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Appeal and Error--Certification to Supreme Court of Appeals--Necessity for Decree in Lower Court Passing Upon Sufficiency of Pleading

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RECENT CASES

APPEAL AND ERROR—CERTIFICATION TO SUPREME COURT OF APPEALS—NECESSITY FOR DEGREE IN LOWER COURT PASSING UPON SUFFICIENCY OF PLEADING.—Solely upon a vacation order awarding an injunction, a cause was certified to the Supreme Court of Appeals upon questions as to the sufficiency of the bill and exhibits. Held, that the Supreme Court had no jurisdiction to entertain such an inquiry in the absence of an order or decree of the lower court rendered in term and based upon a plea or demurrer regularly putting in issue the sufficiency of the bill. City of Wheeling v. Chesapeake & Potomac Telephone Company of West Virginia, 94 S. E. 511 (W. Va. 1917).

In the absence of a statute so providing, an appeal cannot be taken from an interlocutory order or decree. Harris v. Hauser, 26 W. Va. 595 (1885); Hannah v. Bank, 53 W. Va. 82, 44 S. E. 152 (1903). Hence, an order merely sustaining a demurrer to a bill, being interlocutory in nature, in the absence of a statute, cannot constitute the basis of an appeal. Bosworth v. Wilson, 57 W. Va. 80, 49 S. E. 942 (1905). It is otherwise, however, if the order not only sustains the demurrer but also dismisses the bill, as such an order is final. Norris v. Lemen, 28 W. Va. 336 (1886). An order overruling a demurrer to a bill is interlocutory and therefore not appealable. Parsons v. Snider, 42 W. Va. 517, 26 S. E. 285 (1896). Prior to the Acts of 1915, the West Virginia statute had already extended the field of appellate jurisdiction to numerous classes of interlocutory orders and decrees. W. Va. Code, 1913 c. 135, § 1; Carlsdon v. Board of Education, 61 W. Va. 468, 56 S. E. 834 (1906). It was not, however, until the Acts of 1915, c. 69, that appellate relief was allowed as to interlocutory orders and decrees of the nature mentioned, ruling upon the sufficiency of pleadings. Barnes' W. Va. Code, 1916, c. 135, § 1. While the amendment made by Acts of 1915 enlarges the field of appellate jurisdiction as to interlocutory orders and decrees determining the sufficiency of pleadings, it in no way affects or extends the powers or method of the trial court, or judge thereof in vacation, in passing upon the sufficiency of pleadings. In other words, the amendment relates to appellate, and not to trial procedure. Hence, neither before nor after the amendment is made, does a judge have power to enter an order or decree in vacation, unless so authorized by statute. Kinports et al. v. Rawson et al., 29 W. Va. 487, 2 S. E. 85 (1887). Therefore, the principal case holds, although a de-
murrer to the bill might perhaps have been tendered in vacation, still the issue raised by the demurrer could have been decided only by the court in term. Granting the injunction over the objection of the defendant was, in effect, tentative approval of the sufficiency of the bill; but it was not a judicial determination of its sufficiency as a legal proposition in pleading. To ask the Supreme Court to pass upon the mere propriety of having granted the injunction was to ask it to exercise a supervisory, not an appellate, jurisdiction; to prejudge, rather than to review, the action of the lower court. The defendant, however, had a remedy which was practically the equivalent of a demurrer in vacation. The statute allows an appeal from an order overruling a motion to dissolve an injunction. W. Va. Code, c. 135, § 1. A motion to dissolve an injunction, based on the bill alone and without an answer having been filed to the bill, is the practical equivalent of a demurrer to the bill. *Hyre v. Hoover et al.*, 3 W. Va. 11 (1868). Even prior to the Acts of 1915, the defendant, having made a motion in vacation to dissolve the injunction, could have appealed immediately by the regular process of appeal from an adverse ruling of the court thereon, and appellate relief would have been granted. The absence of an answer would have eliminated any question of fact, thus casting the decision upon a pure question of law as involving the sufficiency of the allegations of the bill. All this is assuming, of course, that the defendant is the party seeking appellate relief.

**DEEDS—ACKNOWLEDGMENT—HUSBAND AND WIFE.**—A husband held the legal title to land in trust for the use and benefit of his wife. The husband and wife, in the same deed, but with no description either in the deed or in the certificate of acknowledgment showing the relationship of husband and wife, conveyed the land to a third party. *Held*, (Poffenbarger, J., dissenting), that the deed and acknowledgment were sufficient. *Wehrle v. Price et al.*, 94 S. E. 477 (W. Va. 1917).