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Shacter v. Richter: Rule 42-Further Expansion and the Possibilities of Prejudice

AUERBACH v. UNITED STATES: THE FINALITY REQUIREMENT IN CHANGE OF VENUE ORDERS

In a judicial system which allows appellate review of lower court decisions, there is a need for the adoption of a standard which will not only allow all justifiable appeals to be heard, but will also prevent premature or unwarranted appeals. The American courts have adopted the standard of finality; that is, appellate review is denied until final adjudication in the lower court. In *Auerbach v. United States*[1] the United States Court of Appeals for the Fifth Circuit held that the finality rule prevented it from hearing an appeal from an order by the district court for the Southern District of Florida retransferring petitioner's case back to the Arizona District Court.[2] The holding theorized that a change of venue order was not final and hence, it was not appealable.

This Note will analyze *Auerbach* and its relation to the finality rule to determine whether this traditional test is adequate in such cases.[3] Special attention will be given to the history of the finality rule and the need for its practical application. A practical application seems to demand a liberal interpretation so that each appeal is decided on its merits, regardless of whether that appeal is one which comes within the usual definition of finality.

Auerbach was indicted in the District Court of Arizona for mail fraud[4] which allegedly took place in both Arizona and Florida. At the time of his indictment he contended that his evidence and witnesses were in Florida. By proper and timely motion under Rule 21 (b) of the Federal Rules of Criminal Procedure[5] he moved that the case be transferred to Florida. The Arizona judge

1. 347 F.2d 742 (5th Cir. 1965), *cert. denied*, 382 U.S. 958 (1965).

2. United States v. Auerbach, No. 64-397-CR-CF, S.D. Fla., February 26, 1965.

3. This case also raised another question: May one district judge review the order of another. It was raised by petitioner for the first time on appeal for certiorari. Brief for Appellant, pp. 6-10, Auerbach v. United States, No. 625 (U.S. Sup. Ct., Oct. term 1965). In regard to this question see Holdsworth v. United States, 179 F.2d 933 (1st Cir. 1950); United States v. United States District Court for the Eastern District of Tennessee, 209 F.2d 575 (5th Cir. 1943).

4. 62 Stat. 763 (1948), 18 U.S.C. 1341 (1964).

5. Fed. R. Crim. P. 21(b) provides:

> The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment . . . that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

See generally United States v. Choate, 276 F.2d 724 (5th Cir. 1960).

granted the request and the case was transferred to the Southern District of Florida.[6] Before the case could be tried the Florida court, on its own motion and for reasons not set forth in the record, transferred the case back to Arizona.[7] It was from this order that Auerbach appealed. The court of appeals, in a per curiam opinion with one judge dissenting, refused the appeal, holding that the order was interlocutory in nature and had, therefore, failed to meet the requirement of finality.[8]

The majority's decision that an appeal could not be heard until a final judgment was rendered finds strong support in both common and statutory law. The Judiciary Act of 1789, which in essence established the appellate court system, stated that appeal would lie only from "final judgments or decrees."[9] The requirement of finality has been incorporated into nearly all subsequent federal legislation on the subject of appellate jurisdiction.[10] Section 1291 of the Judicial Code provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . except where a direct review may be had in the Supreme Court."[11] Three main reasons are advanced to support the finality requirement: (1) it eliminates piecemeal appeals; (2) it prevents delay; and (3) it minimizes expense.[12] The Court in *McLish v. Roff*[13] announced the rationale of the finality rule:

> From the very foundation of our judicial system the object and policy of the Acts of Congress in relation to appeals and writs of error (with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887), has been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.[14]

The real problem involved in the application of the finality rule lies in the interpretation of the elusive word itself.[15] Despite the

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6. United States v. Auerbach, No. C-4619-PCT, D. Ariz., July 27, 1964.

7. United States v. Auerbach, No. 64-397-CR-CF, S.D. Fla., February 26, 1965.

8. 347 F.2d at 742.

9. 1 Stat. 72 (1789). The finality requirement appears in three sections of the act: Section 21 on admiralty, section 22 on appeals from district to circuit courts, and section 25 on appeals from state courts to the Supreme Court.

10. *See* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539 (1932); United States v. Bailey, 11 U.S. (9 Pet.) 355 (1835).

11. 72 Stat. 348 (1958), 28 U.S.C. 1291 (1964).

12. *See* Stack v. Boyle, 342 U.S. 1 (1951); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943); Cobbledick v. United States, 309 U.S. 323 (1940); City of Morgantown v. Royal Ins. Co., 169 F.2d 713 (4th Cir. 1948).

13. 141 U.S. 661 (1891).

14. *Id.* at 665.

15. *See*, United States v. 243.22 Acres of Land, 129 F.2d 680 (2d Cir.

recognized difficulty in determining the meaning of "final decree," there have been repeated attempts to give it a specific definition.[16] Perhaps the definition most often given is that a final order is one which "terminates the litigation on its merits and leaves nothing to be done but to enforce by execution what has been determined."[17] By this definition the final decision in a criminal case would be the sentence.[18] If a court adheres to this strict definition of a final decision, a petitioner such as Auerbach, could not appeal until he was sentenced. It is apparent that such a definition gives the rule a meaning which may be well delineated, but which, at the same time, is needlessly harsh.

The harshness of the rule, which would disallow any appeal from the time of indictment until final decision, has been modified somewhat by section 1292 of the Judicial Code.[19] The range of this statute, however, is severely limited to particular subject matter and jurisdiction. Therefore, the courts have felt it necessary to give the finality requirement a liberal interpretation. To achieve this result judges have attempted to give the rule a *practical* rather than a *technical* interpretation. The practical approach was advanced by Mr. Chief Justice Taney when he said:

> The question . . . is whether this is a final decree within the meaning of the Acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. This Court has not heretofore understood the words final decision in this strict and technical sense, but has given to them a more liberal, and we think, a more reasonable construction, and one more consonant to the intention of the legislature.[20]

Federal courts continued to apply the practicality test in holding that certain interlocutory orders were appealable.[21] The chief impetus for a liberal construction, however, came in the recent case of

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1942), wherein Judge Frank said "[F]inal is not a clear one-purpose word; it is slithery, tricky. It does not have a meaning constant in all contexts. There is still too little finality about finality." 129 F.2d at 681. See also DiBella v. United States, 369 U.S. 121 (1962); Republic Gas v. Oklahoma, 334 U.S. 62 (1948).

16. 36 C.J.S. *Federal Courts* § 290(4) (1960), has 21 consecutive definitions of final as used in appeal cases.

17. *E.g.*, Baetjer v. Fernandez, 329 F.2d 798 (1st Cir. 1964); Parker v. United States, 153 F.2d 66, 69 (1st Cir. 1946).

18. Berman v. United States, 302 U.S. 211 (1937); United States v. Brown, 301 F.2d 664 (4th Cir. 1962).

19. 72 Stat. 1770 (1958), 28 U.S.C. 1292 (1964). This statute provides for appeal from selected interlocutory orders namely, orders on injunctions, orders appointing receivers, orders determining the rights of parties in admiralty cases, orders in civil action for patent infringement.

20. Forgay v. Conrad, 16 U.S. (6 How.) 653, 655 (1847).

21. See Ettelson v. Metro Ins. Co., 317 U.S. 188 (1942); Enelow v. N.Y. Life Ins. Co., 293 U.S. 379 (1934); Gen. Elec. Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932); United States v. 243.22 Acres of Land, 129 F.2d 678 (2nd Cir. 1942).

Cohen v. Beneficial Indus. Loan Corp.[22] In a minority stockholders derivative action the court held that an order requiring that security be given was appealable. The appeal was not heard on the grounds that this was the last order possible in the case. It was heard because it was collateral to the main issue.

> This decision appears to fall within that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[23]

The Court then held that the order was appealable as a final disposition of a claimed right which is not an ingredient of the cause of action.[24] It would seem that the Court altered the definition of final decision to achieve what they regarded as a practical result. It is obvious that this order does not dispose of the case by any means that would bring it within the more strict definition of finality.

This interpretation of the finality rule has been accepted by other courts; the practicality doctrine is now being more widely applied.[25] The most recent Court pronouncement is *Gillespie v. United States Steel Corp.*[26] This was an action brought under both the Jones Act[27] and the Ohio wrongful death statute.[28] The Court, citing *Cohen*, held that an order eliminating the brothers and sisters of the decedent as possible plaintiffs was appealable before the Court made any disposition of the main issue. It noted that the requirement of finality is to be given a practical rather than a technical construction so that an order does not necessarily have to be the last one possible to be appealable.[29] The Court noted the difficulty inherent in the application of the rule:

> Our cases long have recognized that whether a ruling is 'final' within the meaning of 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is im-

22. 337 U.S. 541, 545 (1949).

23. *Id.* at 546.

24. *Ibid.* Note that other cases previous to *Cohen* granted appeals from normally interlocutory orders as being separate from the main action but it was in *Cohen* that the Court most fully recognized and propounded this theory. See Land v. Dollar, 330 U.S. 731 (1947). In this case the Court said, "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue fundamental to the further conduct of the case." *Id.* at 734. Conrad v. Forgay, 16 U.S. (6 How.) 653 (1847).

25. Stack v. Boyce, 342 U.S. 1 (1951); Swift and Co. v. Compania Caribe, 339 U.S. 684 (1949); Hodges v. Atlantic Coast Line R.R., 310 F.2d 439 (5th Cir. 1962).

26. 379 U.S. 148 (1964).

27. 41 Stat. 1007 (1920), 46 U.S.C. 688 (1964).

28. OHIO REV. CODE ANN. § 2125.01 (1964).

29. 379 U.S. at 150.

> possible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality.[30]

Parr v. United States[31] is equally indicative of the feelings held by some members of the Court on the practical approach to a change of venue order. Parr was indicted for tax evasion. He moved for, and was granted, a change of venue under Rule 21 (b). The government, to avoid bringing the case in the transferee court, dropped the original charge and brought a new indictment in a third court. Parr appealed to prevent this action by the government but the appeal was denied on the grounds that this was not a final order. The Court upheld the lower court with four members dissenting.[32] This strong dissent noted the weaknesses and possible harsh results following from the strict interpretation given the finality requirement in *Parr*.[33]

The practical approach has also been used in another series of cases to allow what would otherwise be considered interlocutory orders to be reviewed on appeal. In several recent civil rights cases the courts have allowed appeal from orders lacking the usual finality. This has been done to prevent circumvention of the Federal Civil Rights Laws[34] by lower court injunctions which delay the enforcement of the laws.[35] In the typical case the district court either grants or denies an injunction or other preliminary order so that action on the asserted civil right will be delayed long enough to prevent the petitioner from beginning the next term in an all white college,[36] registering to vote in the ensuing election,[37] or having a chance to enroll in a white high school.[38] Realizing that a delay in review until a final decision is reached might be fatal, the courts have defeated these dilatory attempts by granting immediate appellate review. *United States v. Mayton*[39] is typical of

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30. *Ibid.*
31. 351 U.S. 512 (1956).
32. The dissent here is of some special significance due to the fact that the four members who dissented, Chief Justice Warren, and Justices Black, Douglas and Clark, are still on the bench and have been joined by the man who argued the case for Parr, Justice Abe Fortas.
33. Mr. Chief Justice Warren argued in dissenting that "there is no reason why rule 21(b) should not be given its full effect by requiring trial to take place in the district court to which it has been removed in the interest of fairness." 351 U.S. at 515 (dissenting opinion).
34. *E.g.*, Civil Rights Act of 1960, 74 Stat. 86 (1960), 42 U.S.C. 1971 (1964).
35. McCoy v. La. State Board of Education, 332 F.2d 915 (5th Cir. 1964); United States v. Mayton, 335 F.2d 153 (5th Cir. 1964); Harris v. Gibson, 322 F.2d 780 (5th Cir. 1963); Kennedy v. Lynd, 306 F.2d 222 (5th Cir. 1962); United States v. Wood, 295 F.2d 772 (5th Cir. 1961).
36. McCoy v. La. State Board of Education, 332 F.2d 915 (5th Cir. 1964).
37. United States v. Mayton, 335 F.2d 153 (5th Cir. 1964).
38. Harris v. Gibson, 322 F.2d 780 (5th Cir. 1963).
39. 335 F.2d 153 (5th Cir. 1964).

these cases, many of which adopt the *Cohen* rationale. The *Mayton* court said:

> The orders here appealed from are admittedly not final in the sense that they fully terminate an entire cause. But they are appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.[40]

It would seem that the circuit court in these instances has once again achieved a commendable result by foregoing the strict rule of finality in favor of a more practical interpretation.

Despite the liberal and practical interpretation given to the finality rule in the above mentioned instances, it has generally been held that change of venue orders are not appealable.[41] There seems to be good reason for either changing this rule or modifying it to conform to the standard enunciated in *Cohen* and *Gillespie*. *Auerbach* illustrates the need. The practical reasons for hearing the appeal would seem to outweigh the need for a firm adherence to the strict interpretation. The two district courts had arrived at a judicial stalemate simply because they disagreed as to the proper court in which the action should be heard. It appears that there are good arguments for trying the case in either forum, and substantial rights could be lost if the wrong forum is chosen. To force the petitioner to bring his case in what he considers to be an inconvenient forum is certainly inimical to the purpose of Rule 21 (b).

Moreover, this case seems to be one in which the court might apply the *Cohen* doctrine, used mostly in civil cases, to a criminal proceeding. It is this type of order which the Court in *Gillespie* referred to as coming within the "twilight zone of finality."[42] Furthermore, most venue orders would seem to meet the requirements of being a "collateral order," for it clearly is "fundamental to the further conduct of the case and clearly separable from the main cause of action."[43] The place of venue is especially fundamental in cases such as *Auerbach* where the two possible forums are 3,500 miles apart.

It is submitted then that change of venue orders in general are the type of orders to which the practicality criterion might easily be applied. This is especially true since the primary reason for disallowing interlocutory appeals, namely that delay will occur, does not obtain in venue appeals. It does not apply because venue appeals, unlike evidence and other such trial appeals, come up *before trial*. Since these appeals can be settled before the trial,[44]

40. *Id.* at 157.

41. United States v. Brown, 301 F.2d 664 (4th Cir. 1962); Paramount Pictures v. Rodney, 186 F.2d 111 (1950), *cert. denied*, 340 U.S. 953 (1951); Jiffy Lubricator v. Stewart Warner Corp., 177 F.2d 360 (4th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950).

42. 379 U.S. 152 (1964).

43. 337 U.S. 545 (1949).

44. See the table in *Note*, 67 YALE L.J. 133 n.38 (1951). This table

they do not interfere with the main issues to be tried.

Another reason advanced by some courts for allowing appeal of venue orders is that such appeals may be forgotten and never heard at all if the petitioner wins his case.[45] At best this argument rests on what appears to be a legal coin toss, assuming a 50-50 chance that the appeal will never be heard. A more serious objection is offered by the dissent in *Auerbach* when it notes that the retransfer order is wholly "unreviewable by appeal in any court, any time, any where."[46] At first glance this appears to be a slightly exaggerated statement. The general rule is that all interlocutory appeals may be reviewed after a final decision is reached.[47] In change of venue orders, however, there is some question as to whether the order will ever be given full consideration. Since venue orders are said to be directed to the discretion of the court, such orders will be reversed only if there is an abuse of discretion.[48] *In re Josephson*[49] also concerned a change of venue order. There was some question as to which court should try the case. The court discussed the future appealability of the order, emphasizing the petitioner's plight:

> Suppose the transferee court having jurisdiction of the subject matter, proper venue, should proceed to try the case and finally enter judgment. In that event, it is difficult to see how the court of appeals . . . could vacate the judgment of the district court if it were otherwise free of error, merely on the grounds that the case should have been transferred. Reversal would require the court to send the case back for trial again . . . a result which would certainly make an administrative mess of the section of the Code designed to serve interests of convenience and expedition.[50]

Under these decisions the petitioner would probably be forced to prove that the judge abused his discretion.[51] The difficulty will

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shows that according to various studies, pre-trial orders will be reviewed before the trial itself begins. The average time required for all circuits is 9.1 months from issue until trial while average time from notice of appeal until determination is 9 months.

45. In Perkins v. Endicott Johnson Corp., 128 F.2d 208 (2d Cir. 1942), the court said: "Many mistakes, apparently important at the time, will be seen to be trivial from the perspective of a final disposition of the case." *Id.* at 212.

46. Auerbach v. United States, 347 F.2d at 743 (5th Cir. 1965).

47. 36 C.J.S. Federal Courts § 297(14); MacNeil Bros. v. Cohen, 264 F.2d 190 (1959).

48. Bluemfield v. United States, 284 F.2d 46, 51 (8th Cir. 1960); Scott v. United States, 255 F.2d 18, 20 (4th Cir. 1958); Kott v. United States, 163 F.2d 984, 987 (5th Cir. 1947).

49. 218 F.2d 174 (1st Cir. 1954).

50. *Id.* at 181.

51. Abuse of discretion is another uncertain phrase. In *Josephson* the Court says "Abuse of discretion is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is in a discretionary matter, such action cannot be set aside by a reviewing court unless

not be remedied merely by allowing interlocutory appeals since the question, even in the appellate court, would still center around abused discretion. Therefore, the practical approach would be applied to determine if the forum was convenient.[52] It would also seem that a venue order would be given better consideration if it were raised immediately as a single issue instead of with other alleged errors after weeks of trial.

Even *Holdsworth v. United States*,[53] which the majority in *Auerbach* cited for the proposition that venue orders are not appealable, shows that there is a need to modify the very rule it propounds. The facts of *Holdsworth* were strikingly similar to *Auerbach* in that there was a retransfer order of a mail frauds case from one district court to another. *Holdsworth* also held that the retransfer order was not appealable because it was interlocutory.[54] The court then said:

> What has been said disposes of the appeal. But since this case should be tried or otherwise disposed of and since those concerned are in evident confusion as to the appropriate forum, the *practical* need for clarification overcomes the reluctance to issue what may be termed obiter dictum.[55]

The court went on to decide the very question presented by the appeal, *i.e.*, which forum was the proper one. Although the court stated that it could not hear change of venue orders, it did exactly what it said it could not do. The *Holdsworth* court decided the venue issue. Since the court stated that it could not hear the appeal, however, the decision as to venue is dictum. It would be better to apply the practicality test and say that due to the merits of the appeal it is one that may be decided, despite the fact that it is not final. Certainly, by reviewing the case the court admits the practical need for review. It then weakens the force of its decision so as to conform to the technical requirement of finality. The sacrifice of substance to form is manifest.

Conclusion

The finality rule may be a harsh rule or just a formality depending upon the approach taken by the particular court. Several

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it has a definite and firm condition that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant facts." 218 F.2d at 182.

52. Compare Shurin v. United States, 164 F.2d 566 (4th Cir. 1947), where the court said: "After conviction has been had, reversal ought not be granted because the judge thought 21 (b) not applicable to the case, unless it appears that the case should have been transferred and defendant suffered prejudice by reason of failure to transfer it. On no other basis could error be held prejudicial." *Id.* at 568.

53. 179 F.2d 933 (1st Cir. 1950).

54. The *Holdsworth* court added the comment that "a glance at the annotation to this section of the Code (1291) will show how difficult the application of a superfically simple rule may become." *Id.* at 935.

55. *Id.* at 936.

suggestions have been made as to how this cloudy area of the law might be made more clear.[56] Giving the finality requirement a practical rather than a technical interpretation seems to be one means of simplifying and clarifying the rule. This use of the practical approach is an instance of granting appeal on the merits of the individual case, so that such orders are somewhat like a writ of certiorari. The discretion would then lie with the reviewing court.[57]

Although the general rule in the United States judicial system is that only final orders are appealable, the inability to define the term final judgment and the need for sometimes deviating from this rule have created some uncertainty in its application. Many courts have mitigated the harshness of the rule by giving the term finality a liberal and practical interpretation so that orders which are not strictly final are reviewed in order to accomplish a just result.

The *Auerbach* court, however, chose to apply the technical rule. Without any discussion the court held the order to be unappealable. The dissent notes that this case was one in which the practical approach might well have been followed for there seems to be a definite need to decide which forum is proper. It is submitted that venue orders in general are susceptible to this approach since they involve important rights which are not an integral part of the main cause of action. These are the type of "collateral orders" reviewable under the *Cohen* case. Moreover, in most instances a venue appeal will be decided before the trial begins so that the trial will not be delayed or interrupted.

It is further submitted that the practical approach should be recognized by more courts. It should be applied in cases such as *Auerbach* when the need for reviewing lower court orders seems to be essential in order to assure the petitioner a fair trial. There are several writers who agree that "appellate courts are spending far too much time in determining whether to hear cases when the time would be better spent on the merits of the case presented to them."[58] An expanded use of the practical approach would do much to eliminate this problem.

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56. A general discussion of all possible remedies is not within the scope of this note. For an extensive discussion of possible changes see Crick, *The Final Judgment Rule as a Basis for Appeal*, 41 YALE L.J. 539 (1932); Note, 58 YALE L.J. 1186 (1949).

57. American Machine & Metals Inc. v. DeBothezat Impeller Co., 173 F.2d 890 (2d Cir. 1949); Clark v. Taylor, 173 F.2d 940 (2d Cir. 1947) (dissent).

58. 6 Moore's Fed. Prac. Dig. 54.14, p. 116.