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FEDERAL PROCEDURE-JURISDICTION-NO APPEAL ALLOWED UNDER RULE 54(b) WHEN SEPARATED CLAIM NOT FINAL

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FEDERAL PROCEDURE—JURISDICTION—NO APPEAL ALLOWED UNDER RULE 54(b) WHEN SEPARATED CLAIM NOT FINAL—Flegenheimer sued Manitoba Sugar Co., a Canadian Corporation, in a Vermont state court for breach of an employment contract. To gain jurisdiction, Flegenheimer attached parcels of beet pulp which he claimed were the property of the Manitoba Co. After this

[5] This factor was given primary recognition in applying the doctrine of forum non conveniens in state courts, Collard v. Beach, 93 App. Div. 339, 87 N.Y.S. 884 (1904), and has also been considered in granting transfer under §1404(a), United States v. E. I. Du Pont de Nemours & Co., (D.C. D.C. 1949) 83 F. Supp. 233.

[6] Gulf Oil Corp. v. Gilbert, supra note 1.

[7] Mazinski v. Dight, (D.C. Pa. 1951) 99 F. Supp. 192. In Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., (D.C. N.Y. 1949) 88 F. Supp. 863, the court in denying transfer stated that, although the granting of transfer would naturally serve the convenience of the court and of other litigants with pending cases, no court may order such a transfer merely to serve its personal convenience.

[8] Henderson v. American Airlines, (D.C. N.Y. 1950) 91 F. Supp. 191. While denying transfer in United States v. Scott and Williams, (D.C. N.Y. 1950) 88 F. Supp. 531, the court expressed the view that if the factor of public interest were to be given major recognition nearly all of the applications for transfer under §1404(a) would have to be granted because of the generally recognized congested conditions existing in its district.

[9] United States v. E. I. Du Pont de Nemours & Co., supra note 5. The language used in Koster v. American Lumbermen's Mutual Casualty Co., 330 U.S. 518 at 524, 67 S.Ct. 828 (1947), decided under the doctrine of forum non conveniens before the enactment of §1404 (a), would seem to indicate that considerations affecting the court's own administrative and legal problems could alone be sufficient grounds for transfer. Cf. Walsh v. Pullman Co., (D.C. N.Y. 1949) 89 F. Supp. 762.

action was removed to the federal district court, General Mills, Inc., was granted leave to intervene to establish ownership of the beet pulp. The claim of General Mills was dismissed after being heard on the merits. The order dismissing the claim contained a determination that "no just reason for delay" existed, and it therefore directed an "entry of judgment" under federal rule 54(b).[1] From this order General Mills appealed. The Court of Appeals on its own motion *held,* appeal dismissed. Rule 54(b) was not intended to give the district courts power to make "final," and therefore appealable, that which was not "final" before. Since the dismissal on the merits of an intervenor's claim would not be a "final" order, the "determination and direction" by the district court would be of no avail.[2] *Flegenheimer v. General Mills,* (2d Cir. 1951) 191 F.(2d) 237.

Federal courts,[3] legal writers,[4] and law review critics[5] seem confused when they interpret the words, "final decision" in section 1291 of the judicial code.[6] The confusion arises when these interpreters overlook the fact that a "final decision" includes two distinct requirements which must be viewed separately. The first requirement is that the ruling of the district court be on a complete "judicial unit";[7] if the ruling is on a matter which is only a portion of a "judicial unit," it is not appealable because it is not complete.[8] The second requirement is that the district court must end its consideration of the unit with which it dealt; it must fully terminate its ruling on this unit.[9] Appeal is denied when there is a failure to comply with either one or the other requirement.[10] The reasons for each requirement are forceful. It is thought that

[1] Rule 54(b), 28 U.S.C.A. (1950) states: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

[2] As to this aspect of the decision, there is some dissension. See Withenbury v. United States, 5 Wall. (72 U.S.) 819 (1886); Reeves v. Beardall, 316 U.S. 283, 62 S.Ct. 1085 (1942); Rector v. United States, (8th Cir. 1927) 20 F. (2d) 845; MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE §0.03(52), p. 497 (1949).

[3] See Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631 (1945); Rector v. United States, supra note 2; Sheppy v. Stevens, (2d Cir. 1912) 200 F. 946, which was overruled by Collins v. Metro-Goldwyn Pictures Corp., (2d Cir. 1939) 106 F. (2d) 83.

[4] MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE §0.03(52), p. 515 (1949).

[5] 56 YALE L.J. 141 (1946); 47 COL. L. REV. 239 (1947); 47 MICH. L. REV. 233 (1948).

[6] 28 U.S.C. (Supp. V, 1952) §1291 states: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

[7] The term "judicial unit" is suggested by MOORE, COMMENTARY ON U. S. JUDICIAL CODE 506 (1949). It is used here to mean the smallest, yet complete, unit upon which judgment can be made and an appeal allowed. This idea may be found also in Collins v. Miller, 252 U. S. 364, 40 S.Ct. 347 (1920); Hohorst v. Hamburg-American Packet Co., 148 U.S. 262, 13 S.Ct. 590 (1893).

[8] Collins v. Miller, supra note 7; Hohorst v. Hamburg-American Packet Co., supra note 7; Catlin v. United States, supra note 3; Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, 33 S.Ct. 515 (1913).

[9] See principally Catlin v. United States, supra note 3, Collins v. Miller, supra note 7.

[10] Ibid.

appellate review can come only after the lower court has fully disposed of the "judicial unit" so that the appellate court can be dealing with something which is not subject to change by the lower court;[11] also, it is desirable that appeal be made only upon a complete unit in order to ease the judicial load by clarifying fact situations and lessening the number of appeals.[12] The distinction between what the court does with the "judicial unit," and the completeness of the "judicial unit" itself must be recognized in order to appreciate the application of rule 54(b). Before the adoption of rule 54(b), the "judicial unit" included all parts of the action;[13] a "final decision" on this unit required the entire action to be terminated by the district court before an appeal on any part of it could be taken.[14] But with the advent of the liberal joinder provisions of the federal rules, came rules allowing separation of joined claims for trial[15] and also for judgment. Rule 54(b) provides for separate judgments. By way of definition, rule 54(a) states that the word " 'judgment' as used in these rules includes a decree and any order from which an appeal lies."[16] This certainly indicates that from these judgments appeals can be taken, provided of course that they are "final decisions" within the meaning of section 1291 of the judicial code.[17] This again draws forth the two requirements of a "final decision" as set forth above. On analysis it becomes apparent that rule 54(b) has changed the old "judicial unit" so as now to allow an appeal from "a claim, counterclaim, cross-claim, or third-party claim."[18] However, it did not change the requirement that the court must end its consideration of this new "judicial unit." In fact, if anything, rule 54(b) affirms this requirement.[19] And so, when the court in the principal case states that rule 54(b) cannot ". . . make that 'final' which was not 'final' before . . ."[20] it is correct as to the requirement that the court must end its consideration of the "judicial unit" with which it is dealing. But

[11] Collins v. Miller, supra note 7; MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE §0.03(52), pp. 495-501 (1949).

[12] Catlin v. United States, supra note 3; Hohorst v. Hamburg-American Packet Co., supra note 7; Rexford v. Brunswick-Balke-Collender Co., supra note 8.

[13] Collins v. Miller, supra note 7; Hohorst v. Hamburg-American Packet Co., supra note 7; Sheppy v. Stevens, supra note 3; Stromberg Motor Devices Co. v. Arnson, (2d Cir. 1917) 239 F. 891.

[14] Ibid.

[15] Rule 42(b), 28 U.S.C.A. (1950).

[16] Rule 54(a), 28 U.S.C.A. (1950).

[17] This also seems to be the view of Reeves v. Beardall, supra note 2; Clark v. Taylor, (2d Cir. 1947) 163 F. (2d) 940, affd. 337 U.S. 472, 69 S.Ct. 1333 (1949); Libbey-Owens-Ford Glass Co. v. Sylvania Ind. Corp., (2d Cir. 1946) 154 F. (2d) 814, cert. den. 328 U.S. 859, 66 S.Ct. 1353 (1946).

[18] Rule 54(b), supra note 1; Reeves v. Beardall, supra note 2; Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 70 S.Ct. 322 (1950).

[19] The sentence of rule 54(b) which was omitted from note 1, and which bears directly on this, is: "In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

[20] Principal case at 241.

it is mistaken if it feels that the district court cannot separate from the total action this new "judicial unit" and enter "final judgment" on it. This power is given the lower court directly by rule 54(b). In the principal case, the district court did separate what it felt to be a "judicial unit": a "claim" within the meaning of rule 54(b). It then fully decided this "claim," indicating that it had done so.[21] In the light of the express wording of rule 54(a), it would appear that an appeal was possible, if the court had separated a "claim" under rule 54(b). The question was not whether the district court had ended its consideration of this matter but whether it could separate this matter as a "claim." The answer to this question seems to be that rule 24(b), defining intervenor's rights, uses the word "claim" also.[22] Such similarity of wording appears to be more than coincidental. The result of the above analysis does have the effect of giving the district courts wide discretion to separate "claims" and pursue them to "final judgments." However, since only the district court deals with the entire action, it is in the best position to decide which "claims" can be dealt with separately; therefore this discretionary power seems warranted.

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[21] The lower court entered judgment and indicated that it felt that there was "no just reason for delay" as required by rule 54(b). See principal case at 240.

[22] Rule 24(b), 28 U.S.C.A. (1950).