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The *Natanson* requirement of a professional duty limited by what other practitioners would have disclosed in the same or similar circumstances was also adopted by *Wilson*. The court did not comment on the division of the burden in proving that duty, and, in fact, seemed to overlook the problems involved in that area.

There was one interesting development in the *Wilson* decision, however. The court allowed the plaintiff to establish the professional standard by calling the defendant *Wilson* as an adverse expert witness. By his admissions as to his opinion of the standard and by his agreement with a passage from a medical textbook, Dr. *Wilson* provided Scott with all the expert evidence he needed to prove the objective professional standard.⁴⁷ Although some courts would disagree with this procedure⁴⁸ *Wilson* is not the only case which has relied on this method of proof.⁴⁹

The rule that breach of duty is a lay question which requires no expert testimony was adhered to by *Wilson*.⁵⁰ The case, like most cases in this area, resolved itself into a swearing match between the doctor and the patient as to what disclosures were made. In *Wilson* the patient claimed the doctor failed to inform him of a one per cent chance of complete loss of hearing; the doctor, after testifying that the professional standard would require this disclosure, claimed that he had told Scott of the one per cent possibility.

V. CONCLUSION

Two student Notes proclaim that the extended liability generated by the action of informed consent may increase communication between the doctor and the patient.⁵¹ Yet, it is left up to the medical profession whether disclosures to patients will be increased or merely made uniform. By the use of standard "risk" forms practitioners will be virtually assured that their disclosures are uniform to the profession. It is only when the doctor attempts to take the individual patient's circumstance into consideration that he will be inviting liability. The new liability might thus tend to force the doctor to follow objective standards of disclosure. What the patient may gain through increased communication, if there is any, will be lost through decreased personal consideration.

David R. Snodgrass

Interlocutory Appeals from Orders Staying Proceedings

The federal judicial system normally does not permit appeal from interlocutory orders.¹ Although this policy is a strong one, Congress has pro-

⁴⁷ *Id.* at 303.

⁴⁸ *Lane v. Calvert*, 138 A.2d 902 (Md. Ct. App. 1958).

⁴⁹ *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469 (1964).

⁵⁰ *Wilson v. Scott*, 412 S.W.2d 299 (1967).

⁵¹ See Note, 75 HARV. L. REV. 1445, 1449 (1960); Note, 44 TEXAS L. REV. 799, 803 (1966).

¹ 28 U.S.C. § 1291 (1964); see Comment, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966).

vided in section 1292 of the Judicial Code that certain interlocutory orders may be appealed.² Subsection (a) (1) of this provision allows appeal from orders involving injunctions. Determining whether a particular order is or is not appealable as an injunction under this subsection is not always easy, for certain modern procedural orders are held to be equivalent to injunctions,³ though they bear different names and lack the characteristics usually associated with injunctions.⁴ In certain circumstances an order granting or refusing to stay proceedings in the plaintiff's action is included in this category and is appealable under section 1292(a) (1).⁵

I. HISTORICAL BACKGROUND

The basis for permitting interlocutory appeals from stay orders lies in history. When law and equity were heard by separate courts, the defendant could not raise an equitable defense in a law court. Instead, he had to bring

² The relevant portion of the statute provides:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, . . . except where a direct review may be had in the Supreme Court; . . .

. . . .

(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 litigation, he shall so state in writing in such order. The Court of Appeals may, . . . in its discretion, permit an appeal to be taken from such order. . . .

28 U.S.C. § 1292 (1964).

³ Because the injunction as a legal concept has had a long and complex history, it is somewhat hazardous to venture a broad definition of the term. According to Professor Moore, an injunction is: an order requiring a party to do or refrain from doing something that is an integral part of the very matter in litigation or for the protection of the court's jurisdiction over the matter in litigation, and invokes the normal equitable principles underlying the injunctive process.

6 J. MOORE, FEDERAL PRACTICE ¶¶ 54.06(3), 54.07 (2d ed. 1966) [hereinafter cited as MOORE].

⁴ For a number of years there has been a dispute between the Second and Third Circuits over whether an order denying a motion for summary judgment is appealable as a refusal of an injunction when the relief the plaintiff seeks on his claims is a permanent injunction. In *Morgenstern Chem. Co. v. Schering Corp.*, 181 F.2d 160 (3d Cir. 1950), the Third Circuit ruled that such orders are not appealable, because they lack the "drastic and far-reaching effect" which is characteristic of orders which grant or deny injunctions. In *Federal Glass Co. v. Loshin*, 217 F.2d 936 (2d Cir. 1954), the Second Circuit reached a contrary result, permitting interlocutory appeal in the same situation. Sitting en banc, the Second Circuit recently reversed its position and held that such orders are not appealable under § 1292(a) (1). *Chappell & Co. v. Frankel*, 367 F.2d 197 (2d Cir. 1966).

A month after this decision, the Supreme Court, in *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966), removed any remaining doubts by holding that a denial of a motion for summary judgment is not appealable, because it does not settle or decide anything about the merits of the claim. "It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Id.* at 25. Of significance in this opinion is the Court's discussion of § 1292(a) (1) and the policy against permitting interlocutory appeals. "[W]e approach this statute," the Court said, "somewhat gingerly lest a floodgate be opened that brings into exception many pretrial orders." *Id.* at 24. Speaking for the majority, Justice Douglas observed: "Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a) (1). We see no other way to protect the integrity of the congressional policy against piecemeal appeals." *Id.* at 25.

⁵ *Baltimore Contractors v. Bodinger*, 348 U.S. 176 (1955); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Formigli Corp. v. Alcar Builders, Inc.*, 329 F.2d 79 (3d Cir. 1964); *Cuneo Press v. Kokomo Paper Handlers' Local 34*, 235 F.2d 108 (7th Cir.), cert. denied, 352 U.S. 912 (1956); *Gatliff Coal Co. v. Cox*, 142 F.2d 876 (6th Cir. 1944). But see *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254 (1949). See generally 5 MOORE ¶ 39.13(27); 6 *Id.* ¶¶ 54.06(3), 54.07; C. WRIGHT, FEDERAL COURTS § 102 (1963) [hereinafter cited as WRIGHT]; Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 373-75 (1961).

a bill in the equity court, which would issue an injunction against prosecution of the plaintiff's action in the law court.⁶ In *Enelow v. New York Life Insurance Co.*⁷ the United States Supreme Court reasoned that an order staying proceedings in the plaintiff's action is a modern substitute for such an injunction if the plaintiff's action would have been at law before the merger of law and equity.⁸ This reasoning, however, applies only when the stay order would have required an equity court to issue an injunction. If the stay order could have been issued either by a law court⁹ or by an equity court without resort to an injunction,¹⁰ the order issued under modern procedure is not equivalent to a grant of an injunction under the old procedure.¹¹

Finding an historical counterpart for the plaintiff's action is the key to applying this rule. In most cases appeal may be taken under the *Enelow* rule if the plaintiff's action historically would have been before a law court. If all elements of the plaintiff's action are either legal or equitable in character, this determination is relatively simple. But the Federal Rules encourage the plaintiff to combine all of his claims, both legal and equitable in one action,¹² frequently resulting in litigation which is a combination of legal and equitable elements.¹³

⁶ For a discussion of this procedure see F. JAMES, CIVIL PROCEDURE § 8.8 (1965).

⁷ 293 U.S. 379 (1935). For general discussion see 5 MOORE § 39.13 (2); 6 *Id.* § 54.07.

⁸ The Court said, in effect, that a stay order issued under modern procedure where an injunction would have been issued under the old procedure is the same thing as an injunction.

⁹ Both common law courts and equity courts had power to control the progress of the litigation before them, but only a court of equity could order a stay of proceedings in another court. *Jackson Brewing Co. v. Clarke*, 303 F.2d 844 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962); *Chronicle Publishing Co. v. NBC*, 294 F.2d 744 (9th Cir. 1961); *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

¹⁰ If an order of a court of equity merely stayed proceedings in the same court, the order was not an exercise of the court's equity powers. *Alexander v. Pacific Maritime Ass'n*, 332 F.2d 266 (9th Cir.), *cert. denied*, 379 U.S. 882 (1964); *Kirschner v. West Co.*, 300 F.2d 133 (3d Cir. 1962); *Greenstein v. Nat'l Shirt & Sportswear Ass'n*, 274 F.2d 431 (2d Cir. 1960); *Wilson Bros. v. Textile Workers Union*, 224 F.2d 176 (2d Cir.), *cert. denied*, 350 U.S. 834 (1955). *But see* *Glen Oaks Utilities, Inc. v. Houston*, 280 F.2d 330 (5th Cir. 1960).

¹¹ A stay of proceedings pending the outcome of another suit is not equivalent to an injunction because it does not restrain proceedings in another tribunal. *Jackson Brewing Co. v. Clarke*, 303 F.2d 844 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962); *Ferguson v. Tabah*, 288 F.2d 665 (2d Cir. 1961); *Arny v. Philadelphia Transp. Co.*, 266 F.2d 869 (3d Cir. 1959); *International Nickel Co. v. Martin J. Barry, Inc.*, 204 F.2d 583 (4th Cir. 1952); *Triangle Conduit & Cable Co. v. National Elec. Prods. Corp.*, 127 F.2d 524 (6th Cir. 1942). *Contra*, *Glen Oaks Utilities, Inc. v. Houston*, 280 F.2d 330 (5th Cir. 1960); *Jewell v. Davies*, 192 F.2d 670 (6th Cir. 1951) (*dictum*), *cert. denied*, 343 U.S. 904 (1952). Likewise, a stay pending the outcome of administrative proceedings is not equivalent to an injunction. *Allied Air Freight, Inc. v. Pan Am. World Airways*, 340 F.2d 160 (2d Cir.), *cert. denied*, 381 U.S. 924 (1965); *Chronicle Publishing Co. v. NBC*, 294 F.2d 744 (9th Cir. 1961); *Day v. Pennsylvania R.R.*, 243 F.2d 485 (3d Cir. 1957). *But see* *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486 (5th Cir. 1966).

¹² FED. R. CIV. P. 18; WRIGHT § 78.

¹³ For instance, if the plaintiff's only claim is for breach of contract and if the only remedy he seeks is damages, the courts have had no difficulty in determining that the action is legal in character and that an appeal will lie under § 1292(a)(1). *E.g.*, *Formigli Corp. v. Alcar Builders, Inc.*, 329 F.2d 79 (3d Cir. 1964); *Ross v. Twentieth Century-Fox Film Corp.*, 236 F.2d 632 (9th Cir. 1956). Damages, however, may not be an adequate remedy for the plaintiff, for he may need an injunction, an accounting, imposition of trust, a declaratory judgment, or some other relief as well. Once these equitable remedies are interjected, it becomes less clear whether the action would have been before an equity court or a law court.

Complicating this situation further is the possibility that the complaint may assert both legal and equitable claims. For instance, the plaintiff's action might involve both breach of contract and breach of fiduciary duty, or he might allege breach of one contract and seek specific performance of another. On top of this, the plaintiff may seek various forms of relief on each of his claims.

As long as the *Enelow* rule stands, the courts of appeals must utilize some method of deciding whether the plaintiff's action historically would have been at law or in equity. So far, no court of appeals has laid down a clear rule for making this determination, but two distinct approaches seem to be developing.¹⁴ One approach is what Judge Friendly has called the "dominant purpose test."¹⁵ The court asks whether the action is "basically and predominantly an action at law."¹⁶ To answer this question, the court looks at the plaintiff's complaint and sorts the various claims and demands for relief into those which would have been heard by a law court and those which would have been heard by an equity court. Then the court determines which group is the more important to the plaintiff's action.¹⁷ If the action is predominantly legal in character, with its equitable aspects merely incidental to its legal aspects, the action may be considered one at law and thus is appealable.¹⁸ If, however, the reverse is true, the suit is considered one in equity and is not appealable. The advantage of this approach is simplicity in application, because the character of the action depends on the court's characterization of each case brought before it.¹⁹ In addition, this approach allows the appellate court a fairly large degree of flexibility.²⁰

The second approach may be called the historical test, for it is essentially an inquiry into the equity courts' jurisdiction. To prevent multiple litigation of the same claims, an equity court had the power to take jurisdic-

¹⁴ At this point in time assigning a particular circuit to one camp or the other would be precarious at best.

¹⁵ *Schine v. Schine*, 367 F.2d 685, 688 (2d Cir. 1966) (concurring opinion). See discussion accompanying note 28 *infra*.

¹⁶ *Alexander v. Pacific Maritime Ass'n*, 332 F.2d 266, 267 (9th Cir.), *cert. denied*, 379 U.S. 882 (1964).

¹⁷ One problem arising under the dominant purpose test is whether either the allegations of the complaint or the relief demanded in the prayer should control the character of the action. Although this problem has not troubled the courts in any of the cases utilizing this test, this distinction would become important if a case should arise in which characterization of the action solely from the allegations of the complaint would reach a different result than its characterization from the relief demanded.

For a discussion of this problem as it relates to the right of jury trial see *Schaeffer v. Gunzburg*, 236 F.2d 11 (9th Cir.), *cert. denied*, 355 U.S. 83 (1957).

¹⁸ *Travel Consultants, Inc. v. Travel Management Corp.*, 367 F.2d 334 (D.C. Cir. 1966); *Council of Western Elec. Technical Employees v. Western Elec. Co.*, 238 F.2d 892 (2d Cir. 1956); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 372 (1961); *cf.* Professor Wright's criticism of a similar test used to determine right to jury trial, WRIGHT § 92, at 354.

¹⁹ The dominant purpose test apparently is an outgrowth of a now discredited suggestion by Professor Moore that the parties' right to jury trial should be determined by the "basic nature" of the issue. 5 MOORE § 38.11(6). When both legal and equitable issues are combined in a lawsuit, the right to trial by jury is not lost, but the sequence of trial may be very important, for once a trier of fact—either court or jury—determines a fact, that fact may not thereafter be redetermined. *Orenstein v. United States*, 191 F.2d 184 (1st Cir. 1951); 5 MOORE § 38.15, at 148; WRIGHT § 92, at 354; *cf.* *Russell v. Laurel Music Corp.*, 104 F. Supp. 815 (S.D.N.Y. 1952). Recent decisions have held that the legal issues should be tried first so that the right to jury trial will not be lost. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961). In *Dairy Queen, Inc. v. Wood*, *supra*, the Supreme Court repudiated the "basic nature" test, holding that the right to jury trial should not be lost if demanded, "whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not." *Id.* at 473.

²⁰ This flexibility, however, is also a disadvantage, for it means that the test is uncertain in application. If the only way to determine the character of the action is by appeal to the court of appeals, much unnecessary litigation may arise.

tion of legal as well as equitable elements of a lawsuit.²¹ Once it obtained jurisdiction over some phase of the suit, the equity court would decide all issues and render complete relief, even though the remedy might be legal in character.²² In applying the historical test, then, the court decides whether an equity court would have invoked this extension of its jurisdiction.²³ If so, the action must be considered as one which would have been in equity, and no appeal is possible under section 1292 (a) (1).²⁴

The historical test, however, seems more a device for preventing appeal than a "test." In federal courts shortly before the merger of law and equity the equity court's extension of its jurisdiction was freely invoked,²⁵ so the courts applying the historical test readily determine that the action would have been in equity.²⁶ When used in this way the historical test becomes no more than a formula which precludes all appeal from orders staying proceedings in actions containing both legal and equitable elements.²⁷

II. SCHINE V. SCHINE

In the recent case of *Schine v. Schine*²⁸ the Second Circuit adopted the historical test and seemingly rejected the dominant purpose test. The case arose out of a sale of stock in a family corporation, Schine Enterprises, Inc. Plaintiffs sold their stock to defendants, who were officers, directors, and majority stockholders in the corporation. Alleging that defendants wrongfully failed to disclose a real estate deal which was pending at the time of sale, plaintiffs brought suit in federal court. They presented four claims, the first and third of which alleged acts in violation of section 10(b) of the Securities Exchange Act of 1934.²⁹ In their second and fourth claims plaintiffs alleged that by the same acts defendants had violated the fiduciary duty they owed as officers, directors, and majority stockholders to the

²¹ See generally 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 231, 236 (5th ed. Symons 1941); 4 *Id.* §§ 1362, 1363.

²² See *M'Mullen Lumber Co. v. Strother*, 136 F. 295, 305 (8th Cir. 1905); 1 J. POMEROY, EQUITY JURISPRUDENCE § 231 (5th ed. Symons 1941); 4 *Id.* § 1421.

²³ In utilizing the historical test the courts are not forced to decide whether the appealability of the order should hinge solely on either the character of the plaintiff's allegations or on his prayer for relief, for appealability depends on the court which would have had jurisdiction of the entire action prior to the merger of law and equity. Therefore, in characterizing the action, the court must consider both the allegations and the relief sought, for a mere demand for equitable relief would not necessarily render a suit cognizable in equity.

²⁴ *Kirschner v. West Co.*, 300 F.2d 133 (3d Cir. 1962); *City of Thibodaux v. Louisiana Power & Light Co.*, 255 F.2d 774 (5th Cir. 1958), *rev'd*, 360 U.S. 25 (1959).

²⁵ 2 MOORE ¶¶ 2.05-.06. Traditionally, common law courts were jealous of their jurisdiction of legal elements of an action. See 1 J. POMEROY, EQUITY JURISPRUDENCE § 231 (5th ed. Symons 1941).

²⁶ Cases cited note 24 *supra*.

²⁷ The effect of this approach is to limit appeals under the *Enelow* rule to those cases in which the plaintiff's action is solely legal in character. In a more complex action containing both legal and equitable elements there can be no appeal under the historical test.

The policy behind allowing interlocutory appeals from orders granting or refusing injunctions is the "drastic and far-reaching effect" those orders may have on litigants. *Morgenstern Chem. Co. v. Schering Corp.*, 181 F.2d 160 (3d Cir. 1950); see note 4 *supra*. If the historical test is followed, the courts will be saying, in effect, that a stay order in a simple suit has such a "drastic and far-reaching effect" but that a stay order in a more complex suit does not.

²⁸ 367 F.2d 685 (2d Cir. 1966).

²⁹ 15 U.S.C. § 78j(b) (1964).

minority stockholders. On the first and second claims plaintiffs sought damages, and on the third and fourth claims they sought an accounting of profits.

At the time of the sale plaintiffs signed a release which purported to release defendants from liability for willful misrepresentations of the value of the properties of the corporation. When their initial motion for summary judgment based on this release was denied,³⁰ defendants counterclaimed for enforcement of the release through an injunction against prosecution of plaintiffs' action. Then defendants moved for a separate trial on their counterclaim prior to trial of plaintiffs' action. When this motion also was denied by the district judge,³¹ defendants, arguing that the order was equivalent to a denial of an injunction under the *Enelow* rule, sought appeal under section 1292(a)(1).

The Second Circuit Court of Appeals dismissed the appeal on grounds that the district judge's order was not a denial of such an injunction. The court reasoned that a suit for an accounting based on breach of fiduciary duty would have been cognizable in a court of equity prior to the merger of law and equity. Since this claim would have gone to the equity court, that court would have assumed jurisdiction of the other claims as well. Thus there would have been no action in a court of law for an equity court to enjoin.³²

Such reasoning is a good example of the approach taken by the courts in applying the historical test. But in *Schine* the court, in addition, suggested that the dominant purpose test may no longer be employed in the Second Circuit. Previously, *Ring v. Spina*³³ was the leading case in the Second Circuit holding that the character of an action depends on whether the complaint and the relief sought are predominantly legal or equitable. The *Schine* court held that *Ring* had been overruled to the extent that it conflicts with *Schine*.³⁴ However, in a concurring opinion Judge Friendly refused to discard the *Ring* approach. He would continue to examine the plaintiff's complaint to determine whether the dominant purpose of the complaint is legal or equitable. In cases of doubt he would conclude that the claim is not one at law.³⁵

³⁰ 250 F. Supp. 822 (S.D.N.Y. 1966).

³¹ 254 F. Supp. 986 (S.D.N.Y. 1966).

³² *Schine v. Schine*, 367 F.2d 685, 687 (2d Cir. 1966). Though the order is not appealable under § 1292(a)(1), the court noted that an interlocutory order such as that in *Schine* may be appealed under § 1292(b) if the requirements of that subsection are met. But the court pointed out that an order refusing a separate trial may "rarely, if ever," meet the requirements of that subsection. *Id.* at 688. This statement confirms what experience has already indicated: subsection (b), though theoretically applicable to all interlocutory orders not covered by subsection (a), in practice seldom applies to procedural orders. See *Seven-Up Co. v. O-So Grape Co.*, 179 F. Supp. 167, 171 (N.D. Ill. 1959) ("the interlocutory procedural order which would . . . [commend] itself [for immediate appeal] would be almost as rare as the dodo"). *But cf.* *Travel Consultants, Inc. v. Travel Management Corp.*, 367 F.2d 334, 338 (D.C. Cir. 1966).

For a discussion of the statute, see 7A MOORE § 1292, at JC-430-48; *cf.* WRIGHT § 102, at 403; Comment, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 380 (1961).

³³ 166 F.2d 546 (2d Cir. 1948).

³⁴ *Schine v. Schine*, 367 F.2d 685 n.1 (2d Cir. 1966); *cf.* *La Capria v. Compagnie Maritime Belge*, 373 F.2d 579 (2d Cir. 1967).

³⁵ *Schine v. Schine*, 367 F.2d 685, 688 (2d Cir. 1966).

III. CONCLUSION

Schine and the historical test, by precluding appeal, reflect a policy now followed by the federal courts. In *Baltimore Contractors v. Bodinger*³⁶ the Supreme Court indicated dissatisfaction with the *Enelow* rule, but the majority expressed belief that action by Congress would be necessary to eliminate it.³⁷ Nevertheless, that case suggests a policy against allowing interlocutory appeals from stay orders.³⁸ It seems clear that the Court will not sanction any widening of orders appealable under the *Enelow* rule.

Because it is impossible to classify as legal or equitable a hybrid form of lawsuit which could not have existed under the old procedure, Professor Wright, discussing the law-equity distinction as applied to the right to jury trial, has suggested that resort must be had to policy.³⁹ This observation seems equally applicable when the right in question is the right to take an interlocutory appeal from an order staying proceedings. Behind the *Enelow* case was the tacit policy that modern procedural devices should not limit rights available under the older procedure. Today, the smooth operation of the Federal Rules has become a more important policy in federal courts than the preservation of antiquated distinctions. Now there is only one form of action in federal courts,⁴⁰ and under that action the litigants may bring all of their claims.⁴¹ The district court proceeds on these claims generally without regard for their historical origins.⁴² A stay order, for instance, acts no differently in a modern action combining legal and equitable elements than it did in a common law action based on several legal claims. In both cases the plaintiff's action is temporarily held up by the court, but no separate proceeding is enjoined, and in most cases there is no danger of irreparable harm to or a drastic effect on the litigants.⁴³ Thus a stay order possesses neither the effect nor the attributes of an injunction.

The policy governing interlocutory appeals today seems to be that procedural orders should not be appealable. As long as the *Enelow* rule stands, this policy cannot receive full expression, but *Schine* reveals an inclination to limit the exceptions to that policy. Litigants in federal court may expect courts of appeals to look with increasing disfavor on interlocutory appeals from stay orders if *Schine's* historical approach becomes the standard.

Rufus S. Scott

³⁶ 348 U.S. 176 (1955).

³⁷ *Id.* at 185. *But see* Justice Black's dissenting opinion, *id.* at 186.

³⁸ *Id.* at 181.

³⁹ WRIGHT § 92, at 354.

⁴⁰ FED. R. CIV. P. 2.

⁴¹ FED. R. CIV. P. 18.

⁴² The only exception is when the litigants' right to jury trial is in question. This right is subject to the special provisions of FED. R. CIV. P. 38. *See* note 19 *supra*.

⁴³ If a motion for a stay to permit a separate trial of a counterclaim is denied, the defendant still has an opportunity to litigate the counterclaim at its proper place in the lawsuit. Even if the denial of such a motion is in error, the judge may correct his error during the trial, or if the litigant is prejudiced by the order, he may appeal from the court's final judgment. 28 U.S.C. § 1291 (1964).