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Smith: An Appeal from Judgment Entered Pursuant to Texas Rule of Civil P

easement owner was entitled to the award because he was not responsible for the happening of the condition subsequent.[40] This is improper reasoning unless the court considers an easement a determinable fee.

This conclusion was rejected in *Shaw v. Williams*, indicating that an easement was an estate less than a determinable fee.[41] The rule as set down in *Kearney v. Francher*, indicates the easement is extinguished when the purpose becomes physically impossible to execute. Under the present case, this would not occur until the easement was actually inundated with water. Therefore, the easement would not be terminated at time of condemnation, and the owner of the easement would be entitled to the award. Once the easement, as well as the servient tenement, had both been condemned by the same authority, the easement would be extinguished, not because of abandonment, but because of the merger of two interests in a common owner.[42] In any event, the landowner must have acquired title to the easement prior to the taking of his interest by eminent domain.

J. M. Holbrook

CIVIL PROCEDURE—SEPARATE TRIALS—SEVERANCE—AN APPEAL FROM JUDGMENT ENTERED PURSUANT TO TEXAS RULE OF CIVIL PROCEDURE 174(b), SEPARATE TRIALS, IS INTERLOCUTORY AND THERE IS NO BASIS FOR TREATING AN ORDER FOR A SEPARATE TRIAL AS AN ORDER OF SEVERANCE. *Hall v. City of Austin,* 450 S.W.2d 836 (Tex. Sup. 1970).

In 1953, the City of Austin filed a petition in eminent domain seeking to condemn a tract of land owned by Hall. Special commissioners were appointed and made an award to which Hall filed objections on grounds of inadequacy. In 1966, after completion of a freeway across part of the tract, Hall filed amended objections alleging that the city had taken more land than it needed and that the city should be stopped from taking that portion not used for freeway purposes. Pursuant to Rule 174(b), Texas Rules of Civil Procedure,[1] Hall filed a motion for a separate trial on the issues of whether the city had a right to condemn

[40] 13 Tex. Sup. Ct. J. 178, 180 (Feb. 7, 1970); State v. Independent School Dist. No. 31, 124 N.W.2d 121, 126 (Minn. 1963).
[41] Shaw v. Williams, 332 S.W.2d 797 (Tex. Civ. App.—Eastland 1960, no writ).
[42] Howell v. Estes, 71 Tex. 690, 12 S.W. 62 (1888); THOMPSON ON REAL PROPERTY, § 449, p. 801 (1962).

[1] TEX. R. CIV. P. 174(b) reads:
Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

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that portion not used for freeway and whether the city's right to condemn was excessive and arbitrary in that it condemned more land than it needed. The motion was granted and judgment entered that the city take nothing as to that portion of the lot not used for freeway purposes. No disposition was made with respect to the portion occupied by the freeway. The Austin Court of Civil Appeals assumed jurisdiction of the case,[2] evidently on the basis that an order for a separate trial under Rule 174(b) is a final and appealable judgment the same as an order of severance under Rule 41, Texas Rules of Civil Procedure.[3] Held—*Reversed and Appeal Dismissed.* An appeal from judgment entered pursuant to Texas Rule of Civil Procedure 174(b), Separate Trials, is interlocutory and there is no basis for treating an order for a separate trial as an order of severance.

In the past some members of the legal profession have been confused as to the distinction between an order of severance and an order for a separate trial.[4] In 1961, the Texas Supreme Court in *Kansas University Endowment Association v. King*[5] specifically pointed out that there is a distinction: "Any statements in our former opinions indicating that Rule 174 deals with severance are incorrect and should be disregarded."[6] The trial judge had entered an order of severance under Rule 174(b). Justice Walker, speaking for the court, pointed out that the trial judge probably had been led into this error because of earlier, confusing decisions of the supreme court and other courts where severance and separate trial were treated as being synonymous. The Texas Supreme Court, however, took jurisdiction of the cause, indicating thereby, that the trial court's action was in effect the same as if a severance had been ordered under Rule 41. The court held the order of severance erroneous because the severed portion was not capable of being an independent cause of action and the facts were so interwoven as to work a hardship

[2] City of Austin v. Hall, 446 S.W.2d 330 (Tex. Civ. App.—Austin 1969), *rev'd*, 450 S.W.2d 836 (Tex. Sup. 1970).

[3] Mayfair Building Corp. v. Oak Forest Bank, 441 S.W.2d 568, 571 (Tex. Civ. App.—Austin 1969, no writ). Although the court rendered the correct decision, it stated: "The order . . . did not expressly direct a *severance* as authorized under *Rule 174*. . . ." (Emphasis added.) Rule 41 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be *severed* and each ground of recovery improperly joined *may be docketed as a separate suit* between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. *Any claim against a party may be severed and proceeded with separately.* (Emphasis added.)

[4] *See* Hall, *Severance and Separate Trial in Texas*, 36 TEXAS L. REV. 339 (1958); Heardon, *Appealable Judgments and Orders*, in State Bar of Texas, APPELLATE PROCEDURE IN TEXAS § 2.8 [1] (1964).

[5] 162 Tex. 599, 350 S.W.2d 11 (1961).

[6] *Id.* at 612, 350 S.W.2d at 19.

on the parties. The court did not hold that an order of severance under Rule 174(b) is interlocutory; on the contrary, its action allowed a trial judge to mistakenly order a severance under a rule for separate trials.

Justice Walker, however, pointed out the distinction between Rule 174(b) and Rule 41:

> A *severance* divides the lawsuit into *two or more independent causes,* each of which terminates in a separate, *final and enforceable judgment.* The *separate trial* contemplated by Rule 174 results in an *interlocutory order* determining the claims or issues so tried, but there is *only one final judgment* which is entered after all claims and issues involved in the suit have been tried.
>
> An issue that is tried separately under Rule 174 need not constitute a complete lawsuit in itself. *Severance is proper,* however, *only where the suit involves two or more separate and distinct causes of action.* Each of the causes into which the action is severed must be such that the same might properly be tried and determined if it were the only claim in controversy. (Citations omitted.) A severable cause of action may be tried separately under the provisions of Rule 174, but an issue that might properly be the subject of a separate trial is not necessarily severable.[7] (Emphasis added.)

A judgment is required to be final before it can be heard by either a court of civil appeals or the supreme court, unless an appeal is specifically provided by law.[8] Even if the order of severance is erroneous, a judgment based upon the severed portion is final,[9] although it may be set aside on appeal; but a failure to object to an order of severance at the trial level is a waiver of that objection on appeal.[10] The appealability of a judgment does not depend upon whether the action is severable, is capable of being erroneously severed, or whether it should have been severed.[11] Though an action is severable, an express order of severance is necessary; and the doctrine of "severance by implication" has been expressly rejected.[12]

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[7] *Id.* at 611-12, 350 S.W.2d at 19.

[8] TEX. CONST. art. V, § 6; TEX. REV. CIV. STAT. ANN. art. 2249 (1964); TEX. R. CIV. P. 301; North East Independent School District v. Aldridge, 400 S.W.2d 893 (Tex. Sup. 1966); Steeple Oil and Gas Corporation v. Amend, 394 S.W.2d 789 (Tex. Sup. 1965); Palmer v. D.O.K.K. Benevolent and Insurance Association, 160 Tex. 513, 334 S.W.2d 149 (1960); Thomas v. Shult, 436 S.W.2d 194 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ); Myers v. Smitherman, 279 S.W.2d 173 (Tex. Civ. App.—San Antonio 1955, no writ).

[9] Schieffer v. Patterson, 433 S.W.2d 418 (Tex. Sup. 1968); Grossenbacher v. Burket, 427 S.W.2d 595 (Tex. Sup. 1968); Pierce v. Reynolds, 160 Tex. 198, 329 S.W.2d 76 (1959).

[10] Pierce v. Reynolds, 160 Tex. 198, 329 S.W.2d 76 (1959).

[11] Pierce v. Reynolds, 160 Tex. 198, 329 S.W.2d 76 (1959); Pan American Petroleum Corp. v. Texas Pacific Coal and Oil Co., 159 Tex. 550, 324 S.W.2d 200 (1959).

[12] Pan American Petroleum Corp. v. Texas Pacific Coal and Oil Co., 159 Tex. 550, 324 S.W.2d 200 (1959); Thomas v. Shult, 436 S.W.2d 194 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ). In *Thomas* the father and mother of the deceased, Reginald Thomas, Jr., brought suit against Rigo Manufacturing Company, manufacturer of a chemical compound

In 1962, the Fort Worth Court of Civil Appeals, with procedural facts before it similar to those in *Kansas University Endowment Association*, dismissed an appeal[13] on a finding that the judgment was interlocutory and not a final and appealable judgment as required by Rule 301.[14] The trial judge ordered that the defendant's claim be severed and given a separate docket number.[15] Judgment was entered on the plaintiff's action; but no disposition was made of defendant's claim.[16] Chief Justice Massey, writing for the majority, stated:

> There is no provision of law under which appeal is provided under these circumstances. With certain statutory exceptions, an order, judgment or decree, whether at law or equity, must possess the essential characteristic of finality before any appeal will lie therefrom.[17]

The case of *Schieffer v. Patterson*,[18] points out clearly that the problems arising from a lack of understanding of the distinction between an order of severance and an order for a separate trial can keep the litigants fighting in the courts over procedural points, while any decision on the merits must wait until another day. Joy Patterson brought a damage suit against Larry Schieffer, against whom a default judgment was rendered. He, thereafter, moved that the judgment be set aside and that he be granted a new trial. The trial judge overruled his motion except inso-

known as "Kill-Ko Bug Killer," for allegedly having caused Reginald's death and against Dr. Shult, who allegedly negligently treated Reginald for his sickness, after having drunk the compound. The trial court entered judgment in favor of Rigo on May 7, 1968, making no mention of the cause against Dr. Shult and having entered no order of severance. On May 23, judgment was entered in favor of Dr. Shult, making no mention of the prior disposition of Rigo. The parents appealed both judgments. The court of appeals held that both judgments are interlocutory, that no severance was ordered as to the two causes, that there can be no severance by implication, and there can be only one final judgment; therefore, there is no final judgment in the case as it stands and the appeal must be dismissed.

But see Southern Ins. Co. v. Federal Service Finance Corp., 370 S.W.2d 24 (Tex. Civ. App.—Austin 1963, writ dism'd), where the courts found that there had been a "constructive severance." Although there does not seem to be a Texas Supreme Court case expressly rejecting a doctrine of "constructive severance," these cases should be followed with some hesitancy. The only difference between a "constructive severance" and "severance by implication" is semantic. Evan v. Young County Lumber Co., 368 S.W.2d 783 (Tex. Civ. App.—Fort Worth 1963, no writ); Warner Electric Brake & Clutch Co. v. Bessemer Forging Co., 343 S.W.2d 471 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.).

[13] Allison v. Gulf Liquid Fertilizer Co., 353 S.W.2d 512 (Tex. Civ. App.—Fort Worth 1962, no writ).

[14] TEX. R. CIV. P. 301.

[15] Allison v. Gulf Liquid Fertilizer Co., 353 S.W.2d 512, 513 (Tex. Civ. App.—Fort Worth 1962, no writ). The trial judge ordered a severance under Rule 174.

[16] *Id.* The case is unclear as to whether defendant's claim was a cross-claim or compulsory counterclaim.

[17] *Id. But see* Justice Renfro's dissent in same case. The chief justice seems to have overlooked the cases holding that an order of severance no matter how erroneous is a final appealable judgment. The court should have entertained the appeal and remanded for reconsolidation if it was an improper severance.

[18] 430 S.W.2d 290 (Tex. Civ. App.—Austin 1968), *rev'd*, 433 S.W.2d 418 (Tex. Sup. 1964), *on remand* 440 S.W.2d 124 (Tex. Civ. App.—Austin 1969, no writ).

far as it asked for a new trial on the issue of damages. Schieffer excepted and gave notice of appeal. Nearly a month later, he filed a motion to sever the default judgment from the damage issue and the motion was granted. The defendant Schieffer appealed the default judgment. The court of civil appeals held that the judgment was interlocutory and must, therefore, be dismissed for want of jurisdiction. The Texas Supreme Court reversed and remanded the cause to the court of civil appeals for consideration on its merits, expressly stating, however, "Our holding in this case is not to be taken as approving the trial court's order severing the issues of liability and damages."[19]

On remand, the court of civil appeals, per Chief Justice Phillips, held that the allegations in plaintiff's original petition would not support a default judgment and that defendant be granted a new trial on all issues.[20]

The confusion concerning the distinction between an order of severance and an order for a separate trial still persists in some degree since the *Kansas* decision. The fine judicial reasoning required has not been fully appreciated. Be that as it may, it seems certain that a judgment entered pursuant to a severed cause of action under Rule 41 is a *final judgment for purposes of appeal*[21] *no matter how erroneous.* Even, unfortunately, a judgment entered in a *severed* cause under Rule 174(b) is final, if the trial judge puts the word "sever" in his order and gives that cause a separate docket number. This particular laxity does not help distinguish between Rule 41 and Rule 174(b) and seems to allow cases to be appealed piecemeal. As the Texas Supreme Court pointed out in the principal case:

> An order for a separate trial leaves the lawsuit intact but enables the court to hear and determine one or more issues without trying all controverted issues at the same hearing. The order entered at the conclusion of a separate trial is often interloc[u]tory, because no final and appealable judgment can properly be rendered until all of the controlling issues have been tried and decided.[22]

The problem can be eliminated by careful drafting of the motion by trial counsel. It seems that an attorney has enough work trying his case on the merits without spending extra, valuable time locked in combat over a procedural point that can be understood.

James A. Smith

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[19] Schieffer v. Patterson, 433 S.W.2d 418, 419 (Tex. Sup. 1964). *See* Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958), holding that it is improper to sever the liability from the damage issue in a tort action.

[20] Schieffer v. Patterson, 440 S.W. 2d 124 (Tex. Civ. App.—Austin 1969, no writ).

[21] *See* Continental Bus Systems, Inc. v. City of Corpus Christi, 13 Tex. Sup. Ct. J. 164 (Jan. 28, 1970) rendered the same day as the *Hall* case.

[22] Hall v. City of Austin, 450 S.W.2d 836 (Tex. Sup. 1970).