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Orville C. Walker

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## AMALGAMATION OF INTERLOCUTORY ORDERS INTO ONE FINAL JUDGMENT

ORVILLE C. WALKER\*

A shibboleth of appellate procedure declares that an appeal can only be taken from a final judgment,<sup>1</sup> with certain statutory exceptions.<sup>2</sup> As appellate jurisdiction must rest upon the finality of the judgment it is surprising to observe the countless appeals that have been dismissed due to a non-final order. This is usually due to one of two reasons, either the judgment has been inartfully drawn which fails to dispose of all matters and parties involved in the suit, or the appeal has been prematurely brought. In the former situation the Texas Supreme Court in the early case of *Trammell v. Rosen*<sup>3</sup> announced the doctrine of disposal by implication in order to create a final judgment. The court recently liberalized the doctrine in *North East Independent School District v. Aldridge*.<sup>4</sup> As a result of these two decisions fewer dismissals have occurred as a result of poorly drafted judgments. It is the latter situation to which this article is addressed.

It has long been the rule that only one final judgment shall be rendered in any cause except where it is otherwise specifically provided by law.<sup>5</sup> It frequently happens during the progress of a trial that a series of orders are entered, each being interlocutory and nonappealable; however, the last such order entered may dispose of the entire case. Is it necessary that one instrument be drafted which merges all of the previous orders into one final judgment? In the 1961 case of *McEwen v. Harrison*<sup>6</sup> the Texas Supreme Court attempted to answer this question. In that case an interlocutory default judgment had been taken against Texaco, Inc. Thereafter, the plaintiffs took a non-suit as to the other two defendants. The court held that upon the taking of the non-suit as to the remaining defendants the earlier default judgment against Texaco thereupon became final as of the date of taking the non-suit. Upon the second appeal in *Texaco, Inc. v. McEwen*<sup>7</sup> it was held that the time for appeal or writ of error by Texaco started to run from the entry of the

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\* Professor of Law, St. Mary's University. B.A., Howard Payne College; LL.B., University of Texas.

<sup>1</sup> TEX. REV. CIV. STAT. ANN. art. 2249 (1964); TEX. R. CIV. P. 467.

<sup>2</sup> TEX. REV. CIV. STAT. ANN. arts. 2008, 2250, 2251 (1964).

<sup>3</sup> 106 Tex. 132, 157 S.W. 1161 (1913).

<sup>4</sup> 400 S.W.2d 893 (Tex. Sup. 1966).

<sup>5</sup> TEX. R. CIV. P. 301.

<sup>6</sup> 162 Tex. 125, 345 S.W.2d 706 (1961).

<sup>7</sup> 356 S.W.2d 809 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

final judgment, that is, the order disposing of the remaining defendants. Fortunately, for Texaco, it perfected its appeal by writ of error within six months from the date of the non-suit.<sup>8</sup>

Just two years later a similar situation arose in *H. B. Zachry Co. v. Thibodeaux*<sup>9</sup> where suit was brought against a city and a contractor. The trial court granted the contractor's motion for summary judgment. Thereafter, on motion of the plaintiff, the trial court dismissed the suit as to the city. In dismissing the appeal, the court of civil appeals held both orders (of April 18 and May 3) to be interlocutory and that no final judgment had been rendered. The supreme court said: "We adhere to the holdings of the McEwen cases. Since the holding in the Zachry case is contrary, we are authorized under Rule 483, Texas Rules of Civil Procedure, to reverse this cause without granting the application for writ of error."<sup>10</sup> The case was remanded to the court of civil appeals to consider the appeal on its merits.<sup>11</sup>

Subsequent to the *McEwen* decision, the case of *Craig v. Rio Grande Electric Cooperative*<sup>12</sup> involved only a slightly different situation. The trial court had sustained defendant, Rio Grande Electric Cooperative's motion for summary judgment, but denied the motions of the two other defendants. Subsequently plaintiff's suit against these defendants was severed from his suit against the electric company. The severance effectively confirmed the previous order granting the electric company's motion for summary judgment and made the summary judgment in favor of the electric company final and appealable. It seems clear that it is not necessary that the finality of a judgment be dependent upon one instrument.

At this point it would also seem immaterial by what method a party defendant is disposed of so long as all that remains is the earlier interlocutory order or orders which have now ripened into a final and therefore appealable judgment.<sup>13</sup> Furthermore, there would seem to be no obstacle insofar as any violation of the rule prohibiting the entry of more than one final judgment. The evident purpose of the *McEwen* and *Zachry* cases was to permit the amalgamation of several nonappealable orders into one final judgment thereby opening the door to im-

<sup>8</sup> TEX. REV. CIV. STAT. ANN. art. 2255 (1964).

<sup>9</sup> 364 S.W.2d 192 (Tex. Sup. 1963).

<sup>10</sup> *Id.* at 193.

<sup>11</sup> *Thibodeaux v. H. B. Zachry Co.*, 368 S.W.2d 776 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

<sup>12</sup> 346 S.W.2d 438 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.).

<sup>13</sup> *Sears v. Mund Boilers, Inc.*, 328 S.W.2d 199 (Tex. Civ. App.—Texarkana 1959, writ ref'd). The court held in the absence of a severance order as to one defendant, the earlier order sustaining motion for summary judgment was not final and appealable.

mediate appellate review. Nevertheless, the lower courts have been reluctant to extend the application of the doctrine of "amalgamation."

The case of *Sisttie v. Holland*<sup>14</sup> involved a suit by plaintiff for personal injuries against two defendants. Each defendant filed separate motions for summary judgment. A hearing was held on both motions at the same time. The court granted both motions in separate and distinct judgments; one judgment was signed on February 8, 1963, and the other on February 12, 1963. The appellant perfected her appeal from both judgments which was necessary as neither judgment made reference to the other nor was the first judgment incorporated into the latter. On its own motion the court raised the question of the finality of the judgment. For the first time the court relied upon Rule 301 which prohibits the rendition of more than one final judgment. The court said, "If the Wagner judgment is selected as final, even though it disposes of the only party left, as all the other parties were disposed of in the February 8th judgment, it alone does not dispose of the Hollands and neither does the Holland judgment dispose of Wagner."<sup>15</sup>

It is interesting to note that the court agreed that the two judgments together disposed of the entire controversy but that neither alone did so. Can the judgments be treated as one? The court answered its own question by saying, "Since the last judgment does not refer in any way to the first judgment, nor incorporate it, we do not think they can be treated as one judgment and hence there is no final judgment from which an appeal will lie to this court."<sup>16</sup> The court did not cite either the *McEwen* or *Zachry*<sup>17</sup> cases. In both of those cases the judgment appealed from did not make any reference to the other interlocutory orders. The only possible distinction is that in the *Sisttie* case there was an appeal based upon two instruments whereas in the *McEwen* and *Zachry* cases only one of the interlocutory orders (which had later become final) were brought up on appeal. Does Rule 301, prohibiting the entry of more than one final judgment, preclude the amalgamation of the two interlocutory orders into one final judgment? Furthermore, does the fact that there is an appeal from two instruments necessarily mean there exists two final judgments?

The case of *Everett v. Humble Employees West Texas Federal Credit Union*<sup>18</sup> involved the same question as the *Sisttie* case. Suit was on a

<sup>14</sup> 374 S.W.2d 803 (Tex. Civ. App.—Tyler 1964, no writ).

<sup>15</sup> *Id.* at 804.

<sup>16</sup> *Id.* at 804.

<sup>17</sup> *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706 (1961); *H. B. Zachry Co. v. Thibodeaux*, 364 S.W.2d 192 (Tex. Sup. 1963).

<sup>18</sup> 377 S.W.2d 232 (Tex. Civ. App.—El Paso 1964, no writ).

note against several defendants. One defendant failed to answer and the court entered a default judgment as against him on May 23, 1961. The case proceeded to trial as to the other defendants and judgment was rendered against them on July 18, 1962. The second judgment made no order as to the defaulting defendant and did not refer to the prior judgment. Citing the *Sisttie* case the court declined to treat the two interlocutory judgments as one final judgment. It said, "[E]ven if we ignore the rule of 'one final judgment', there are the ministerial acts to be performed as to *the* judgment in the case."<sup>19</sup> Has the court created a jurisdictional problem by the failure of the trial court to perform a ministerial act? Again, the court did not cite either the *McEwen* or *Zachry* cases, evidently not believing them to be in point.

The case of *Thomas v. Shult*<sup>20</sup> presents a similar situation. The plaintiff filed suit against two defendants based upon separate and distinct causes of action. A judgment signed on May 7, 1968, sustained one defendant's plea in abatement on the ground that the cause of action was barred by limitation. There was a trial as to the other defendant and a second judgment was entered on May 23, 1968, as a result of a trial upon the merits. This judgment decreed that the plaintiffs take nothing as against the defendant. No reference was made to the previous take nothing judgment. The court citing both the *Sisttie* and *Everett*<sup>21</sup> cases dismissed the appeal. The court stated that the one final judgment rule had been violated and that, "This one judgment must dispose of all parties in a suit and all issues."<sup>22</sup> The court is insisting upon one instrument before two interlocutory orders can otherwise become final.

The case of *Thomas v. Shult*, for the first time, mentions the *McEwen* and *Zachry* cases but found both cases to be distinguishable. It said, "In each of them there was an order dismissing the parties from the suit and there was only one judgment making adjudication on the merits as to all issues, as between all other parties in the suit."<sup>23</sup> Is this a distinction without a difference? It is true that in the *McEwen* and *Zachry* cases there was an appeal from one interlocutory order which had culminated in a final judgment. However, it was necessary to enter another interlocutory order to create the one final judgment. Does Rule 301 preclude the merger of two interlocutory orders (two instru-

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<sup>19</sup> *Id.* at 233. (Court's emphasis.)

<sup>20</sup> 436 S.W.2d 194 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ).

<sup>21</sup> *Id.* at 196.

<sup>22</sup> *Id.* at 196.

<sup>23</sup> *Id.* at 196.

ments) into which one final judgment is evolved, thereby permitting appellate review of both?

The problem arose again in the case of *Schell v. Centex Materials Co.*<sup>24</sup> In that case plaintiff filed suit for breach of contract and defendant filed a cross-action. The court, by order dated February 4, 1969, granted defendant's motion for summary judgment that plaintiff take nothing in his suit and that the cause proceed to trial upon the counterclaim. On May 19, 1969, the trial court entered a judgment disposing of the cross-action by agreement of the parties. This judgment, while it referred to the earlier judgment of October 17, did not incorporate such prior judgment in the May, 1969, judgment. The court thereupon held that there was an attempted appeal from two interlocutory judgments. The court said, "Of course, if the two interlocutory judgments are combined, the entire controversy is determined. This would seem the practical thing to do, but there is contrary authority."<sup>25</sup> The court felt constrained to follow the *Sistie, Thomas* and *Everett* cases by this language: "We follow these three opinions of our highly respected peers and hold that we have no jurisdiction of this appeal for the reason that no final judgment has been rendered disposing of all parties and all issues."<sup>26</sup> On motion for rehearing the court referred to the *Zachry* and *McEwen* opinions but adopted the distinction set forth in *Thomas v. Shult*.<sup>27</sup> The question persists: Why does Rule 301 prohibit the merger of two interlocutory orders into one final judgment thereby permitting an appeal of both orders? Are the courts confusing two instruments with the rule against the entry of more than one final judgment?

We are not without authority that Rule 301 does not stand in the way of joining the two interlocutory judgments. The case of *Starr v. Koppers Co.*<sup>28</sup> is in apparent conflict with the opinions of the four other courts of civil appeals. In that case plaintiff's suit was against Koppers Company and Mavor-Kelly Company. Both defendants filed motions for summary judgment. The motion of Koppers Company was heard first and in an order signed on March 20, 1965, the court granted the motion and made an order in this same judgment severing the cause asserted by Mavor-Kelly. On the same day the trial court heard Mavor-Kelly's motion and it also was granted. Both motions were heard

<sup>24</sup> 450 S.W.2d 673 (Tex. Civ. App.—Austin 1970, no writ).

<sup>25</sup> *Id.* at 676.

<sup>26</sup> *Id.* at 677.

<sup>27</sup> 436 S.W.2d 194, 196 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ).

<sup>28</sup> 398 S.W.2d 827 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

and granted under the same cause number and no effort was made to carry out the order of severance by giving one a new style and number. An appeal was perfected by treating these two judgments as one, and filing one appeal bond and transcript. The appellees contended that one appeal had been attempted from two judgments. The appellate court considered the severance order as never having been carried into effect as the trial court disregarded and had impliedly set aside its order of severance. Consequently, the court said, "[T]hese two judgments taken together constitute but one final judgment, from which appellant has prosecuted this appeal. The two orders taken together dispose of the entire lawsuit. The fact that they were in two instruments does not prevent them from being one judgment."<sup>29</sup> The court relied upon *H. B. Zachry Co. v. Thibodeaux*<sup>30</sup> and *Texaco v. McEwen*.<sup>31</sup> The result of the two supreme court opinions along with *Starr v. Koppers Co.* is that a party may appeal from one judgment although it is found in two instruments and rendered on different dates. Furthermore, the rule against the entry of more than one final judgment in a case is not violated.

As previously stated, the case of *Schell v. Centex Materials Co.*<sup>32</sup> held that it is not permissible to combine two interlocutory judgments and appeal from both as one final judgment. The court stated that *Starr* was not in point: "As we view that case there were two final judgments, one in each of the severed cases. The irregularity in combining the appeal from each judgment in one appeal bond and one transcript was only that and nothing more."<sup>33</sup> The court's analysis appears inaccurate. In that case the court did not hold that it is procedurally possible to appeal from two separate final judgments involving two lawsuits by perfecting one appeal. The court treated the order of severance not only as incomplete but also as impliedly set aside, resulting in one appeal from one final judgment.

In view of the foregoing, just what does the rule against the entry of more than one final judgment mean? Is it legally possible to render two final judgments in a single cause? It would seem not. To denominate both judgments as "final" is a meaningless anomaly. If both judgments are required to fully adjudicate the rights of *all* parties and *all* issues, then neither can be a final judgment.

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<sup>29</sup> *Id.* at 828.

<sup>30</sup> 364 S.W.2d 192 (Tex. Sup. 1963).

<sup>31</sup> 356 S.W.2d 809 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

<sup>32</sup> 450 S.W.2d 673 (Tex. Civ. App.—Austin 1970, no writ).

<sup>33</sup> *Id.* at 677.

The underlying purpose of Rule 301 providing for the rendition of one final judgment is to preclude piecemeal appeals. A judgment might very well be final as to one party without adjudicating the rights of another party to the lawsuit. A trial court may not create for itself a so-called final judgment thereby giving one party an immediate right of appeal. In federal court, Rule 54(b) provides: "[T]he court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay . . ."<sup>84</sup> thereby giving an immediate right of appeal. However, Rule 301 prohibits such a procedure in our state courts.

The rule announced in the *Zachry, McEwen* and *Starr* decisions simply allows the amalgamation of two interlocutory orders into one final judgment. The one final judgment rule does not mean that there must be one instrument in which the judgment is found. The decisions in *Sisttie v. Holland*, *Everett v. Humble Employees West Texas Federal Credit Union*, *Thomas v. Shult*, and *Schell v. Centex Materials Co.* are based upon the contrary assumption.

Finally, it is significant that only *Starr v. Koppers Co.* has a writ history. The application for writ of error was refused, *no reversible error*. The lower court had declined to dismiss the appeal for lack of jurisdiction, reversing and remanding the case upon the merits. Had the Texas Supreme Court not agreed with the jurisdictional problem, it would have granted the writ to the extent of remanding the cause back to the court of civil appeals with instructions to dismiss it. Instead the supreme court, by its refusal of the application for writ of error, passed upon the merits of the case and by indirection approved the jurisdictional question decided by the lower court.

What has been said should not be interpreted to mean that an appeal from two interlocutory orders is good practice. While it is not essential to its finality, good draftsmanship dictates that the last judgment prepared should not only incorporate by reference the earlier judgment but also should reaffirm each of the earlier interlocutory orders. Certainly, this should be adopted as a "safe rule" due to the uncertainty in the law as it now stands.

Furthermore, the two interlocutory orders could very well be woven into one instrument to avoid the very real possibility of dismissal under the present uncertainty in the law. As already stated, a dismissal of an appeal to compel the parties to return to the trial court and require the

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<sup>84</sup> FED. R. CIV. P. 54(b).



trial court to perform the ministerial act of entering a "single instrument judgment" (thus causing additional expense and delay due to a second appeal of the same case) seems unwise and bad law. Additionally, this does violence to the well established rule that statutes giving the right of appeal should be liberally construed in favor of that right.<sup>85</sup>

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<sup>85</sup> TEX. R. CIV. P. 1:

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.