that to shut the door completely to appeal prior to final judgments would result in serious irreparable consequences. Whenever the pressure for change rose to such a point that Congress was influenced, legislative remedies followed. Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicality of savings in time and ex-

¹⁴ *Id.* at 85, 84 and 80 (§§ 25, 22, and 13 respectively).

¹⁵ 26 STAT. 828 (1891).

¹⁶ 28 STAT. 666 (1895).

¹⁷ 31 STAT. 660 (1900). *Rowan v. Ide*, 107 Fed. 161, 164 (5th Cir. 1901); *Columbia Wire Co. v. Boyce*, 104 Fed. 172 (7th Cir. 1900).

¹⁸ 36 STAT. 1134 (1911). See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 126-127 (1927).

¹⁹ 43 STAT. 937 (1925).

²⁰ *Hildegard Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 457 (1935).

²¹ 44 STAT. 1261 (1927).

²² 30 STAT. 553 (1898), 11 U.S.C. § 47 (1952).

²³ 28 U.S.C. § 1292 (1952).

pense, and to give proper weight to the effect on litigants.²⁴ Congress has shown a propensity to broaden the right of appeal and it would seem that now again Congress might act. Either Congress should open the door further or take a firm stand against additional appeals.

The history of judicial appeals extends far into the past. The Roman Law, after an early period during which it granted no relief from the decisions of the magistrate, set up a complicated system of appeals. This proved to be burdensome and was subsequently reformed so that no appeals were allowed from interlocutory orders.²⁵ Early England knew no appeal for it was decided that the king's court could not be charged with a false judgment, and the only means for correcting errors in common law courts was by a writ of error.²⁶ These common law decisions involving writs of error are clearly the origin of our rule that only final judgments are appealable.²⁷ This rigid rule of the common law was not known to the equity courts as is indicated by the Judicature Act of 1925.²⁸

Morgenstern v. Federal Glass Co.

The cases in this country fail to show any unanimity upon what interlocutory orders are appealable. In the federal circuits, the majority of the courts maintain that unless an order is clearly final, it will not be appealable. The Third Circuit, the leading advocate of this doctrine, decided in *Morgenstern Chemical Co. v. Schering Corp.*,²⁹ that a denial of a summary judgment was not a final order and therefore not appealable. The plaintiff brought suit against the defendant for an alleged infringement of his registered trade-mark. Plaintiff's motion for a summary judgment was denied by the district court. An appeal was taken to the Third Circuit and there it was urged that the denial of a

²⁴ DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27 (1953). See HART & WECHSLER, *THE FEDERAL COURTS & THE FEDERAL SYSTEM* 1344 (1953).

²⁵ ENGELMANN, *HISTORY OF CONTINENTAL CIVIL PROCEDURE* (Continental Legal History Series) 367-368 (1927).

²⁶ 2 POLLOCH & MATTLAND, *HISTORY OF ENGLISH LAW* 666 (2d ed. 1952). See Note, 31 NOTRE DAME LAW. 55 (1955).

²⁷ See *McLish v. Roff*, 141 U.S. 661, 665 (1891).

²⁸ The Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 GEO. 5, c. 49. See, 4 HALSBURY, *COMPLETE STATUTES OF ENGLAND*, 146, 162 (1929).

²⁹ 181 F.2d 160 (3d Cir. 1950).

motion for summary judgment which, if granted, would have resulted in an injunction, came under the exceptions to the final judgment rule as set out in section 1292 (1).³⁰ The petitioner stated in effect that he was denied an injunction. The Third Circuit ruled that a denial of a motion for summary judgment was not an appealable order when there were genuine issues of fact present. In *Hook v. Hook & Ackerman, Inc.*,³¹ the Third Circuit reaffirmed its position in the *Morgenstern* case when it denied a motion for a permanent injunction that was based upon the granting of a partial summary judgment.

The Eighth Circuit has adopted the view of the Third Circuit in holding that a denial of a motion for summary judgment is not appealable for it is not a final order.³² The Ninth Circuit says that a partial summary judgment is not a final judgment but rather only a pre-trial order and could only be appealable if the action threatens to dissipate the res of the controversy prior to determination of all the issues in the district court.³³ Thus the Ninth Circuit will only allow appeal if by granting the motion, the controversy is settled. They would seem not to consider possible irreparable damages. Likewise, the Tenth Circuit in *Kasishke v. Baker*³⁴ would allow appeal from a partial judgment only if the result amounted to a final order. The United States Court of Customs and Patent Appeals adds additional support to the view that denial of a motion for summary judgment is not an appealable order.³⁵ Strangely enough the Patent Court cites a 1949 Second Circuit court decision as authority for this position.³⁶

The other side of this argument is centered in the Second Circuit, with support from the District of Columbia and occasionally from the Fifth Circuit. The leading case in opposition to the *Morgenstern* rule is the *Federal Glass Co. v. Loshin*³⁷ case in which a denial of a motion for summary judgment was held to be, in effect, a denial of an injunction and appealable under section 1292 (1). The plaintiff had brought an action to enjoin the defendant from copying the plaintiff's tradename and corporate

³⁰ 28 U.S.C. § 1292 (1952). See note 2 *supra*.

³¹ 213 F.2d 122 (3d Cir. 1954).

³² *Dutton v. Cities Service Defense Corp.*, 197 F.2d 458 (8th Cir. 1952).

³³ *Wynn v. Reconstruction Finance Corp.*, 212 F.2d 953 (9th Cir. 1954).

³⁴ 144 F.2d 384 (10th Cir. 1944).

³⁵ *Master, Wardens, Etc. v. Sheffield Steel Corp.*, 41 C.C.P.A. (Patents) . . . , 215 F.2d 285 (1954).

³⁶ *Marcus Breier Sons, Inc. v. Marvlo Fabrics, Inc.*, 173 F.2d 29 (2d Cir. 1949).

³⁷ 217 F.2d 936 (2d Cir. 1954).

title. The district court for the District of Connecticut denied a motion of the petitioner for summary judgment. The petitioner appealed and the respondent moved to dismiss the appeal. Judge Learned Hand's opinion for the court argued that merely because summary judgment was denied because of a genuine issue of fact, this does not justify holding that nothing has been decided; this is no objection, for denial of preliminary injunctions would also be excluded and the result would be a nullity of section 1292 (1). Judge Hand saw the denial working an injustice in that it may result in irreparable injury to the moving party. Judge Frank concurred in this ruling while Chief Justice Clark followed the reasoning in the *Morgenstern* case in his dissent. The Second Circuit had earlier ruled on this same question in *Raylite Electric Corp. v. Noma Electric Corp.*,³⁸ reaching a similar decision, but its ruling was based on the concurrent denial of an injunction.

The Fifth Circuit in hearing argument on denial of petitioner's motion for judgment on the pleadings in the *International Forwarding Co.*³⁹ case found no difficulty with the fact that the appeal was there at all. The decision merely cited in a footnote to section 1292 (1) and proceeded. The other circuits have not found the matter quite so simple. It should be mentioned that the Fifth Circuit has discussed the problem in other cases, reaching a different conclusion.⁴⁰

The Second Circuit also has interpreted rule 54 (b) in a manner diametrically opposed to the Third Circuit. The Second Circuit, along with the Court of Appeals of the District of Columbia, held that the courts of appeal are required to make an independent determination as to whether the order in question was, in fact, a final order.⁴¹ Again, as in the summary judgment question, the Second Circuit found itself internally split. In *Pabellon v. Grace Line, Inc.*,⁴² Judge Clark wrote the opinion and held that the district court judge had jurisdiction to decide appealability of orders. Judge Frank, in a concurring opinion, disagreed in respect to this phase of the case. Eight days later, in *Flegenheimer v. General Mills*,⁴³ the Second Circuit did an about face and held that the circuit court should make an independent determination, the majority of the court accepting Frank's reason-

³⁸ 170 F.2d 914 (2d Cir. 1948).

³⁹ *International Forwarding Co. v. Brewer*, 181 F.2d 49 (5th Cir. 1950).

⁴⁰ *Jones v. St. Paul Fire & Marine Ins. Co.*, 108 F.2d 123 (5th Cir. 1939).

⁴¹ *Flegenheimer v. General Mills, Inc.*, 191 F.2d 237 (2d Cir. 1951); followed in *Gold Seal Co. v. Weeks*, 209 F.2d 802, 810 (D.C. Cir. 1954).

⁴² 191 F.2d 169 (2d Cir. 1951). Questioned in 218 F.2d 295 (7th Cir. 1955).

⁴³ 191 F.2d 237 (2d Cir. 1951).

ing. Soon thereafter, Judge Clark vigorously defended his view that had been taken in the *Pabellon* case.⁴⁴ Again, Judge Frank and Judge Clark were alligned on the opposite sides of the fence. It is clear that their thinking in this matter is reflected in their holdings on the appealability of summary judgments.

The First Circuit has sided with the Third Circuit in this position, but its stand would appear to involve a more fundamental point. In *Boston Medical Supply Co. v. Lea*,⁴⁵ the First Circuit held that where an order has been entered by a district court judge, he has made a determination and jurisdiction is automatically and conclusively conferred upon the court of appeal to hear the appeal. The effect of this reasoning is that where the district court judge has not fulfilled the procedure laid out in the Federal Rules of Civil Procedure in rule 54 (b),⁴⁶ the order is not final or appealable. The Third Circuit two months earlier used this reasoning in their holding in the *Bendix Aviation* case.⁴⁷ The Seventh Circuit, in *Mackey v. Sears, Roebuck & Co.*,⁴⁸ clearly laid the problem out and then fell in line with the First and Third Circuits. It is interesting to note that the court, in the *Mackey* opinion, called for an early Supreme Court ruling on this matter, but as of this writing the Supreme Court had not done so.

Moore, in his *Federal Practice*, observes the dispute and states that the *Morgenstern* case and the Third Circuit have the correct view.⁴⁹ He believes that the Second Circuit in the *Raylite* case "... seems to have assumed that the denial of plaintiff's motion was appealable because it denied the claimant an injunction." Moore is of the opinion that this is not the case and that a motion for summary judgment is not an application for a preliminary injunction. The denial merely means that the case should go to

⁴⁴ *Lopinsky v. Hertz Drive-Ur-Self Systems, Inc.*, 194 F.2d 422, 424 (2d Cir. 1951) (concurring opinion).

⁴⁵ 195 F.2d 853 (1st Cir. 1952).

⁴⁶ FED. R. CIV. P. 54(b). "Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, 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."

⁴⁷ *Bendix Aviation Corp. v. Glass*, 195 F.2d 267, 269 (3d Cir. 1951) (dictum).

⁴⁸ 218 F.2d 295, 298 (7th Cir. 1955).

⁴⁹ 6 MOORE, FEDERAL PRACTICE 2321-22 (1953).

trial and the plaintiff is not precluded from seeking a temporary injunction in accordance with equitable principles.⁵⁰

The Supreme Court and Interlocutory Orders

The Supreme Court has seen the problem of appeal from interlocutory orders but on a much broader scale than is in question here. Starting with the *Enelow* case⁵¹ in 1935, the Supreme Court has recognized the denial of a legal action pending the outcome of an equitable defense was in effect an injunction and appealable. However, in 1938, with the merger of law and equity in the adoption of the Federal Rules of Civil Procedure, it was held that the logical basis for the *Enelow* decision no longer existed.⁵² Yet, in 1942, the Supreme Court reaffirmed the theory of the *Enelow* case, ruling in a similar situation that the district judge's order to hear the equitable defense was first as effective as an injunction issued by the chancellor.⁵³

In January of 1955, the Supreme Court found considerable authority for the refusal to grant appeals from orders other than final orders and held that a refusal to stay an action for an accounting is not the refusal of an injunction so as to permit appeal.⁵⁴ This lack of clarity in the Supreme Court has mirrored itself throughout the federal districts.

The Federal Circuits

This confusion among the circuits extends beyond the appealability of a summary judgment motion and can be found wherever an order is declared interlocutory and appealable. The cases

⁵⁰ *Ibid.*

⁵¹ *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935).

⁵² *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*, 124 F.2d 563, 564-565 (2d Cir. 1942).

⁵³ *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *cf.* *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *But see*, *Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 258 (1949), where the Court refused to extend the exception of appealability of stays at pretrial level to situations where trial of a legal counterclaim is stayed pending determination of the initial suit which is equitable in nature.

⁵⁴ *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955).

manifest no common denominator for future decision.⁵⁵ The Supreme Court said in *Ettelson v. Metropolitan Life Ins. Co.*⁵⁶ that "the statute looks to the substantial effect of the order made," with regard to the rights affected rather than the mere form of the order. It would seem that the courts of appeal have failed to follow this standard. The circuits that have once ruled an order final, hesitate to reverse themselves regarding the particular order, with the result that the order controls rather than the substance of the right. The foregoing cases seem to indicate that the test for section 1292 is the same as that used in the equity courts, namely: whether the denial of the appeal is likely to result in irreparable injury. The circuits are threatening to establish judicial precedent for a particular order and are turning a deaf ear to pleas that may make an interlocutory order appealable in one case and not in another.

Proposals

In 1952, a proposal was made to incorporate into section 1292 an additional provision, the effect of which would open further

⁵⁵ The treatment of interlocutory orders by the circuit courts of appeals as to whether such orders are appealable or not has proven a confusing and, indeed, a most perplexing situation. In *Youpe v. Moses*, 213 F.2d 613 (D.C. Cir. 1954), the court held that the granting of a motion to quash service of summons was not appealable where defendants were jointly liable with twelve others who were properly served. The Fifth Circuit allowed an appeal from a denial of a judgment on the pleadings. *Int'l Forwarding Co. v. Brewer*, 181 F.2d 49 (5th Cir. 1950) (though the question of appealability of the order was not presented to the court.). The Ninth Circuit in *Chugach Elec. Ass'n, Inc. v. Anchorage*, 214 F.2d 110, 112n. (9th Cir. 1954), held appealable under Rule 54(b), note 38 *supra*, a judgment on one cause of action where there were several causes. The Third Circuit in the same year held that a dismissal of a complaint against one party is not appealable where there is an existing suit against a second party named in the complaint. *ShIPLEY Corp. v. Leonard Marcus Co.*, 214 F.2d 493 (3d Cir. 1954). An order to make proper conveyances within a specified time was held appealable, *Kasishke v. Baker*, 144 F.2d 384 (10th Cir. 1944), while a directive order was declared not a final order in *Virgin Islands Bar Ass'n v. Dench*, 215 F.2d 810 (3d Cir. 1954). Finally, in perhaps the widest application of the Third Circuit's position, the First Circuit in *In re Josephson*, 218 F.2d 174 (1st Cir. 1954) held that an order to transfer a civil action from Massachusetts to New Mexico was not appealable as a final order nor one of the exceptions under section 1292.

⁵⁶ 317 U.S. 188, 192 (1942).

⁵⁷ DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 203 (1952).

the door to appeal before final order.⁵⁷ However, the committee rejected the proposal, stating, in the annual report of the Judicial Conference of 1952, ". . . an amendment to the Code in the form proposed would unduly encourage fragmentary and frivolous appeals with the evils and delays incident thereto. . . ."⁵⁸ It was, however, further noted that proposals would be accepted the following year. In 1953, the committee appointed to study proposals to enlarge the scope of appeal from interlocutory orders of the district court presented its report.⁵⁹ The committee unanimously concluded that ". . . provision should be made for the allowance of appeals from interlocutory orders in those exceptional cases where it is desirable that this be done to avoid unnecessary delay and expenses. . . ." The Judicial Conference in their annual report for 1953⁶⁰ approved the recommendation of the committee but as of this writing no further action has been taken. Under this proposal, limits could be set to preclude groundless appeals and piecemeal litigation. The proposed amendment would read as follows:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.⁶¹

The committee gave as the controlling reason for the proposal, "protracted and expensive litigation."⁶² Final discretion would lie with the courts of appeal who would not permit their dockets to be crowded with piecemeal and minor litigation. It is submitted that the proposed amendment merely permits the circuit courts to hear an appeal if they so desire. Such an arrangement would probably not alleviate the confusion that already exists. Is it likely that circuit judges will hear appeals that prior to the

⁵⁸ *Ibid.*

⁵⁹ DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27 (1953).

⁶⁰ *Id.* at 28.

⁶¹ *Id.* at 27.

⁶² *Ibid.*

proposed amendment they had refused to accept, merely because the law will permit them to do so, but does not command them?

Conclusion

The answer to this maelstrom would seem to lie in more forceful legislation, or, as one court suggested, an early Supreme Court ruling.⁶³ The petitioner in the typical case argues for wider appeal for prevention of injury while the litigation lumbers on to adjudication. The plea is sound. If irreparable injury might ensue, the appeal should be heard immediately. But the argument is made by the courts that the dockets are already crowded and such a move would add immeasurably to the burden. Here again, the plea is sound. If the refusal to the plea of irreparable injury is based on crowded conditions, then, rather than the plea go unheard, the crowded conditions must be relieved. If additional judges and emergency judicial teams, as proposed by the United States Attorney General fail to relieve the congestion,⁶⁴ then further steps must be taken. Perhaps the answer lies with the splitting of the federal circuit system and the creation of more benches, giving the distressed litigants more courts to which an appeal may be taken. If these steps are necessary for a resolution of the problem, we should not hesitate through fear of change. If the only means of serving justice is a complete revision of the circuit system, the move should be undertaken. The circuit courts were created to relieve crowded conditions.⁶⁵ Such conditions exist again.

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⁶³ The Seventh Circuit in the *Mackey* case, note 48 *supra*.

⁶⁴ *New York Times*, Oct. 22, 1955, § 1, p. 1, col. 8.

⁶⁵ MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 37 (1949).