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A Reinstatement Order, Although Void, Is Interlocutory and Therefore Not Appealable to the Court of Civil Appeals.

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be hoped that the supreme court will take the first opportunity to extend the application of substantial evidence review to the remainder of administrative rate appeals formerly accorded substantial evidence de novo review.

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APPELLATE PROCEDURE—Interlocutory Orders—A Reinstatement Order, Although Void, Is Interlocutory and Therefore Not Appealable to the Court of Civil Appeals

Johnson Radiological Group v. Medina,
566 S.W.2d 117 (Tex. Civ. App.—
Houston [14th Dist.] 1978, writ dism'd as moot).

On July 5, 1977, the Medinas' suit against Johnson Radiological Group was dismissed for want of prosecution. The Medinas received notice of the dismissal within twenty days and filed a motion to reinstate the suit on August 4th. The court granted the motion on September 6th. From this order, Johnson Radiological Group appealed to the court of civil appeals on the ground that the trial court lacked jurisdiction to grant the motion.[1] Relying on Rule 165a, appellants contended that the order was void as it was not granted within thirty days from the date of dismissal and prayed to have the reinstatement order set aside. Held-*Appeal dismissed.* A reinstatement order, although void, is interlocutory and therefore not appealable to the court of civil appeals.[2]

Generally, the jurisdiction of appellate courts extends only to final judgments.[3] A judgment is said to be final if it determines the controversies

1. Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot). A reinstatement order can only be made within thirty days after dismissal when each of the parties was given notice within twenty days. TEX. R. CIV. P. 165a; *see, e.g.*, N-S-W Corp. v. Snell, 561 S.W.2d 798, 798 (Tex. 1977); Baughtman v. Electric Ins. Co., 553 S.W.2d 5, 6 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.); Riley v. Mead, 531 S.W.2d 670, 671 (Tex. Civ. App.—El Paso 1975, no writ). The reinstatement order in the instant case was granted after thirty days had expired, and was therefore void as the court was without jurisdiction. Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot); *accord*, N-S-W Corp. v. Snell, 561 S.W.2d 798, 798 (Tex. 1977); Riley v. Mead, 531 S.W.2d 670, 672 (Tex. Civ. App.—El Paso 1975, no writ).

2. Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot).

3. *See* North E. Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966); Marulanda v. Mendez, 489 S.W.2d 128, 129 (Tex. Civ. App.—San Antonio 1972, no writ); Nelon v. Thomas, 329 S.W.2d 148, 151 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.); TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 13.4, at 669 (2d ed. 1977); 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 17.03.2, at 38 (rev. 1971); STATE BAR OF TEXAS, APPELLATE PROCEDURE IN TEXAS § 2.2 (1964).

between the plaintiff and the defendant over the entire subject matter of the litigation.[4] The final judgment rule originated with the concept of the case as an indivisible unit.[5] It appears that at early common law an appeal required a review of the case record, but the record was not full and complete until a final judgment was entered.[6] The rule was necessary since appellate courts could not intelligently determine whether a judgment was erroneous until it was rendered.[7] Thus, there could be no appeal without a final judgment.[8] Although the concept of a case as a judicial unit has changed,[9] the final judgment rule is nevertheless applied today when it tends to reduce appellate litigation,[10] disruption of the trial process,[11] and accumulation of litigation costs.[12] Thus, unless the legislature has conferred jurisdiction over a non-final judgment, an appellate court can review only final judgments.[13] Since an order granting a motion to reinstate, like an order granting a motion for new trial, does not decide the entire controversy, it is not final, but interlocutory[14] and therefore not appealable.[15]

4. Henderson v. Shell Oil Co., 143 Tex. 142, 143-44, 182 S.W.2d 994, 995 (1944); Hargrove v. Insurance Inv. Corp., 142 Tex. 111, 116, 176 S.W.2d 744, 746 (1944); *accord,* Collins v. Miller, 252 U.S. 364, 370 (1919). *See generally* M. GREEN, BASIC CIVIL PROCEDURE 231 (1972); 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 17.03.2, at 38 (rev. 1971).

5. Frank, *Requiem for the Final Judgment Rule,* 45 TEXAS L. REV. 292, 292 (1966); *see* Metcalfe's Case, 77 Eng. Rep. 1193, 1195 (1615).

6. Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 543 (1932); *see* Metcalfe's Case, 77 Eng. Rep. 1193, 1195 (1615).

7. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 13.4, at 670 (2d ed. 1977). *See generally* Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539 (1932).

8. Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 543 (1932).

9. *See* M. GREEN, BASIC CIVIL PROCEDURE 235 (1972).

10. Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 539-40 (1932); Frank, *Requiem for the Final Judgment Rule,* 45 TEXAS L. REV. 292, 293 (1966); *see* Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 69 (1948).

11. *See* Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 69 (1948); M. GREEN, BASIC CIVIL PROCEDURE 232 (1972); Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 539-40 (1932); Frank, *Requiem for the Final Judgment Rule,* 45 TEXAS L. REV. 292, 292-93 (1966).

12. Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 540 (1932).

13. *See* Henderson v. Shell Oil Co., 143 Tex. 142, 144, 182 S.W.2d 994, 995 (1944); TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971).

14. Kinney v. Tri-State Tel. Co., 222 S.W.227, 230 (Tex. Comm'n App. 1920, judgmt adopted); Hewitt v. Nielsen, 553 S.W.2d 248, 249 (Tex. Civ. App.—Austin 1977, no writ). An interlocutory order does not settle all the subject matter issues between the parties, thereby leaving something further to be litigated in the courts. Kinney v. Tri-State Tel. Co., 222 S.W. 227, 230 (Tex. Comm'n App. 1920, judgmt adopted); Hewitt v. Nielsen, 553 S.W.2d 248, 249 (Tex. Civ. App.—Austin 1977, no writ); *see* 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 17.03.1, at 36-37 (rev. 1971).

15. *See, e.g.,* Marulanda v Mendez, 489 S.W.2d 128, 129 (Tex. Civ. App.—San Antonio 1972, no writ) (motion to reinstate); B.F. Walker, Inc. v. Chaney, 446 S.W.2d 896, 897 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.) (motion for new trial); Brown v. American Fin. Co., 432 S.W.2d 564, 567 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (motion for new trial).

Although ordinarily an appeal from an interlocutory order is not allowed, statutory exceptions exist.[16] There is a conflict among the Texas courts about whether a judicial exception exists when the interlocutory order is void. Some courts have determined that an order which is void due to lack of jurisdiction can be set aside on appeal.[17] Other courts have refused to allow such an appeal, stating that the orders are not "final reviewable judgments."[18]

The Texas Supreme Court has considered judgments of the courts of civil appeals which have reversed or affirmed void trial court orders. An early group of cases indicates that jurisdiction may exist to declare, on appeal, the invalidity of an interlocutory order and set it aside.[19] More recent decisions have been less clear. The court of civil appeals in *Rhodes v. Tindall*[20] reversed a void order that had granted a new trial and declared the prior judgment to be final.[21] The supreme court, rather than affirming the *Tindall* decision, held that the appeal to the court of civil appeals must be dismissed.[22] Despite this, the void order was declared "of no effect" and the prior judgment rendered "final," thus the result was the same as that of the court of civil appeals.[23] In *Fulton v. Finch*[24] the supreme court held

16. TEX. REV. CIV. STAT. ANN. art. 2008 (Vernon 1964) (pleas of privilege); *id.* art. 2250 (Vernon 1971)(appointment of receivers and trustees); *id.* art. 2251 (temporary injunctions).

17. *See* De Leon v. Harlingen Consol. Indep. School Dist., 552 S.W.2d 922, 928 (Tex. Civ. App.—Corpus Christi 1977, no writ); Delaney v. Adkins, 552 S.W.2d 561, 563 (Tex. Civ. App.—San Antonio 1977, no writ); Caddell v. Gray, 544 S.W.2d 481, 483 (Tex. Civ. App.—Waco 1976, no writ)(on motion for rehearing); Brady v. Fry, 517 S.W.2d 304, 308 (Tex. Civ. App.—Beaumont 1974, no writ); Atlantic Richfield Co. v. Liberty-Danville Fresh Water Supply Dist. No. One, 506 S.W.2d 931, 934 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); Travelers Express Co. v. Winters, 488 S.W.2d 890, 892 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.); Matlock v. Williams, 281 S.W.2d 229, 230 (Tex. Civ. App.—Beaumont 1955, no writ); Dula v. Bush, 136 S.W.2d 898, 900 (Tex. Civ. App.—Dallas 1939, no writ).

18. *See* Shafer v. Willis, 530 S.W.2d 598, 599 (Tex. Civ. App.—Eastland 1975, no writ); Banks v. Sada, 527 S.W.2d 522, 523 (Tex. Civ. App.—San Antonio 1975, no writ). Both *Shafer* and *Banks* relied upon Tindall v. Rhodes, 493 S.W.2d 733, 734 (Tex. 1973)(per curiam), in holding that the void orders are not reviewable as they are not final. Notably, however, the San Antonio Court of Civil Appeals has subsequently followed the holding in Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961), in declaring that the court of civil appeals does have authority to dismiss the void interlocutory order. *See* Delaney v. Adkins, 552 S.W.2d 561, 563 (Tex. Civ. App.—San Antonio 1977, no writ).

19. *See* Williams v. Steele, 101 Tex. 382, 387, 108 S.W. 155, 157 (1908); Jones v. Bass, 49 S.W.2d 723, 724 (Tex. Comm'n App. 1932, holding approved); Roy v. Whitaker, 50 S.W. 491, 498 (Tex. Civ. App. 1898, writ ref'd).

20. 487 S.W.2d 158 (Tex. Civ. App.—Amarillo 1972), *rev'd*, 493 S.W.2d 733 (Tex. 1973).

21. *Id.* at 159.

22. Tindall v. Rhodes, 493 S.W.2d 733, 734 (Tex. 1973)(per curiam).

23. *Id.* at 734. In light of the supreme court's opinion in Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823 (1961), the significance of the *Tindall* decision may be to reinforce the fact that the court of civil appeals may not review the void interlocutory order. Some courts of civil appeals, however, have interpreted *Tindall* to mean that they have no authority to set aside the void order. *See* Shafer v. Willis, 530 S.W.2d 598, 599 (Tex. Civ. App.—Eastland 1975, no writ); Banks v. Sada, 527 S.W.2d 522, 523 (Tex. Civ. App.—San Antonio 1975, no

that an order "which discloses its invalidity on its face. . .is a nullity and may be disregarded anywhere at any time."[25] In *Fulton*, the court realized that the court of civil appeals was without authority to *review* an interlocutory order in the absence of a statutory provision.[26] The supreme court recognized, however, that the court of appeals was authorized to declare the invalidity of the order and set it aside.[27] It is in this spirit that the court of civil appeals has been held to possess jurisdiction to set aside void interlocutory orders on appeal.[28]

In *Johnson Radiological Group v. Medina*[29] the court addressed the question of the court of civil appeals' jurisdiction to set aside void interlocutory orders by appeal. In *Johnson* the court held that although the order was void, it was without jurisdiction to set aside the reinstatement order reasoning that an order reinstating a case after dismissal was interlocutory, and therefore not appealable in the absence of a statutory provision.[30] In refusing to consider the order, the court made it clear that it would not follow previous decisions which had heard appeals for the lim-

writ). *But see* Delaney v. Adkins, 552 S.W.2d 561, 563 (Tex. Civ. App.—San Antonio 1977, no writ)(court of civil appeals can set aside void interlocutory order).

24. 162 Tex. 351, 346 S.W.2d 823 (1961). Although this was a mandamus action, the supreme court's decision is controlling and not mere dictum as an important question in the case was whether the availability of an adequate remedy by appeal would foreclose the court's power to issue mandamus. The court in *Fulton* concluded that a void interlocutory order may be set aside on appeal. *Id.* at 356, 346 S.W.2d at 827; *see* Williams v. Steele, 101 Tex. 382, 387, 108 S.W. 155, 157 (1908); Jones v. Bass, 49 S.W.2d 723, 724 (Tex. Comm'n App. 1932, holding approved). The supreme court, however, also determined that the existence of a limited appeal to determine the validity of an interlocutory order does not foreclose mandamus. Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961).

25. Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961).

26. *Id.* at 356, 346 S.W.2d at 827; *see, e.g.*, Tindall v. Rhodes, 493 S.W.2d 733, 734 (Tex. 1973)(per curiam); McCauley v. Consolidated Underwriters, 157 Tex. 475, 475, 304 S.W.2d 265, 265 (1957)(per curiam); Lynn v. Hanna, 116 Tex. 652, 655-56, 296 S.W. 280, 281 (1927).

27. Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); *see* Williams v. Steele, 101 Tex. 382, 387, 108 S.W. 155, 157 (1908); Jones v. Bass, 49 S.W.2d 723, 724 (Tex. Comm'n App. 1932, holding approved).

28. *See* Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 837 (1961); Williams v. Steele, 101 Tex. 382, 387, 108 S.W. 155, 157 (1908); Jones v. Bass, 49 S.W.2d 723, 724 (Tex. Comm'n App. 1932, holding approved); De Leon v. Harlingen Consol. Indep. School Dist., 552 S.W.2d 922, 928 (Tex. Civ. App.—Corpus Christi 1977, no writ); Delaney v. Adkins, 552 S.W.2d 561, 563 (Tex. Civ. App.—San Antonio 1977, no writ); Caddell v. Gray, 544 S.W.2d 481, 483 (Tex. Civ. App.—Waco 1976, no writ) (on motion for rehearing); Brady v. Fry, 517 S.W.2d 304, 308 (Tex. Civ. App.—Beaumont 1974, no writ); Atlantic Richfield Co. v. Liberty-Danville Fresh Water Supply Dist. No. One, 506 S.W.2d 931, 934 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); Travelers Express Co. v. Winters, 488 S.W.2d 890, 892 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.); Matlock v. Williams, 281 S.W.2d 229, 230 (Tex. Civ. App.—Beaumont 1955, no writ); Dula v. Bush, 136 S.W.2d 898, 900 (Tex. Civ. App.—Dallas 1939, no writ).

29. 566 S.W.2d 117 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot).

30. *Id.* at 118.

ited purpose of setting aside the void order.[31] The court determined that such a rule is "ill considered" as it would open the courts to an unlimited number of interlocutory appeals and frustrate swift, orderly trial process.[32] Moreover, the court reasoned that since the Texas Supreme Court had issued a writ of mandamus to set aside a void reinstatement order in *N-S-W Corp. v. Snell*,[33] the court of civil appeals must lack jurisdiction to review such orders by appeal as the supreme court will not issue mandamus when another adequate remedy exists.[34]

The court's interpretation of the order as interlocutory, and thereby not appealable rejects the careful distinction made by prior courts when an order is void.[35] Those courts held that although an interlocutory order cannot be reviewed, appellate courts do have limited jurisdiction over a void order to declare its invalidity and set it aside.[36] For its authority, the *Johnson* court cited *Henderson v. Shell Oil Co.*,[37] wherein the Texas Supreme Court held that "[a]n interlocutory order is not appealable unless specifically made so by statute."[38] This position, however, has been qualified by *Fulton v. Finch*[39] and numerous other cases.[40] In *Fulton*, the supreme court held that the court of civil appeals was without authority to review an interlocutory order in the absence of a statutory provision.[41] The court, however, reasoned that a void order was a mere "nullity" which may be set aside anywhere at any time;[42] therefore the inability to review did

31. *Id.* at 118; *see, e.g.*, Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); Caddell v. Gray, 544 S.W.2d 481, 483 (Tex. Civ. App.—Waco 1976, no writ); Matlock v. Williams, 281 S.W.2d 229, 230 (Tex. Civ. App.—Beaumont 1955, no writ).

32. Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot).

33. 561 S.W.2d 798, 799 (Tex. 1977).

34. Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot); *see* State *ex rel.* Pettit v. Thurmond, 516 S.W.2d 119, 121 (Tex. 1974); Pope v. Ferguson, 445 S.W.2d 950, 953 (Tex. 1969), *cert. denied*, 397 U.S. 997 (1970).

35. *See, e.g.*, Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); Williams v. Steele, 101 Tex. 382, 387, 108 S.W. 155, 157 (1908); Caddell v. Gray, 544 S.W.2d 481, 483 (Tex. Civ. App.—Waco 1976, no writ)(on motion for rehearing).

36. *E.g.*, Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); Williams v. Steele, 101 Tex. 382, 387, 108 S.W. 155, 157 (1908); Jones v. Bass, 49 S.W.2d 723, 724 (Tex. Comm'n App. 1932, holding approved).

37. 143 Tex. 142, 182 S.W.2d 994 (1944).

38. *Id.* at 144, 182 S.W.2d at 995; *see* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot).

39. 162 Tex. 351, 346 S.W.2d 823 (1961).

40. *See, e.g.*, De Leon v. Harlingen Consol. Indep. School Dist., 552 S.W.2d 922, 928 (Tex. Civ. App.—Corpus Christi 1977, no writ); Delaney v. Adkins, 552 S.W.2d 561, 563 (Tex. Civ. App.—San Antonio 1977, no writ); Travelers Express Co. v. Winters, 488 S.W.2d 890, 892 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

41. Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); *accord*, McCauley v. Consolidated Underwriters, 157 Tex. 475, 476, 304 S.W.2d 265, 265 (1957)(per curiam).

42. Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); *accord*, Delaney v. Adkins, 552 S.W.2d 561, 563 (Tex. Civ. App.—San Antonio 1977, no writ).

not deprive the court of the power to set aside the void order.[43] In fact, one court of civil appeals has interpreted this to mean not only that it may set aside the void interlocutory order, but that it is its *duty* to do so.[44] Therefore, the *Johnson* court was correct in asserting that it lacked authority to review the interlocutory order, but erred in refusing to set it aside upon discovering that it was void.[45]

The court's holding in *Johnson Radiological Group v. Medina*[46] does not advance the purposes of the final judgment rule. Since one of the main purposes of this rule is to reduce litigation,[47] it should not be applied when its application would encourage further litigation rather than terminate the lawsuit.[48] The court's holding requires that the party adverse to the order either seek a writ of mandamus from the Texas Supreme Court[49] or await final judgment from the trial court and then appeal to the court of civil appeals[50] in order to correct the trial court's fundamental error.[51] The

43. *See, e.g.*, Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); Jones v. Bass, 49 S.W.2d 723, 724 (Tex. Comm'n App. 1932, holding approved); Caddell v. Gray, 544 S.W.2d 481, 483 (Tex. Civ. App.—Waco 1976, no writ).

44. *See* De Leon v. Harlingen Consol. Indep. School Dist., 552 S.W.2d 922, 928 (Tex. Civ. App.—Corpus Christi 1977, no writ).

45. *Compare* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot)(court of civil appeals without jurisdiction to review void interlocutory orders) *and* Tindall v. Rhodes, 493 S.W.2d 733, 734 (Tex. 1973) (per curiam) (court of civil appeals without power to review non-final orders by appeal) *with* Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961) (void order is a nullity which can be set aside anywhere at any time) *and* De Leon v. Harlingen Consol. Indep. School Dist., 552 S.W.2d 922, 928 (Tex. Civ. App.—Corpus Christi 1977, no writ) (duty of court of civil appeals to set aside void interlocutory order).

46. 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot).

47. *See* Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964); Republic Natural Gas v. Oklahoma, 334 U.S. 62, 69 (1948); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 539-40 (1932); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 292 (1966).

48. *See* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 557-58 (1932); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 293 (1966).

49. *See* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot) (supreme court issued mandamus in *N-S-W*); N-S-W Corp. v. Snell, 561 S.W.2d 798, 799 (Tex. 1977)(mandamus granted to set aside void reinstatement order).

50. *See* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot). *See also* Berry v. Riley, 551 S.W.2d 74, 75 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.)(judgment of trial court reversed as reinstatement order was void under TEX. R. CIV. P. 165a); Riley v. Mead, 531 S.W.2d 670, 672 (Tex. Civ. App.—El Paso 1975, no writ)(judgment of trial court reversed as reinstatement order was void under TEX. R. CIV. P. 165a).

51. The court of civil appeals is without jurisdiction to issue mandamus to set aside a void order. 6 L. LOWE, REMEDIES § 335, at 332 (Texas Practice 2d 1973); *see, e.g.*, Crofts v. Court of Civil Appeals, 362 S.W.2d 101, 103-04 (Tex. 1962); Crane v. Tunks, 160 Tex. 182, 190, 328 S.W.2d 434, 438 (1959); Comet Alum. Co. v. Dibrell, 452 S.W.2d 32, 33 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ). *But see* Caddell v. Gray, 544 S.W.2d 481, 483-

latter course wastes time and money in needless litigation in the trial court,[52] and the former would require all void interlocutory orders to be heard in the supreme court rather than divided among the fourteen courts of civil appeals.[53]

The Texas judicial practice of setting aside void interlocutory orders is analogous to the practice of interlocutory review in federal courts. In the federal judicial system, pursuant to congressional legislation,[54] appellate courts have the discretionary power to review interlocutory orders.[55] The Interlocutory Appeals Act allows courts of appeals to review any interlocutory order arising from a civil case if it involves a question of law about which there is "substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation."[56] Through this legislation the United States Congress has attempted to relieve the harshness of the final judgment rule by allowing review of interlocutory orders when review will advance the termination of litigation.[57] Although the Texas courts do not allow review[58]

84 (Tex. Civ. App.—Waco 1976, no writ)(on motion for rehearing)(court of civil appeals can issue mandamus to set aside void interlocutory order when not appealable)(dicta). The court of civil appeals, however, has authority to issue a writ of mandamus to order a trial court to proceed to trial. TEX. REV. CIV. STAT. ANN. art. 1824 (Vernon 1964). This may have the effect of setting aside void orders as when the judge refused to proceed to trial in reliance upon the void order. *See* Fulton v. Finch, 162 Tex. 351, 359, 346 S.W.2d 823, 829 (1961); Crane v. Tunks, 160 Tex. 182, 189, 328 S.W.2d 434, 438 (1959); McGregor v. Clawson, 506 S.W.2d 922, 930 (Tex. Civ. App.—Waco 1974, no writ). The court of civil appeals in *Caddell* cited *McGregor* to support its statement that the court of civil appeals can set aside void interlocutory orders by mandamus. Caddell v. Gray, 544 S.W.2d 481, 483-84 (Tex. Civ. App.—Waco 1976, no writ)(on motion for rehearing). Although a court's granting of mandamus may have the effect of setting aside a void order in particular cases, an order to proceed to trial will not remedy a void reinstatement order as it is the trial proceeding that the movant seeks to avoid. A careful analysis of *Caddell* reveals that the void order may be set aside by mandamus only when the order is not appealable. *See id.* at 483-84. The court of civil appeals in *Caddell* set aside the void reinstatement order under its appellate jurisdiction. The question of its power to issue mandamus, not before the court, is therefore mere dictum. *See id.* at 483.

52. The needless accumulation of litigation costs is contrary to the purpose of the final judgment rule. *See* Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 540 (1932).

53. One purpose of the final judgment rule is to relieve the congestion of the appellate courts. *See* M. GREEN, BASIC CIVIL PROCEDURE 232 (1972); Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 539-40 (1932); Frank, *Requiem for the Final Judgment Rule,* 45 TEXAS L. REV. 292, 292 (1966).

54. 28 U.S.C. § 1292 (1970).

55. *See* C. WRIGHT, FEDERAL COURTS § 102, at 512-19 (1976).

56. *Id.* at 517.

57. *See* 28 U.S.C. § 1292 (1970); Frank, *Requiem for the Final Judgment Rule,* 45 TEXAS L. REV. 292, 293 (1966).

58. *See, e.g.,* Tindall v. Rhodes, 493 S.W.2d 733, 734 (Tex. 1973)(per curiam); Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961); McCauley v. Consolidated Underwriters, 157 Tex. 475, 476, 304 S.W.2d 265, 265 (1957) (per curiam).

since legislation would be necessary to do so,[59] the act of setting aside void interlocutory orders accomplishes the same purpose, that being the reduction of further, needless trial and appellate litigation.

In addition to misapplication of the final judgment rule, the court's reliance on *N-S-W Corp. v. Snell*[60] is misplaced because the general rule that mandamus will not be issued when there is another adequate remedy[61] has been qualified.[62] Mandamus has been granted by the Texas Supreme Court when the court of civil appeals' remedy is tedious[63] or when the trial judge abused his discretion, the judgment being void upon its face.[64] Since the supreme court's opinion in *N-S-W Corp.* did not address the court of civil appeals' inability to remedy the void order,[65] it does not absolutely preclude jurisdiction of the court of civil appeals;[66] thus, the *Johnson* court's holding is a non sequitur. The conclusion in *Johnson* is in direct contrast to the conclusion in *Fulton v. Finch,* wherein the Texas Supreme Court held that the limited authority of the court of civil appeals did not foreclose its ability to grant mandamus.[67] The *Fulton* position is reinforced by the subsequent issuance of mandamus by the supreme court to set aside

59. *See* Henderson v. Shell Oil Co., 143 Tex. 142, 144, 182 S.W.2d 994, 995 (1944); TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971).

60. 561 S.W.2d 798, 799 (Tex. 1977)(mandamus issued to set aside void reinstatement order).

61. *See* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot); State *ex rel.* Pettit v. Thurmond, 516 S.W.2d 119, 121 (Tex. 1974). "Except in rare instances" the Texas Supreme Court will not issue a writ of mandamus directing a trial judge to enter or set aside a particular judgment or order when there is another adequate remedy by appeal. *Id.* at 121; *see* Pope v. Ferguson, 445 S.W.2d 950, 953 (Tex. 1969), *cert. denied,* 397 U.S. 997 (1970); Iley v. Hughes, 158 Tex. 362, 367, 311 S.W.2d 648, 652 (1958).

62. *See, e.g.,* Neville v. Brewster, 163 Tex. 155, 159, 352 S.W.2d 449, 451 (1961)(supreme court can issue mandamus to compel trial court to vacate void order); Wallace v. Briggs, 162 Tex. 485, 491, 348 S.W.2d 523, 527 (1961)(mandamus may be issued when trial judge abused discretion in granting interlocutory order); Fulton v. Finch, 162 Tex. 351, 358, 346 S.W.2d 823, 828 (1961)(limited appellate jurisdiction to set aside interlocutory order does not preclude mandamus).

63. Fulton v. Finch, 162 Tex. 351, 359, 346 S.W.2d 823, 829 (1961). It is no objection to mandamus that the defendant may secure review of an adverse order following final judgment. *Id.* at 359, 346 S.W.2d at 829.

64. Neville v. Brewster, 163 Tex. 155, 159, 352 S.W.2d 449, 451 (1961)(supreme court can issue mandamus to compel trial court to vacate void order); Wallace v. Briggs, 162 Tex. 485, 491, 348 S.W.2d 523, 527 (1961)(mandamus may be issued when trial judge abused his discretion in granting interlocutory order); Crane v. Tunks, 160 Tex. 182, 192, 328 S.W.2d 434, 440 (1959)(mandamus will not issue to set aside interlocutory order within the discretion of the trial court, but may be issued to curb abuse of discretion).

65. *See* N-S-W Corp. v. Snell, 561 S.W.2d 798, 799 (Tex. 1977).

66. *See* Danforth Memorial Hosp. v. Harris, 573 S.W.2d 762, 762 (Tex. 1978) (issuance of mandamus renders question of court of civil appeals' remedy for void order moot); Fulton v. Finch, 162 Tex. 351, 358, 346 S.W.2d 823, 828 (1961)(limited appellate jurisdiction to set aside void interlocutory order does not preclude mandamus).

67. Fulton v. Finch, 162 Tex. 351, 358, 346 S.W.2d 823, 828 (1961).

the void reinstatement order of the *Johnson* case. The supreme court held that it need not determine whether the court of civil appeals could remedy the void order since the granting of mandamus rendered the issue moot.[68] This contrasts with the Houston court's logic which would have required the supreme court to determine if the court of civil appeals could remedy the order before determining if mandamus should lie.[69]

In the face of legal precedent to the contrary, the Houston Court of Civil Appeals for the Fourteenth District has refused to exercise jurisdiction to set aside a void interlocutory order.[70] Although the decision in *Johnson Radiological Group v. Medina* is based upon existing legal principles,[71] a careful analysis reveals that these principles have been subject to judicial erosion and are not applicable in this case.[72] Not only did the court reject the judicially created distinction between void and valid interlocutory orders,[73] but it applied the final judgment rule when such application frus-

68. Danforth Memorial Hosp. v. Harris, 573 S.W.2d 762, 762 (Tex. 1978).

69. *Compare* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App. — Houston [14th Dist.] 1978, writ dism'd as moot) (supreme court will not hear mandamus if issue appealable) *with* Danforth Memorial Hosp. v. Harris, 573 S.W.2d 762, 762 (Tex. 1978) (need not consider appeal to court of civil appeals to grant mandamus).

70. *Compare* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot)(court of civil appeals lacks jurisdiction to review interlocutory orders in absence of statutory provision) *with* Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961) (court of civil appeals has no power to review, but has limited power to set aside void interlocutory orders) *and* De Leon v. Harlingen Consol. Indep. School Dist., 552 S.W.2d 922, 928 (Tex. Civ. App. — Corpus Christi 1977, no writ) (duty of court of civil appeals to set aside void interlocutory order).

71. *See* Henderson v. Shell Oil Co., 143 Tex. 142, 144, 182 S.W.2d 994, 995 (1944)(no appeal may be taken from an interlocutory order in absence of a statutory provision). The *Johnson* court also relied on the issuance of mandamus in *N-S-W Corp. v. Snell,* as implicitly holding that the court of civil appeals is without remedy for the void order, since the supreme court will not issue mandamus when another adequate remedy exists. *See* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978) (citing N-S-W Corp. v. Snell, 561 S.W.2d 798 (Tex. 1977)). The proposition that mandamus will not be issued when another adequate remedy exists is well-established. *See* State *ex rel.* Pettit v. Thurmond, 516 S.W.2d 119, 121 (Tex. 1974); Pope v. Ferguson, 445 S.W.2d 950, 953 (Tex. 1969), *cert. denied,* 397 U.S. 997 (1970).

72. *See* Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961) (court of civil appeals has no power to review, but has authority to set aside void interlocutory order); Williams v. Steele, 101 Tex. 382, 387, 108 S.W. 155, 157 (1908)(court of civil appeals has authority and jurisdiciton over void order to declare its invalidity and set it aside). The *Johnson* court's reliance on *N-S-W Corp.* to show lack of jurisdiction is misplaced. *See* Danforth Memorial Hosp. v. Harris, 573 S.W.2d 762, 762 (Tex. 1978) (issuance of mandamus renders question of court of civil appeals' remedy for void order moot); Fulton v. Finch, 162 Tex. 351, 358, 346 S.W.2d 823, 828 (1961)(limited appellate jurisdiction to set aside void interlocutory order does not preclude mandamus).

73. *Compare* Johnson Radiological Group v. Medina, 566 S.W.2d 117, 118 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ dism'd as moot) (reinstatement order is interlocutory and therefore not appealable) *with* Fulton v. Finch, 162 Tex. 351, 356, 346 S.W.2d 823, 827 (1961) (void interlocutory orders, unlike interlocutory orders in general, can be set aside on appeal) *and* Matlock v. Williams, 281 S.W.2d 229, 230 (Tex. Civ. App.—Beaumont 1955, no