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Charles W. Bunn

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THE NEW APPELLATE JURISDICTION IN FEDERAL COURTS

BY CHARLES W. BUNN*

AN act of Congress, approved February 13, 1925, which becomes effective May 13, 1925, revolutionizes the appellate jurisdiction of the Supreme Court of the United States and of the circuit courts of appeals. Besides making great changes, it puts the appellate jurisdiction, which, since the creation of the circuit courts of appeals in 1891, has been most complicated and difficult, upon a simple basis, easily understood. Certain it is that effort spent on mere jurisdiction is wasted. Because the new act almost eliminates waste effort, we think the reform will meet with unqualified approval of the Bench and Bar. For this improved procedure we are greatly indebted to the chief justice and associate justices of the Supreme Court of the United States, seconded by the American Bar Association.

To appreciate the changes wrought by the new act, it should be compared with the prior law.

PRIOR LAW

By that law appellate jurisdiction over the district courts was divided between the Supreme Court and the circuit courts of appeals, as follows:

Section 238, Judicial Code, provided for appeals from the district courts direct to the Supreme Court in cases where the jurisdiction of the district court is in issue; in final sentences and decrees in prize causes, and in any case that involves the construction or application of the constitution of the United States, or the validity or construction of a treaty.

Section 128, Judicial Code, gave the circuit courts of appeals

*General Counsel of the Northern Pacific Railway Co., St. Paul, Minn.

appellate jurisdiction over the district courts in all cases, other than those in which there was direct review in the Supreme Court, as provided in section 238, and the judgments of the circuit courts of appeals were made final "in all cases in which the jurisdiction (i. e. of the district court) is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states"; also in cases arising under the patent laws, copyright laws, revenue laws, criminal laws, and admiralty cases. In cases where the jurisdiction of the district court rested wholly or partly on a federal question, there was a writ of error or appeal from the circuit courts of appeals to the Supreme Court.

Under the foregoing sections, it was finally held in *McMillan Co. v. Abernathy*,[1] on a line of authorities (not on the language of the act), that in cases where the plaintiff had invoked the jurisdiction of the federal court on the sole ground of a constitutional or treaty question, the exclusive appellate jurisdiction was in the Supreme Court, and no appeal or writ of error would lie to the circuit court of appeals.

It was so difficult for the most experienced and careful practitioners to draw the line between these jurisdictions, that both the Bench and Bar were expending a great amount of waste effort in determining which court cases ought to go to. So many cases went to the wrong court, that Congress, September 14, 1922, passed an act providing for their transfer to the right court, instead of dismissal.[2]

The New Law

The new law first rewrites section 128 Judicial Code. The new section gives the circuit courts of appeals appellate jurisdiction to review final decisions in the district courts in all cases, save where direct review may be had in the Supreme Court under section 238; also to review the interlocutory orders or decrees of the district courts specified in section 129; also to review decisions of the district courts sustaining or overruling exceptions to awards in arbitrations as provided in section 8 of an act providing for mediation, etc., approved July 15, 1913;[3] also appellate and supervisory jurisdiction under secs. 24 and 25 of the Bankruptcy act.

Section 129 Judicial Code is rewritten and gives the circuit

[1](1923) 263 U. S. 438, 44 S. C. R. 200.
[2]42 Stat. at L. 837.
[3]38 Stat. at L. 103, 107.

courts of appeals jurisdiction to review certain interlocutory orders in the district courts; viz., those by which an injunction is granted, continued, modified, refused or dissolved, or by which an application to dissolve or modify an injunction is refused, and interlocutory orders appointing a receiver, or refusing an order to wind up a receivership; such interlocutory appeals must be applied for within thirty days from the entry of the order and take precedence in the appellate court.

Section 238 Judicial Code is rewritten and enumerates all the direct review by the Supreme Court of orders and decrees of the district courts. It preserves such direct review already provided by certain acts of Congress; viz., (1) section 2, act of February 11, 1903, called the Expedition Act,[4] which applies to certain suits brought by the United States under the anti-trust or interstate commerce laws; (2) act of March 2, 1907,[5] providing for writs of error in certain instances in criminal cases where the decision of the district court is adverse to the United States; (3) an act restricting the issuance of interlocutory injunctions to suspend the enforcement of a statute of a state, or of an order made by an administrative board or commission created by and acting under the laws of a state, approved March 4, 1913;[6] (4) suits to enforce, suspend or set aside orders of the Interstate Commerce Commission, other than for the payment of money, provided for in act approved October 22, 1913;[7] (5) section 316 of an act to regulate interstate and foreign commerce in livestock, etc., approved August 15, 1921.[8]

These direct reviews in the Supreme Court, save the certain criminal cases referred to, are in cases where existing acts of Congress require a hearing before three judges in the district courts.

Section 240 Judicial Code is rewritten so as to provide that in any case, civil or criminal, in a circuit court of appeals, or in the court of appeals of the District of Columbia, it shall be competent for the Supreme Court to issue certiorari either before or after judgment or decree in the lower court; and where certiorari issues it is provided that the Supreme Court shall have the same power and authority as if the case had been brought there by writ of error or appeal.

[4] 32 Stat. at L. 823.
[5] 34 Stat. at L. 1246.
[6] 37 Stat. at L. 1013.
[7] 38 Stat. at L. 208.
[8] 42 Stat. at L. 159, 168.

All review in the Supreme Court both of the circuit courts of appeals and of the court of appeals of the District of Columbia (except review by certiorari) is abolished. There will be no more appeals or writs of error to review judgments, either of the circuit courts of appeals, or of the court of appeals of the District of Columbia.

By section 3 of the new act the judgments of the court of claims are put on the same basis as those of the circuit courts of appeals and the court of appeals of the District of Columbia; that is they will be reviewable in the Supreme Court on certiorari and not otherwise.

Section 237 Judicial Code, which covers review in the Supreme Court of the United States of the final judgments of state courts, is also rewritten in the new act without largely changing the existing law. Section 237 Judicial Code had already been amended (a) by act December 23, 1914,[9] authorizing the Supreme Court to issue certiorari to review a decision of the highest court of a state which *sustains* an asserted federal right; (b) by act September 6, 1916,[10] eliminating from review by writ of error and adding to the certiorari cases those where is drawn in question the construction of the constitution or a treaty or statute of, or commission held under the United States and the decision is against the title, right, privilege or exemption so specially set up or claimed, no matter which way the state court decided.

Under existing law, cases where was drawn in question in a state court the validity of an act of Congress or a treaty and the decision was against its validity, or where was drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of its validity have been reviewable by writ of error *and by writ of error only*.

The new act rewrites section 237 and much improves it in simplicity and clearness.

It would seem that under the new law cases are subject to be reviewed *either by writ of error or certiorari,* where is drawn in question in the state court the validity of a treaty or statute of the United States and the decision is against its validity, or where is drawn in question the validity of a statute of the state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity.

[9]38 Stat. at L. 790.
[10]39 Stat. at L. 725.

SUMMARY OF CHANGES

The important changes in jurisdiction may be thus summed up:

All final judgments of the district courts (save where direct review is preserved in the Supreme Court) are appealable to the circuit courts of appeals; interlocutory orders of the district courts granting or refusing an injunction, and certain receivership interlocutory orders are reviewable in the circuit courts of appeals if appeal is taken within thirty days.

Direct review of the district courts in the Supreme Court is abolished in cases where the jurisdiction of the district courts is in issue and in prize causes; and cases that involve the construction or application of the constitution of the United States or of a treaty will not be directly reviewable in the Supreme Court upon that ground. Direct review in the Supreme Court is preserved only in certain enumerated cases now expressly provided for in acts of Congress.

There will be in the Supreme Court no review as of right of the judgments and decrees, of either the circuit courts of appeals, or the court of appeals of the District of Columbia, or the court of claims. The only review in such cases will be by certiorari.[11]

The act repeals a large number of sections of the Judicial Code and certain other statutes, all enumerated in section 13 and which it is not necessary to state. These repeals in brief are of provisions inconsistent with the new law.

By section 14 the new act will take effect three months after its approval, but will not affect cases then pending in the Supreme Court, and as respects judgments or decrees entered prior to the 13th of May the mode of review and time of exercising the same will be according to existing law unaffected by the new act.

By the new act all proceedings for review of final judgments or decrees, whether by appeal, or error, or certiorari, must be commenced within three months, section 8 (a) and (c).

[11]While as before stated the new section 237 does not largely change existing law, from a practical standpoint there will result an important gain in convenience both to the court and to the bar. As the law stood there were a good many decisions of state courts near the border line between writ of error and certiorari and in those cases it became common and prudent practice to sue out writ of error and also petition for certiorari. Under the new law that great inconvenience may be avoided by the practitioner. As now the court will have jurisdiction in all the reviewable cases from state courts to issue certiorari, it will be safe in the former doubtful cases to proceed by certiorari alone. The court will have jurisdiction to issue that writ notwithstanding writ of error would also lie.