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JUDGMENTS BY DEFAULT—A SURVEY OF TEXAS LAW

by

Michael A. Pohl* and Stephen R. Kirklin**

A judgment is any final determination by a court of competent jurisdiction of the rights of the parties on matters submitted to the court.¹ This Article is concerned, however, only with the operation and legal effects of two kinds of judgments: judgments by default and judgments *nil dicit*. An examination of the mechanics of obtaining such judgments and the alternatives available to a defendant desiring relief therefrom is the focus of this survey.

I. JUDGMENTS BY DEFAULT DEFINED

A judgment by default is one entered against a defendant who, having been properly served, fails to timely answer.² Its purpose is to keep dockets current, thereby preventing a procrastinating defendant from impeding the plaintiff in the establishment of his claim.³ It is not supposed to be a procedural device to help the plaintiff obtain a judgment without experiencing the difficulty that arises from a contest on the merits.⁴

A judgment *nil dicit* serves much the same purpose as a judgment by default. It is entered against a defendant who fails to interpose a defense on the merits after the denial of a dilatory plea, neglects to oppose a cross-action or counterclaim,⁵ or abandons or withdraws his answer.⁶ Since judgments *nil dicit* and default judgment cases do not differ in any material respect,⁷ they are cited interchangeably throughout this Article.

II. COMMENCEMENT OF THE ACTION

Although a civil suit in district or county court is commenced by filing a petition in the office of the clerk,⁸ the petition must meet certain requisites in

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1. *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 28 & n.25 (S.D. Tex. 1968); *Fort Worth Acid Works v. City of Fort Worth*, 248 S.W. 822, 824 (Tex. Civ. App.—Fort Worth 1922), *aff'd*, 259 S.W. 919 (Tex. Comm'n App. 1924, jdgmt adopted).

2. 49 C.J.S. *Judgments* § 187, at 324 (1947); *see* TEX. R. CIV. P. 239.

3. 47 AM. JUR. 2d *Judgments* § 1152, at 184 (1969).

4. *Beck v. Avondino*, 50 S.W. 207, 209 (Tex. Civ. App. 1899, no writ); 47 AM. JUR. 2d *Judgments* § 1152, at 184 (1969).

5. *Frymire Eng'r Co. v. Grantham*, 524 S.W.2d 680, 681 (Tex. 1975); 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.25, at 126 (F. Elliott rev. ed. 1971).

6. *Graves v. Cameron*, 77 Tex. 273, 14 S.W. 59 (1890); *Wheeler v. Pope*, 5 Tex. 262, 264 (1849); 4 R. McDONALD, *supra* note 5, § 17.25, at 126.

7. 1 H. BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 79, at 108-09 (2d ed. 1902); 3 A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 1262, at 2628 (E. Tuttle rev. ed. 1925); 49 C.J.S. *Judgments* § 187, at 325 (1947); *see* *Hatton v. Gonzalez*, 541 S.W.2d 197, 198 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Bredeson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 513 S.W.2d 110, 112 (Tex. Civ. App.—Dallas 1974, no writ).

8. TEX. R. CIV. P. 22.

order to invoke the court's subject matter jurisdiction.⁹ Under the Texas Rules of Civil Procedure, a petition need only consist of a statement in plain and concise language of the plaintiff's cause of action.¹⁰ That an allegation be evidentiary or conclusory is not grounds for objection when fair notice to the opponent is given by the allegations as a whole.¹¹ Nor must a pleading be technically correct so long as it does not affirmatively show that the plaintiff has no cause of action.¹² To support a default judgment a plaintiff need not set out in his pleadings the evidence on which he relies to establish his cause of action¹³ since the rules expressly approve more general allegations than formerly were permitted. As a consequence, a default judgment will stand if a claim upon which the substantive law would give relief is alleged with sufficient particularity to give fair notice to the defendant of the basis for the complaint, even though elements of the petition would require revision if attacked by special exceptions.¹⁴

At the pleading stage the non-appearing defendant is governed by two basic pleadings rules. First, a defendant, by his default, admits all material transversible allegations of a petition except those pertaining to unliquidated damage;¹⁵ and second, rule 90,¹⁶ concerning waiver of defects in pleadings, does not apply to a party against whom a default judgment is rendered.¹⁷ As a result, the courts have fashioned a variety of rules for testing the sufficiency of pleadings depending in part on the nature of the claim asserted. Despite the foregoing liberal pleading rules and the apparently severe consequences of failing to interpose a defense on the merits, courts have often found fatal pleading defects in a default judgment situation. For example, it is clear that in a suit on a sworn account the mechanical requisites of rule 185¹⁸ must be strictly observed.¹⁹ Other examples of pleading defects which

9. *Edwards Feed Mill, Inc. v. Johnson*, 158 Tex. 313, 317, 311 S.W.2d 232, 233-34 (1958). The total absence of pleadings renders any judgment in the case void. The court derives its power to act over the subject matter of the claim from the pleadings. *Id.* at 316, 311 S.W.2d at 233. *Smith v. Pegram*, 80 S.W.2d 354, 356 (Tex. Civ. App.—Amarillo 1935, writ ref'd n.r.e.); *Hart v. Hunter*, 114 S.W. 882, 886 (Tex. Civ. App. 1908, writ ref'd); *see Howe v. Keystone Pipe & Supply Co.*, 115 Tex. 158, 274 S.W. 563 (1925); *Queen Ins. Co. v. Galveston, H. & S.A. Ry.*, 296 S.W. 484, 484-85 (Tex. Comm'n App. 1927, jdgmt adopted); *Bray v. Bray*, 1 S.W.2d 525 (Tex. Civ. App.—Galveston 1927, no writ). It is also error to enter a judgment where the clerk is unable to locate the petition. *Carborundum Co. v. Keese*, 313 S.W.2d 332, 334-35 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.); *see TEX. R. CIV. P. 77*.

10. *TEX. R. CIV. P. 45*.

11. *Stayton, The Scope and Function of Pleading Under the New Federal and Texas Rules*, *Tex. R. Civ. P. Ann.* 45, 20 *TEXAS L. REV.* 16 (1941).

12. *Edwards Feed Mill, Inc. v. Johnson*, 158 Tex. 313, 317, 311 S.W.2d 232, 234 (1958).

13. *Id.* at 317, 311 S.W.2d at 234-35; *Hillson Steel Prods., Inc. v. Wirth Ltd.*, 538 S.W.2d 162, 163-64 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

14. 4 R. McDONALD, *supra* note 5, § 17.23.3, at 120.

15. *Williamsburg Nursing Home, Inc. v. Paramedics, Inc.*, 460 S.W.2d 168, 170 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); *Southern S.S. Co. v. Schumacher Co.*, 154 S.W.2d 283, 284 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.).

16. *TEX. R. CIV. P. 90*.

17. *See, e.g., Hancock v. O.K. Rental Equip. Co.*, 441 S.W.2d 955, 956 (Tex. Civ. App.—San Antonio 1969, no writ); *C & H Transp. Co. v. Wright*, 396 S.W.2d 443, 446 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.); *TEX. R. CIV. P. 90*.

18. *TEX. R. CIV. P. 185*.

19. *Hassler v. Texas Gypsum Co.*, 525 S.W.2d 53, 54-55 (Tex. Civ. App.—Dallas 1975, no writ); *Unit, Inc. v. Ten Eyck-Shaw, Inc.*, 524 S.W.2d 330, 332-34 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); *U.S. Insulation Sales Corp. v. Jones-Blair Co.*, 491 S.W.2d 226, 227 (Tex. Civ. App.—Dallas 1973, no writ); *Hancock v. O.K. Rental Equip. Co.*, 441 S.W.2d 955, 957 (Tex. Civ. App.—San Antonio 1969, no writ); *Sekaly v. Hilton Center, Inc.*, 340 S.W.2d 827, 828 (Tex. Civ. App.—Waco 1960, no writ).

prove fatal to default judgments include the following: failure to plead the defendant's residence;²⁰ failure to properly plead agency;²¹ failure to plead how service may be obtained;²² failure to describe the accident sufficiently;²³ failure to state why the owner of property was responsible for payment;²⁴ inconsistency between the pleadings and a named party;²⁵ failure to allege duty in a negligence case;²⁶ general allegations of negligence;²⁷ failure to plead facts giving the court jurisdiction over the person of the defendant;²⁸ failure to state whether damages claimed were personal or property damages;²⁹ and a pleading that discloses on its face lack of capacity to sue.³⁰

Once a sufficient petition has been correctly filed and the requisite filing fee paid, the clerk is required to issue citation promptly as requested by any party.³¹ The citation, among its other prescriptions, directs an officer to serve the process on the defendant and commands the defendant to appear in the lawsuit by filing a written answer by 10:00 a.m. on the Monday following the expiration of twenty days from the date of service.³² Once citation has issued, jurisdiction must still be obtained over the person of the defendant by service of that citation before a plaintiff can obtain a valid default judgment against the defendant.

III. OBTAINING JURISDICTION OVER THE PERSON OF THE DEFENDANT

As jurisdiction over a defendant depends on effecting proper service of citation, proof of such service must appear in the record.³³ In this regard, the following statement of the Austin court of civil appeals is particularly instructive:

To sustain a default judgment against attack based upon a claim of invalid service of process, it is necessary to demonstrate a strict compliance with the provided mode of service.

Though, ordinarily, presumptions are made in support of a judgment, including presumptions of due service of citation when the judgment so

20. *Spinner v. Armstrong*, 63 S.W.2d 1071 (Tex. Civ. App.—El Paso 1933, no writ).

21. *Lopez v. Abalos*, 484 S.W.2d 613, 615 (Tex. Civ. App.—Eastland 1972, no writ).

22. *Mobile Pipe-Dillingham v. Stark*, 468 S.W.2d 552, 553-54 (Tex. Civ. App.—Beaumont 1971, no writ).

23. *Ramfield v. Wilburn*, 465 S.W.2d 844, 845 (Tex. Civ. App.—Corpus Christi 1971, no writ).

24. *Simon v. L.D. Brinkman & Co.*, 449 S.W.2d 90, 92-93 (Tex. Civ. App.—Waco 1969), *rev'd on other grounds*, 459 S.W.2d 190 (Tex. 1970).

25. *Hancock v. O.K. Rental Equip. Co.*, 441 S.W.2d 955, 957 (Tex. Civ. App.—San Antonio 1969, no writ).

26. *Schieffer v. Patterson*, 440 S.W.2d 124, 126 (Tex. Civ. App.—Austin 1969, no writ); *White Motor Co. v. Loden*, 373 S.W.2d 863, 866 (Tex. Civ. App.—Dallas 1963, no writ); *White v. Jackson*, 358 S.W.2d 174, 177-79 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

27. *Stinson v. Jones*, 434 S.W.2d 212, 213 (Tex. Civ. App.—Beaumont 1968, no writ).

28. *Firence Footwear Co. v. Campbell*, 411 S.W.2d 636, 638 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.).

29. *White v. Jackson*, 358 S.W.2d 174, 179 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

30. *Rector v. Metropolitan Life Ins. Co.*, 506 S.W.2d 696, 698 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

31. TEX. R. CIV. P. 99.

32. TEX. R. CIV. P. 99, 101, 103.

33. Where personal service has been effected on the defendant the officer's return constitutes proof of service. TEX. R. CIV. P. 107, 239. When a defendant is served under the long-arm statute, proof of service may be supplied by filing with the court a certificate of service from the secretary of state. *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94, 95-97 (Tex. 1973).

recites . . . , no such presumptions are made in a direct attack on a default judgment.³⁴

The remainder of this section examines the various requirements and methods for obtaining service of citation and discusses the kinds of defects in the citation and the service thereof which have proven fatal in default judgment situations.³⁵

A. *Methods of Service of Process*

Personal Service. Service of process, unless otherwise allowed, must be made by the sheriff or constable delivering to the defendant, in person, a copy of the citation with attached pleading.³⁶ The officer serving the citation is required to endorse the date of delivery on the citation and return it to the court.³⁷ Before judgment by default may be entered, the citation with the officer's return thereon must have been on file with the court at least ten days, exclusive of the day of filing and the day of judgment.³⁸

The citation may be served by the sheriff or constable of any county in which the party to be served may be found,³⁹ and the citation may be served anywhere within the State of Texas.⁴⁰ The officer is bound to execute and return the process without delay⁴¹ and is required by the citation to return it unserved if service cannot be perfected within ninety days.⁴² When the citation has not been served, the return must show the diligence used by the officer to execute it, the cause of the failure to execute it, and the location of the defendant if ascertainable.⁴³

Service Under the Texas Long-Arm Statute. Article 2031b provides the mechanism for service of citation upon a nonresident.⁴⁴ Under article 2031b a nonresident is deemed to have appointed the secretary of state as his agent for service of process if the nonresident is doing business in Texas but either does not have an agent in the state or has an agent upon whom service has been unsuccessfully attempted. Consequently, to show compliance with this

34. *Prine v. American Hydrocarbons, Inc.*, 519 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1975, no writ).

35. *But cf.* TEX. R. CIV. P. 118 ("At any time in its discretion and upon such notice as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.").

36. TEX. R. CIV. P. 106. When personal service is impractical, the court, upon motion, may authorize some form of alternate service if done in a manner reasonably effective to give the defendant fair notice of the suit. *Id.*; see notes 53-60 *infra* and accompanying text.

37. TEX. R. CIV. P. 106. Failure of the officer to note, on the copy of the citation given to the defendant, the date service was perfected will not render the citation defective.

38. TEX. R. CIV. P. 107, 239; *Gentry v. Gentry*, No. 12,559 (Tex. Civ. App.—Austin April 20, 1977).

39. TEX. R. CIV. P. 103. But no officer that is a party to or interested in the outcome of the litigation is qualified to serve a citation. *Id.* See also TEX. R. CIV. P. 104.

40. TEX. R. CIV. P. 102.

41. TEX. R. CIV. P. 105. Process issued and served prior to filing of petition is a nullity. *Moorhead v. Transportation Bank*, 62 S.W.2d 184, 185-86 (Tex. Civ. App.—Amarillo 1933, no writ). See 53 TEX. JUR. 2D *Sunday and Holidays* § 22, at 554 (1964) as to effect of service of process on Sunday or legal holidays.

42. TEX. R. CIV. P. 101. Service of citation more than 90 days old is void. *Lemothe v. Cimalista*, 236 S.W.2d 681, 682 (Tex. Civ. App.—San Antonio 1951, writ ref'd).

43. TEX. R. CIV. P. 107.

44. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

statute plaintiff must allege in his petition that defendant engages in business in the state but does not maintain a regular place of business or an agent who can be served in the state, and that the defendant as a result of such action is deemed to have appointed the secretary of state as his agent for service of process.⁴⁵ To insure jurisdiction, facts concerning the nature of the business engaged in by the defendant should be stated in the plaintiff's petition.⁴⁶

Proof of service upon the secretary of state and his forwarding of process to the defaulting defendant is mandatory and a certificate affirming these facts may be obtained from the secretary of state for a nominal charge.⁴⁷ The secretary of state's certificate or other proof of service must be filed before a final default judgment is entered.⁴⁸ Proof of service is jurisdictional, and an attempt to cure a jurisdictional defect by filing proof of service at a post-judgment hearing is futile.⁴⁹ Moreover, courts do not engage in a presumption of regularity regarding the standard jurisdictional recitations in default judgment cases,⁵⁰ but rather require that jurisdiction of the trial court appear affirmatively on the face of the record.⁵¹

45. *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965); *Firence Footwear Co. v. Campbell*, 411 S.W.2d 636, 638 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.). TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964) reads as follows:

Any . . . non-resident natural person that engages in business in this State . . . and does not maintain a place of regular business in this State or a designated agent upon whom service may be made . . . the act or acts of engaging in such business . . . shall be deemed equivalent to an appointment . . . of the Secretary of State of Texas as agent upon whom service of process may be made

46. The following allegations are sufficient when coupled with a statement of the facts regarding defendant's business activities in the State of Texas:

Defendant is a Louisiana Corporation doing business in the State of Texas with its headquarters, principal place of business, and home office in New Orleans, Louisiana. Defendant does not maintain a place of regular business in this state or a designated agent upon whom service may be made. Defendant may be served with citation by service upon the Secretary of State, his appointed agent, as provided in TEX. REV. CIV. STAT. ANN. art. 2031b (1964). Defendant may be given notice of the pendency of this suit by the Secretary of State mailing process to the aforementioned office as follows:

Defendant (name)
Post Office Box XXX
New Orleans, Louisiana

47. *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94, 96-97 (Tex. 1973); *Prine v. American Hydrocarbons, Inc.*, 519 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1975, no writ). Service is complete when the secretary of state mails the citation and accompanying petition. *Texas Real Estate Comm'n v. Howard*, 538 S.W.2d 429, 433 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.). Service is effected on the secretary of state by the sheriff of Travis County, Texas. The secretary of state requires two copies of the petition and the standard service fee.

48. In setting aside the judgment in *Whitney* the supreme court held that "a showing in the record that the secretary of state forwarded a copy of the process is essential" to establish personal jurisdiction and for this purpose the filing of the secretary's certificate would suffice. 500 S.W.2d at 96. There is no suggestion in *Whitney* that the secretary of state's certificate is the exclusive means of making the requisite showing or that other proof will not suffice. The policy of *Whitney* is simply that "defendants ought not to be cast in personal judgment without notice." *Id.* at 97.

49. *Prine v. American Hydrocarbons, Inc.*, 519 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1975, no writ). In *Prine* the court stated: "If the trial court did not have jurisdiction over the person of *Prine* at the time of the entry of the default judgment, jurisdiction could not then be created upon the basis of proof of service that was introduced after the entry of judgment being attacked." *Id.* at 522. *But see* 47 AM. JUR. 2D *Judgments* § 1174, at 198 (1969).

50. *Flynt v. City of Kingsville*, 125 Tex. 510, 511, 82 S.W.2d 934, 935 (1935); *see* note 34 *supra* and accompanying text.

51. *McKanna v. Edgar*, 388 S.W.2d 927, 930 (Tex. 1965); *Flynt v. City of Kingsville*, 125 Tex. 510, 511, 82 S.W.2d 934, 935 (1935); *Firence Footwear Co. v. Campbell*, 411 S.W.2d 636, 637 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.).

Substituted Service of Citation. Rule 106 authorizes substituted service if the plaintiff first moves that the court allow substituted service and shows that it is impractical to secure personal service.⁵² Normally, the evidence adduced at this hearing will consist of testimony by the officer who attempted service that he has been unable to effectuate service on defendant and evidence that the alternate method of service selected will likely reach the defendant.⁵³ This evidence must be stenographically recorded so as to allow the defendant an opportunity to challenge the sufficiency of plaintiff's evidence.⁵⁴ Further, the order authorizing substituted service of citation must specify the method of substituted service allowed and must direct that a new citation issue according to the court's instructions. In a default situation the record must reflect strict compliance with rule 106 and the mode of substituted service specified by the court.⁵⁵

Rule 106 permits several forms of substituted service. The court may authorize substituted service by leaving a copy of the citation with attached petition at the usual place of business of the party to be served, by delivering it to anyone over sixteen years of age at the person's usual abode, by registered or certified mail, or in any other manner which will be reasonably effective to give defendant notice of the suit.⁵⁶ Rule 106, however, does require that the substitute service ordered by the court be that most likely to reach the defendant.⁵⁷

Service by Publication. Service of citation by publication is authorized in Texas,⁵⁸ and its mechanics are recited in rules 114 through 116.⁵⁹ A judgment by default, however, is not allowed when service is by publication.⁶⁰ For this reason, rule 244 requires that the court appoint an attorney to defend the suit on behalf of the non-answering defendant served by publication,⁶¹ and rule 812 requires that in such cases the facts entitling plaintiff to judgment must be exhibited to the court at the time of trial.⁶²

B. *Defects in the Citation*

No judgment can be entered against a defendant who has not been duly served.⁶³ Strict rules have been established by the courts for testing the

52. TEX. R. CIV. P. 106. See also *David A. Carl Enterprises, Inc. v. Crow-Shutt No. 14*, Docket No. 16,851 (Tex. Civ. App.—Houston [1st Dist.] March 17, 1977).

53. *Id.*

54. *Spencer v. Texas Factors, Inc.*, 366 S.W.2d 699, 700-01 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

55. *Kirkegaard v. First City Nat'l Bank*, 486 S.W.2d 893, 894-95 (Tex. Civ. App.—Beaumont 1972, no writ); *Spencer v. Texas Factors, Inc.*, 366 S.W.2d 699, 700-01 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); see *Gianelle v. Morgan*, 514 S.W.2d 133, 134 (Tex. Civ. App.—Texarkana 1974, no writ); *Crawford v. Brown*, 507 S.W.2d 574, 575 (Tex. Civ. App.—Beaumont 1974, no writ).

56. TEX. R. CIV. P. 106.

57. *Forney v. Jorrie*, 511 S.W.2d 379, 384 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *Kirkegaard v. First City Nat'l Bank*, 486 S.W.2d 893, 894-95 (Tex. Civ. App.—Beaumont 1972, no writ).

58. TEX. R. CIV. P. 110.

59. TEX. R. CIV. P. 114-116.

60. TEX. R. CIV. P. 812; *McCarthy v. Jespersen*, 527 S.W.2d 825, 826 (Tex. Civ. App.—El Paso 1975, no writ).

61. TEX. R. CIV. P. 244.

62. TEX. R. CIV. P. 812.

63. TEX. R. CIV. P. 124.

validity of citations to insure that a defendant receives proper notice of any proceeding commenced against him.⁶⁴ Thus, regardless of which method of service is utilized, the slightest defect in a citation may be fatal, for Texas courts traditionally have been quick to find errors in a citation sufficient to set aside a default judgment. Examples of such errors include: failure to disclose the manner of service;⁶⁵ failure to state the date of service,⁶⁶ or stating an impossible date;⁶⁷ failure to state the date citation was issued;⁶⁸ failure to state correctly the date of filing suit;⁶⁹ failure to state the correct date that defendant's answer is due;⁷⁰ incorrect statement of defendant's name;⁷¹ incorrect statement of plaintiff's name;⁷² failure to disclose the identity of the person served;⁷³ failure to disclose capacity to accept service

64. 1 H. BLACK, *supra* note 7, § 324.

65. Continental Ins. Co. v. Milliken, 64 Tex. 46, 47-48 (1885) (citation failed to state the manner of service or that it was on the local agent of a corporate defendant); Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 3, 6-7 (1883) (citation failed to state the manner of service and failed to command the defendant to appear); Graves v. Robertson, 22 Tex. 130, 133 (1858) (citation failed to state the manner or time of service); Carlson Boat Works v. Hauck, 459 S.W.2d 887, 888 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (citation initially stated the manner of service but then used the qualifying words "by serving"); Diamond Chem. Co. v. Sonoco Prods. Co., 437 S.W.2d 307, 308 (Tex. Civ. App.—Corpus Christi 1968, no writ) (citation showed service on a corporation by serving an individual who was not otherwise described and the manner of service was not described); T-P Investment Corp. v. Winter, 400 S.W.2d 957, 958 (Tex. Civ. App.—Waco 1966, writ *dism'd*) (citation failed to state the manner of service and the identity of the person served as agent for a corporate defendant); Hyltin-Manor Funeral Home, Inc. v. Hill, 304 S.W.2d 469, 470 (Tex. Civ. App.—San Antonio 1957, no writ) (citation failed to state the manner of service or that anything was delivered to the president of the corporation as agent for service); Miller v. First State Bank & Trust Co., 184 S.W. 614, 618 (Tex. Civ. App.—Austin 1916, no writ) (citation in an action against a partnership failed to state the manner of service and failed to identify the person served).

66. Sloan v. Batte, 46 Tex. 215, 216 (1876); Williams v. Downes, 30 Tex. 51, 52 (1867); Roberts v. Stockslager, 4 Tex. 307, 308-10 (1849) (return of citation failed to show the date or place of service); Fitzpatrick v. Dorris Bros., 284 S.W. 303, 304 (Tex. Civ. App.—Eastland 1926, no writ) (ambiguity as to which of two dates served); Robinson v. Horton, 81 S.W. 1044, 1044-45 (Tex. Civ. App. 1904, no writ) (failure to show the date and failure to affix the seal).

67. Covingtons v. Burleson, 28 Tex. 368, 371 (1866) ("the second Monday after the tenth Monday in March"); Friend v. Thomas, 187 S.W. 986, 987-88 (Tex. Civ. App.—Fort Worth 1916, no writ) (a writ showing execution of citation upon the 19th day of July, A.D. 191); Texas State Fair & Dallas Exposition v. Lyon, 24 S.W. 328 (Tex. Civ. App. 1893, no writ) (petition filed Feb. 26, 1892, and served Feb. 20, 1892).

68. Hance v. Cogswell, 307 S.W.2d 277, 278 (Tex. Civ. App.—Austin 1957, no writ).

69. Pruitt v. State, 92 Tex. 434, 435, 49 S.W. 366, 367 (1899); Hance v. Cogswell, 307 S.W.2d 277, 278-79 (Tex. Civ. App.—Austin 1957, no writ); George v. Elledge, 261 S.W.2d 201 (Tex. Civ. App.—San Antonio 1953, no writ).

70. Watson v. Miller, 55 Tex. 289, 292 (1881); Tobler v. Stubblefield, 32 Tex. 188, 189 (1869); Foster v. Christensen, 67 S.W.2d 246, 253 (Tex. Comm'n App. 1934, holding approved); Heard v. J. & C. Drilling Co., 124 S.W.2d 866 (Tex. Civ. App.—San Antonio 1939, writ *dism'd*).

71. Southern Pacific Co. v. Block Bros., 84 Tex. 21, 22, 19 S.W. 300, 301 (1892) (citation directed to Southern Pacific Railway Co., a different entity from Southern Pacific Co.); Hendon v. Pugh, 46 Tex. 211, 212 (1876) (citation named J.W. Hendon and return showed service on J.N. Hendon); Faver v. Robinson, 46 Tex. 204, 205 (1876) (citation directed to "Favers," judgment against "Faver"); Brown-McKee, Inc. v. J.F. Bryan & Assoc., 522 S.W.2d 958, 959 (Tex. Civ. App.—Texarkana 1975, no writ) (citation directed to Brown McKee Const. Co. instead of Brown-McKee, Inc.); Nail v. Gene Biddle Feed Co., 347 S.W.2d 830, 831 (Tex. Civ. App.—Beaumont 1961, no writ) (citation to "B.F. Nail," judgment against his father "Frank Nail"); Zimmerman v. First Nat'l Bank, 235 S.W.2d 720, 722-24 (Tex. Civ. App.—Fort Worth 1950, writ *ref'd n.r.e.*) (transposition of the garnishee's initials destroys default judgment based on the writ, "T.W." instead of "W.T.").

72. Firman Leather Goods Corp. v. McDonald & Shaw, 217 S.W.2d 137, 141 (Tex. Civ. App.—El Paso 1948, no writ) (J.B. George, McDonald & Shaw instead of J.B. McDonald and George Shaw); Heard v. J. & C. Drilling Co., 124 S.W.2d 866 (Tex. Civ. App.—San Antonio 1939, writ *dism'd*).

73. Holcomb & Hoke Mfg. Co. v. Amason, 2 S.W.2d 360, 362 (Tex. Civ. App.—San

as an agent;⁷⁴ failure to state what was delivered to defendant;⁷⁵ failure to state service on each defendant in a multiple defendant situation;⁷⁶ failure to state service in the county which the citation designates;⁷⁷ when the citation affirmatively negates service;⁷⁸ failure to state the correct location of the court;⁷⁹ incorrectly stating the cause number of the suit;⁸⁰ service on an individual where a corporation is the defendant;⁸¹ failure to affix the seal;⁸² failure to state the file number;⁸³ failure to state that the citation was not served by a sheriff or constable, but instead was served by a tax collector;⁸⁴ failure of process server to affirm that he was disinterested in connection with service of an out-of-state citation;⁸⁵ and failure to command defendant

Antonio 1927, no writ) (return merely recited that sheriff had served citation on defendant's agent).

74. *Harmon & Reid v. Quin*, 258 S.W.2d 441, 442 (Tex. Civ. App.—San Antonio 1953, no writ) (failure to sufficiently allege that person named would be a proper agent for service); *National Ben Franklin Fire Ins. Co. v. Scott*, 214 S.W. 604, 605 (Tex. Civ. App.—Amarillo 1919, no writ) (petition alleged cause of action against a foreign fire insurance company having an agent in Texas; return service showed service upon a partner but did not affirmatively show that the partner served was also a local agent); *Remington-Rand Bus. Serv., Inc. v. Angelo Printing Co.*, 31 S.W.2d 1098 (Tex. Civ. App.—Austin 1930, no writ) (neither pleading, citation, nor return showed that party upon whom service was had was such agent as statutes required for service on a foreign corporation).

75. *Woodall v. Lansford*, 254 S.W.2d 540, 542-43 (Tex. Civ. App.—Fort Worth 1953, no writ) (return failed to state that a true and correct copy of plaintiff's petition was delivered to defendant); *Midwest Piping & Supply Co. v. Page*, 128 S.W.2d 459, 462 (Tex. Civ. App.—Beaumont 1939, writ ref'd) (citation directed that a certified copy of plaintiff's original petition be served while return failed to state that a certified copy was served); *Price v. Black Bros.*, 19 S.W.2d 847 (Tex. Civ. App.—Texarkana 1929, no writ) (return failed to state what the officer delivered to the defendant); *Grammar v. State*, 89 Tex. Crim. 188, 190, 230 S.W. 165, 166 (1921) (citation stated "came to hand on the 23rd day of January, 1920, and executed on the 2nd day of February, 1920, by delivering to the within names").

76. *Holliday v. Steele*, 65 Tex. 388, 389 (1886) ("[C]ame on to hand . . . a true copy of this writ . . ."); *King v. Goodson*, 42 Tex. 152, 153 (1875) ("[C]ame to hand . . . a certified copy of plaintiff's petition . . ."); *Willis v. Bryan*, 33 Tex. 429 (1870); *State v. Davis*, 139 S.W.2d 638, 640 (Tex. Civ. App.—Eastland 1940, writ dism'd jdgmt cor.) ("by delivering a copy of the above notice" to defendants); *Fitzpatrick v. Dorris Bros.*, 284 S.W. 303, 304 (Tex. Civ. App.—Eastland 1926, no writ) (return stated that it was executed on May 16, by delivering to D. & C. May 27 "the within named defendant"); *Martin v. Hawkins*, 238 S.W. 991, 992 (Tex. Civ. App.—Fort Worth 1922, writ ref'd) (return of service on several defendants stating that it was served "by delivering to the within named defendant in person a true copy . . ."); *Kellam v. Trail*, 185 S.W. 988 (Tex. Civ. App.—Dallas 1916, no writ) (return showing service of citation by delivering to two defendants "in person a true copy"); *Duke v. Spiller*, 111 S.W. 787 (Tex. Civ. App. 1908, no writ) (return showed that but one copy of the citation was delivered to two defendants, "a true copy of this writ"); *Mahan v. McManus*, 102 S.W. 789, 790 (Tex. Civ. App. 1907, no writ) (citation named three defendants and the return stated that it was executed "by delivering to the within named defendant in person a true copy of the citation"); *Russell v. Butler*, 71 S.W. 395 (Tex. Civ. App. 1902, no writ) (return stated "came to hand" on a certain day "and executed" on a named day "by delivering to C.R. & M.R., the within defendants, in person, a true copy of the citation").

77. *Douthit v. Martin*, 39 S.W. 944, 945 (Tex. Civ. App. 1897, no writ) (service was by sheriff of the county (Harris) in which defendant was living but citation was issued from and directed to the sheriff of Travis county).

78. *Holland v. Wood*, 196 S.W. 309 (Tex. Civ. App.—El Paso 1917, no writ) (return affirmatively showed defendant "not found" by sheriff for service of citation).

79. *Crenshaw v. Hempel*, 130 S.W. 731, 733 (Tex. Civ. App. 1910, no writ).

80. *Durham v. Betterton*, 79 Tex. 223, 224, 14 S.W. 1060, 1060-61 (1891); *Beck v. Nelson*, 17 S.W.2d 144, 145 (Tex. Civ. App.—Amarillo 1929, writ dism'd); *Atkinson v. Leonard*, 287 S.W. 525 (Tex. Civ. App.—Fort Worth 1926, no writ); *Crenshaw v. Hempel*, 130 S.W. 731, 733 (Tex. Civ. App. 1910, no writ); *Duke v. Spiller*, 111 S.W. 787 (Tex. Civ. App. 1908, no writ).

81. *Firman Leather Goods Corp. v. McDonald & Shaw*, 217 S.W.2d 137, 140 (Tex. Civ. App.—El Paso 1948, no writ); *Whitaker Chevrolet Co. v. Blacksher*, 132 S.W.2d 425 (Tex. Civ. App.—Eastland 1939, no writ).

82. *Robinson v. Horton*, 81 S.W. 1044, 1045 (Tex. Civ. App. 1904, no writ).

83. *Duke v. Spiller*, 111 S.W. 787 (Tex. Civ. App. 1908, no writ).

84. *Turner v. Ephraim*, 28 S.W.2d 608, 609 (Tex. Civ. App.—El Paso 1930, no writ).

85. *Scucchi v. Woodruff*, 503 S.W.2d 356, 359 (Tex. Civ. App.—Fort Worth 1973, no writ).

to appear.⁸⁶

As indicated above, the courts have developed a highly technical standard for reviewing citations. The common error in citations of failing to disclose the manner of service illustrates the courts' use of rule 124 to set aside default judgments. In *T-P Investment Corp. v. Winter*,⁸⁷ for instance, the citation evidencing the sheriff's return recited that a true copy of the citation with plaintiff's petition was delivered to defendant.⁸⁸ The sheriff's return, however, failed to disclose the manner of service.⁸⁹ The court held this omission alone constituted a fatal defect under rule 107⁹⁰ even though the return included the name of the corporation, date of service, time of service, and mileage.⁹¹ As a result of this error, the default judgment in *Winter* was reversed.⁹²

Situations involving service on an agent are also a particularly troublesome area. Plaintiff's petition in *Kay's Jewelers, Inc. v. Sikes Senter Corp.*⁹³ alleged that defendant was "an Oklahoma corporation duly qualified to do business in Texas, maintaining its resident agent for service, one Jerry Alexander, of Texarkana, Texas." The sheriff's return reflected service on "Kay's Jewelers, Jerry Alexander as agent."⁹⁴ The court reversed the judgment by default because plaintiff's petition had alleged Jerry Alexander was a resident agent instead of a registered agent.⁹⁵ Similarly, courts have reversed default judgments for the failure to correctly state the defendant's name.⁹⁶ For example, in *Brown-McKee, Inc. v. J.F. Bryan & Associates*⁹⁷ the court reversed a default judgment because the sheriff's return indicated service on Brown-McKee Construction Co. instead of Brown-McKee, Inc.

A motion to quash service is the proper method for challenging defects in service of citations prior to the entry of judgment.⁹⁸ But even if the citation

86. *Stafford Constr. Co. v. Martin*, 531 S.W.2d 667, 668 (Tex. Civ. App.—El Paso 1975, no writ).

87. 400 S.W.2d 957 (Tex. Civ. App.—Waco 1966, writ dismissed).

88. *Id.* at 958.

89. *Id.*

90. TEX. R. CIV. P. 107.

91. *T-P Investment Corp. v. Winter*, 400 S.W.2d 957, 958 (Tex. Civ. App.—Waco 1966, writ dismissed).

92. *Id.* at 959.

93. 444 S.W.2d 219 (Tex. Civ. App.—Fort Worth 1969, no writ).

94. *Id.* at 221.

95. *Id.*

96. See note 78 *supra* and accompanying text.

97. 522 S.W.2d 958 (Tex. Civ. App.—Texarkana 1975, no writ).

98. TEX. R. CIV. P. 122. A special appearance is not the proper way to challenge defects or errors in obtaining jurisdiction over the person or property of the defendant. *Goldman v. Pre-Fab Transit Co.*, 520 S.W.2d 597, 598 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); 8 R. STAYTON, TEXAS FORMS § 4716, Comment, at 65 (Supp. 1976); Thode, *In Personam Jurisdiction; Article 2031b, The Texas "Long-Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279, 313 (1964). But see *Gathers v. Walpace Co.*, 544 S.W.2d 169, 170-71 (Tex. Civ. App.—Beaumont 1976, no writ); *Castle v. Berg*, 415 S.W.2d 523 (Tex. Civ. App.—Dallas 1967, no writ). When a party makes a special appearance under rule 120a, all objections to jurisdiction, including method of service, are waived if the party is amenable to process issued by the courts of this state. TEX. R. CIV. P. 120a(3). Having specially appeared, the only jurisdictional issue which defendant may assert on appeal is his amenability to service of process. This is not a harsh result. By utilizing the special appearance procedure, a party quite properly admits that he has notice of the suit and it is not inappropriate for him to confine his attack to the jurisdiction of the court over his person or property. This is a small price to pay for the privilege of specially appearing for the purpose of fully litigating the fundamental question of minimal contacts at the rule 120a hearing and upon appeal.

is quashed, the defendant shall be deemed to have entered his appearance at 10:00 a.m. on the Monday following the expiration of twenty days after the day on which the citation is quashed.⁹⁹ Since the defendant is thus deemed to have been duly served so as to require him to appear and answer at that time or suffer a judgment by default,¹⁰⁰ the only real value of a motion to quash citation is to obtain additional time to answer. Since a defendant could just as easily file a general denial,¹⁰¹ this motion is of little utility.

A party to an action who enters a general appearance cannot thereafter ignore the action and expect by such conduct to prevent the court from acting; having appeared in a suit, a defendant is presumed to be present in court and aware of all subsequent proceedings in the cause.¹⁰² Therefore, even if service of process was defective, a defendant may waive any objections he may have had as to the method jurisdiction was obtained over his person by generally appearing.¹⁰³ Such an appearance is entered whenever the defendant invokes the jurisdiction of the court without being compelled to do so by a previous ruling of the court sustaining jurisdiction.¹⁰⁴

IV. ENTRY OF JUDGMENT

A. *Failure to Answer*

A party who has been properly served must answer or otherwise plead by 10:00 a.m. on appearance day.¹⁰⁵ If a defendant fails to answer or has his pleadings stricken,¹⁰⁶ the case is ripe for the entry of a judgment by default. But before a default judgment may properly be entered, the record must contain proof of the circumstances surrounding service in order to show compliance with the rules. If the citation was personally served, the citation with the officer's return thereon must have been on file with the court for ten days, exclusive of the day of filing and the day of judgment.¹⁰⁷ If service

The Texas special appearance rule, however, does not address the issue of when a defendant must file his answer after the overruling of his special appearance. In the authors' opinion a defendant's answer is due immediately upon the overruling of his special appearance. This approach finds support in rule 101 which states that an answer is due 20 days after the service of citation. Rule 120a has no provision extending the time within which to answer following the overruling of a motion challenging the court's jurisdiction over the person or property of the defendant. Requiring an answer upon the overruling of defendant's special appearance is not unreasonable because rule 120a(1) expressly provides that any other plea, pleading or motion may either be contained in the jurisdictional motion or filed subsequent thereto without waiver of the special nature of the appearance.

99. TEX. R. CIV. P. 122.

100. *Id.*

101. TEX. R. CIV. P. 92.

102. *Carter v. G & L Tool Co. of Utah, Inc.*, 428 S.W.2d 677, 683 (Tex. Civ. App.—San Antonio 1968, no writ); *accord*, *Thompson v. Alford*, 20 Tex. 491, 492 (1857).

103. *E.g.*, *Republic Oil & Gas Co. v. Owen*, 210 S.W. 319, 320-21 (Tex. Civ. App.—Fort Worth 1919, writ ref'd); 2 R. McDONALD, *supra* note 5, § 9.04, at 366; 6 C.J.S. *Appearances* § 35 (1975).

104. *E.g.*, *St. Louis & S.R.R. v. Hale*, 109 Tex. 251, 206 S.W. 75 (1918); *Toler v. Travis County Child Welfare Unit*, 520 S.W.2d 834, 836 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); 2 R. McDONALD, *supra* note 5, § 9.04, at 366.

105. *Andrus v. Andrus*, 168 S.W.2d 891 (Tex. Civ. App.—Eastland 1943, no writ); TEX. R. CIV. P. 101.

106. TEX. R. CIV. P. 215(a)(1); Annot., 6 A.L.R.3d 713 (1966); Annot., 14 A.L.R.2d 580 (1950); 99 L. Ed. 54 (1955).

107. TEX. R. CIV. P. 107, 239; *Flynt v. City of Kingsville*, 125 Tex. 510, 511-12, 82 S.W.2d 934, 935 (1935).

was effected pursuant to the Texas long-arm statute, proof of service on the secretary of state must be on file with the court before a final default judgment is entered.¹⁰⁸ When personal service is effected on a foreign corporation that is qualified to do business in Texas, service must be upon its agent;¹⁰⁹ proof of this agency must be adduced in order to sustain a default judgment.¹¹⁰ In addition, the default judgment request must be accompanied by a non-military affidavit¹¹¹ and a certificate of last known mailing address.¹¹² Once judgment has been entered, the clerk will mail a postcard notice of the judgment to the defendant at the address provided by counsel in his certificate of last known mailing address.¹¹³

A default judgment is interlocutory if one or more of the defendants answer.¹¹⁴ Since the requirements of *Craddock v. Sunshine Bus Lines, Inc.*¹¹⁵ do not apply as long as the judgment remains interlocutory, the trial court's exercise of discretion in setting the judgment aside during this time is not reviewable.¹¹⁶ If the judgment is interlocutory in nature, the plaintiff may sever the causes of action,¹¹⁷ non-suit the answering defendants,¹¹⁸ or proceed to trial against the answering defendants.¹¹⁹ Final judgment, however, can be entered only after all the claims of all the parties have been resolved.¹²⁰

B. Entry of a Judgment on Amended Pleadings

After the petition is filed and served a defendant who fails to answer must be notified of all changes substantively affecting the litigation.¹²¹ Increasing the amount of plaintiff's demand,¹²² alleging a new cause of action,¹²³ or the addition of new parties by amendment or intervention,¹²⁴ require notice to a defendant already served; a default judgment, however, will not be set aside

108. *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973); TEX. REV. CIV. STAT. ANN. art. 2031(b) (Vernon 1964).

109. *Investors Diversified Servs., Inc. v. Bruner*, 366 S.W.2d 810, 812-13 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.).

110. *Anglo Mexicana de Seguros, S.A. v. Elizondo*, 405 S.W.2d 722, 725 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.); *White Motor Co. v. Loden*, 373 S.W.2d 862, 865 (Tex. Civ. App.—Dallas 1963, no writ).

111. 50 U.S.C. § 520 (1970).

112. TEX. R. CIV. P. 239a.

113. *Lee v. Thomas*, 534 S.W.2d 422, 427 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

114. TEX. R. CIV. P. 240.

115. 134 Tex. 388, 133 S.W.2d 124 (1939).

116. *Stone v. Enstam*, 541 S.W.2d 473, 478 (Tex. Civ. App.—Dallas 1976, no writ); *City of Wichita Falls v. Dye*, 517 S.W.2d 680, 682 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.).

117. TEX. R. CIV. P. 174(b).

118. TEX. R. CIV. P. 164.

119. TEX. R. CIV. P. 240.

120. *County of Harris v. Black*, 448 S.W.2d 859, 860 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); 1 H. BLACK, *supra* note 7, §§ 23, 24.

121. 49 C.J.S. *Judgments* § 194, at 340 (1947).

122. *Weatherford v. Van Alstyne*, 22 Tex. 22 (1858); *Liquid Carbonic Co. v. Head*, 48 S.W.2d 464, 465 (Tex. Civ. App.—1932, writ dism'd); *Hittson v. Gentry*, 22 S.W. 70 (Tex. Civ. App. 1893, no writ).

123. *Mann v. Mathews*, 82 Tex. 98, 17 S.W. 927 (1891); *McNeil v. Childress & Folts*, 34 Tex. 370 (1870); *Morrison v. Walker*, 22 Tex. 18, 20 (1858); Note, *Pleading and Practice—Amendments to Petitions—What Constitutes a New Cause of Action*, 7 TEXAS L. REV. 144 (1928).

124. *Liquid Carbonic Co. v. Head*, 48 S.W.2d 464, 465 (Tex. Civ. App.—Austin 1932, writ dism'd); *Jeness v. First Nat'l Bank*, 256 S.W. 634, 635 (Tex. Civ. App. 1923, no writ); *Barrett v. McKinney*, 93 S.W. 240, 242 (Tex. Civ. App. 1906, no writ).

if plaintiff neglects to notify defendant of purely formal amendments.¹²⁵ While there is authority that notification of substantive changes must be by service of process,¹²⁶ the Texas rules of civil procedure would also seem to sanction notification by registered mail.¹²⁷ If judgment has been entered on a substantively amended pleading, the propriety of reforming the judgment to conform with the original demand has been questioned.¹²⁸

C. Proving Damages

When a claim is liquidated and proved by an instrument in writing, damages will be assessed by the court.¹²⁹ A court will treat a claim as liquidated if it is well-pleaded and the amount of damages can be calculated from plaintiff's petition and an instrument in writing.¹³⁰ Pleadings, even if sworn, do not constitute proper default judgment evidence if unaccompanied by a written instrument.¹³¹ Common examples of liquidated claims include suits on promissory notes,¹³² leases,¹³³ bonds,¹³⁴ checks,¹³⁵ and sworn accounts.¹³⁶

Unliquidated damages, however, are treated differently. A judgment by default does not automatically accept as true allegations pertaining to unliquidated damages¹³⁷ or those damages which are uncertain in nature or require more than mere mathematical computation from the pleadings and the instrument in writing. In these situations rule 243 requires the court to hear evidence as to damages.¹³⁸ Consequently, to warrant entry of a default

125. *Spencer v. McCarty*, 46 Tex. 213, 215 (1877); *Morrison v. Walker*, 22 Tex. 18, 20 (1858); *Ellis v. Mabry*, 60 S.W. 571 (Tex. Civ. App. 1901, no writ); *McConnel v. Foscoe*, 24 S.W. 964, 965 (Tex. Civ. App. 1894, no writ).

126. *Phillips v. The Maccabees*, 50 S.W.2d 478, 479 (Tex. Civ. App.—Waco 1932, no writ); *Jenness v. First Nat'l Bank*, 256 S.W. 634, 635 (Tex. Civ. App. 1923, no writ).

127. TEX. R. CIV. P. 21a, 63, 72, 810. *Contra*, *Hodges, Collateral Attacks on Judgments*, 41 TEXAS L. REV. 499, 508 (1963).

128. *Compare* *Weatherford v. Van Alstyne*, 22 Tex. 22 (1858), with *Liquid Carbonic Co. v. Head*, 48 S.W.2d 464, 465 (Tex. Civ. App.—Austin 1932, writ dism'd).

129. TEX. R. CIV. P. 241.

130. *Freeman v. Leasing Associates, Inc.*, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); see FED. R. CIV. P. 55(b)(1).

131. *Hughes v. Jones*, 543 S.W.2d 885, 886 (Tex. Civ. App.—El Paso 1976, no writ); *Odom v. Pinkston*, 193 S.W.2d 888, 891 (Tex. Civ. App.—Austin 1946, writ ref'd n.r.e.); *R.R. Dancy & Co. v. Rosenberg*, 174 S.W. 831, 832 (Tex. Civ. App.—Galveston 1915, no writ).

132. *Loungeway v. Hale*, 73 Tex. 495, 11 S.W. 537 (1889); *Wallace v. Snyder Nat'l Bank*, 527 S.W.2d 485, 487 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); *Odom v. Pinkston*, 193 S.W.2d 888, 890 (Tex. Civ. App.—Austin 1946, writ ref'd n.r.e.).

133. See *Freeman v. Leasing Associates, Inc.*, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

134. *Buttrill v. Occidental Life Ins. Co.*, 45 S.W.2d 636, 637, 639 (Tex. Civ. App.—Dallas 1931, no writ) (since damages were liquidated "the right to a jury trial did not exist").

135. *Farley v. Clark Equip. Co.*, 484 S.W.2d 142, 149 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

136. *O'Brien v. Cole*, 532 S.W.2d 151, 152 (Tex. Civ. App.—Dallas 1976, no writ); *Alexander v. Texoma Wholesale Jewelers*, 307 S.W.2d 631, 632 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.); *Colorado River Syndicate Subscribers v. Alexander*, 288 S.W. 586, 587 (Tex. Civ. App.—Austin 1926, no writ); TEX. R. CIV. P. 185. The requisites of rule 185 are, however, strictly construed. *Hassler v. Texas Gypsum Co.*, 525 S.W.2d 53, 54-55 (Tex. Civ. App.—Dallas 1975, no writ); *Big K Furniture Co. v. The Covey Co.*, 511 S.W.2d 329, 330 (Tex. Civ. App.—Austin 1974, no writ).

137. TEX. R. CIV. P. 243; *Maywald Trailer Co. v. Perry*, 238 S.W.2d 826, 827 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.); *Southern S.S. Co. v. Schumacher*, 154 S.W.2d 283, 284 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.).

138. TEX. R. CIV. P. 243; 3 A. FREEMAN, *supra* note 7, § 1287, at 2673. See also FED. R. CIV. P. 55(b)(2). No evidence is required to support the award of an attorney's fee within the minimum prescribed by the state bar minimum fee schedule if the case falls within the ambit of

judgment when damages are unliquidated a plaintiff must present competent evidence of his damages consistent with the cause of action pleaded.¹³⁹

When the issue of damages is tried defendant is entitled to participate fully by cross-examining plaintiff's witnesses and offering evidence in rebuttal for the purpose of reducing damages.¹⁴⁰ The defendant is also entitled to a jury trial on the issue of unliquidated damages if he makes a proper demand.¹⁴¹ A defendant who fails to appear at the time unliquidated damages are proved may, however, waive these rights.¹⁴²

Following judgment, the sufficiency of plaintiff's evidence is subject to review on appeal.¹⁴³ This review is based on the statement of facts prepared by the trial court.¹⁴⁴ For this reason it has long been established that if an appellant exercises due diligence and is unable to obtain a statement of facts, he is entitled to a new trial in order to preserve his right to an effective appellate review.¹⁴⁵ In the leading case of *Victory v. Hamilton*¹⁴⁶ the commission of appeals stated the rule in the following manner:

The appealing party is entitled to a statement of facts in question and answer form, and if, through no fault of his own, after the exercise of due diligence, he is unable to procure such a statement of facts, his right to have the cause reviewed on appeal can be preserved to him in no other way than by a retrial of the case.¹⁴⁷

The most troublesome portion of this rule is the statement that the inability of an appellant to procure a statement of facts must be "through no fault of his own, after the exercise of due diligence." The majority view requires the appellant to make at least a diligent effort to procure an agreed, abbreviated, or narrative statement of facts.¹⁴⁸ Some courts have gone so far as

TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1976-77). *O'Brien v. Cole*, 532 S.W.2d 151, 153-54 (Tex. Civ. App.—Dallas 1976, no writ).

139. *Schoenberg v. Forrest*, 253 S.W.2d 331, 335-36 (Tex. Civ. App.—San Antonio 1952, no writ); 3 A. FREEMAN, *supra* note 7, § 1292, at 2683; 47 AM. JUR. 2D *Judgments* § 1176, at 199 (1969).

140. *Rainwater v. Haddox*, 544 S.W.2d 729, 733 (Tex. Civ. App.—Amarillo 1976, no writ); 1 H. BLACK, *supra* note 7, § 91; 4 R. McDONALD, *supra* note 5, § 17.23.4, at 122; *see* *Maywald Trailer Co. v. Perry*, 238 S.W.2d 826, 828 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.); *St. Louis S.W. Ry. v. Denson*, 26 S.W. 265, 266 (Tex. Civ. App. 1894, no writ).

141. *Bumpass v. Morrison*, 70 Tex. 756, 759, 8 S.W. 596, 597-98 (1888); *White Motor Co. v. Loden*, 373 S.W.2d 863, 865-66 (Tex. Civ. App.—Dallas 1963, no writ); *Western Union Tel. Co. v. Skinner*, 128 S.W. 715, 716 (Tex. Civ. App. 1910, writ ref'd); TEX. R. CIV. P. 243; *see* TEX. CONST. art. I, § 15.

142. *Green v. W.E. Grace Mfg. Co.*, 422 S.W.2d 723, 726 (Tex. 1968); TEX. R. CIV. P. 220.

143. *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312, 314 (Tex. Civ. App.—Dallas 1975, writ ref'd); *Brown v. Brown*, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismiss'd); *Johnson v. Brown*, 218 S.W.2d 317, 320 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.).

144. *Wallace v. Snyder Nat'l Bank*, 527 S.W.2d 485, 488 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); *Dugie v. Dugie*, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ); *Justice Life Ins. Co. v. Walker*, 508 S.W.2d 434, 438 (Tex. Civ. App.—Forth Worth 1974, writ ref'd n.r.e.).

145. *E.g.*, *Robinson v. Robinson*, 487 S.W.2d 713, 715 (Tex. 1972); *Parker v. Sabine Valley Lumber Co.*, 485 S.W.2d 853, 855 (Tex. Civ. App.—Fort Worth 1972, no writ); *Pacific Greyhound Lines, Inc. v. Burgess*, 118 S.W.2d 1100, 1102-03 (Tex. Civ. App.—Amarillo 1938, writ ref'd) (appellant, appellee, and trial judge each submitted his own statement of facts); *Joachim v. Hamilton*, 186 S.W. 251, 253 (Tex. Civ. App.—Galveston 1916, writ dismiss'd).

146. 127 Tex. 203, 91 S.W.2d 697 (1936).

147. *Id.* at 209, 91 S.W.2d at 700.

148. *E.g.*, *Robinson v. Robinson*, 487 S.W.2d 713, 715 (Tex. 1972); *Bledsoe v. Black*, 535 S.W.2d 795, 796-97 (Tex. Civ. App.—Eastland 1976, no writ); *Phillips v. Phillips*, 532 S.W.2d 161, 163 (Tex. Civ. App.—Austin 1976, no writ); *Ducock v. Ducock*, 523 S.W.2d 264, 267 (Tex.

to require that the appellant mandamus the trial judge or court reporter to demonstrate his due diligence.¹⁴⁹ Conversely, other cases have construed the due diligence language of *Victory v. Hamilton* more liberally.¹⁵⁰ In a case where the statement of facts was lost in an appeal from an instructed verdict, one court stated:

Attached to Appellee's Motion for Rehearing is an affidavit of the trial judge to the effect that if requested he could and would have prepared a statement of facts. We have no doubt as to the honesty and integrity of the trial court; however, since his mind has already been made up in favor of the Defendant-Appellees, it places an unfair burden upon Appellant to have to rely on the trial court for his statement of facts. Likewise, in our opinion, to require the Appellant to have to depend upon the successful parties for an agreement as to a statement of facts is not calculated to be productive of a statement of facts sufficient for our purposes of review.

We need a question and answer statement of facts as produced verbatim from the spoken words of both counsel and witnesses, which will furnish a true 'negative' of the facts introduced, unblemished by human interpolation. Regardless of his honesty and integrity, the trial judge is subject to all the weaknesses of human nature and the frailties of the human mind in reproducing from memory the testimony introduced in a trial.

A close examination of Rule 377 T.R.C.P. reveals to us that this rule presupposes the availability of the official court reporter's shorthand notes, and that the procedures required by and provided for therein should be interpreted in this light.¹⁵¹

While it has been difficult to discern the proper application of the *Victory v. Hamilton* rule in non-default judgment cases, its application in a default judgment situation has been even more difficult. There is a clear division among the courts of civil appeals¹⁵² on the question of whether a defaulting defendant waives his right to a statement of facts when he does not endeavor to procure a statement of facts in an alternate form in situations in which they are unavailable in question-and-answer form. Some courts have applied the "due diligence" test¹⁵³ while others have held that a defaulting

Civ. App.—Houston [14th Dist.] 1975, no writ); *Whatley v. Whatley*, 493 S.W.2d 299, 301 (Tex. Civ. App.—Dallas 1973, no writ); *Parker v. Sabine Valley Lumber Co.*, 485 S.W.2d 853, 855, 856 (Tex. Civ. App.—Fort Worth 1972, no writ); *Koonce v. City of Mesquite*, 382 S.W.2d 309, 311 (Tex. Civ. App.—Tyler 1964, writ dismissed); *Joachim v. Hamilton*, 186 S.W. 251, 253 (Tex. Civ. App.—Galveston 1916, writ dismissed).

149. *E.g.*, *Reagan v. Copeland*, 78 Tex. 551, 556, 14 S.W. 1031, 1032 (1890); *Crenshaw v. Montague County*, 228 S.W. 569, 570 (Tex. Civ. App.—Fort Worth 1920, no writ); *Pruitt v. Blesi*, 204 S.W. 714, 715 (Tex. Civ. App.—Dallas 1918, writ refused); *Smith v. Pecos Valley & N.E. Ry.*, 95 S.W. 11, 12 (Tex. Civ. App. 1906, writ refused).

150. *E.g.*, *Waller v. O'Rear*, 472 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1971, writ refused n.r.e.); *State v. Ripke*, 426 S.W.2d 599, 604-05 (Tex. Civ. App.—Corpus Christi 1968, writ refused n.r.e.); *Strode v. Srygley*, 342 S.W.2d 638, 641 (Tex. Civ. App.—Fort Worth 1961, writ refused n.r.e.).

151. *Waller v. O'Rear*, 472 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1971, writ refused n.r.e.).

152. *Figari*, *Texas Civil Procedure, Annual Survey of Texas Law*, 30 Sw. L.J. 293, 306 (1976).

153. *Brown v. Brown*, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.); *Parker v. Sabine Valley Lumber Co.*, 485 S.W.2d 853, 856 (Tex. Civ. App.—Fort Worth 1972, no writ); *Harris v. Lebow*, 363 S.W.2d 184, 185 (Tex. Civ. App.—Dallas 1962, writ refused n.r.e.); *Johnson v. Brown*, 218 S.W.2d 317, 321-22 (Tex. Civ. App.—Beaumont 1948, writ refused n.r.e.); *Hall v. Kynerd*, 97 S.W.2d 278, 279 (Tex. Civ. App.—El Paso 1936, writ dismissed); see notes 148 *supra*, 160-70 *infra* and accompanying text.

defendant cannot waive his right to a statement of facts in an unliquidated damages situation.¹⁵⁴ In determining how this controversy should be resolved it is helpful to examine the statutory framework within which the cases are decided and the reasoning used by those courts that have applied the rule of *Victory v. Hamilton* in default judgment situations.

As amended, article 2324 directs the official court reporter, upon request, to attend all sessions of court and take full shorthand notes of the cases tried for the purpose of making a record.¹⁵⁵ The Family Code similarly provides that a record shall be made of all civil cases unless waived by the parties with the consent of the court.¹⁵⁶ In defining the record on appeal rule 371¹⁵⁷ states that it shall consist of the transcript and "where necessary to the appeal" a statement of facts. This statement of facts may take one of several forms as rules 377 and 378¹⁵⁸ expressly sanction narrative, abbreviated, and agreed statements of fact as alternatives to the standard question-and-answer form.

Rules 377 and 378 have assumed additional importance since several courts, in adopting the "due diligence" test, have held that a defaulting defendant can waive his right to a statement of facts by failing to avail himself of these rules.¹⁵⁹ Language from two of the leading cases is particularly illuminating. In *Brown v. Brown*,¹⁶⁰ a domestic relations case, defendant complained that he was deprived of a statement of facts in question-and-answer form. The *Brown* court properly rejected this argument because plaintiff had procured a narrative statement of facts¹⁶¹ and stated that:

It reasonably follows that if the showing of unavailability of a question-and-answer statement of facts does not show a ground for reversal unless it is also shown that no statement is available from the alternative sources, then the unavailability of a question-and-answer statement of facts does not require reversal where there is available, and appellant is furnished, a narrative statement certified by the trial judge.¹⁶²

Similarly, in an early breach of contract case a judgment by default was entered "upon good and sufficient evidence."¹⁶³ There was no stenographic record of the evidence since a court reporter had not been requested. The

154. *E.g.*, *Woods v. Indiana Lumberman's Mut. Ins. Co.*, No. 1205 (Tex. Civ. App.—Corpus Christi April 28, 1977); *Hall v. C-F Employees Credit Union*, 536 S.W.2d 266, 268 (Tex. Civ. App.—Texarkana 1976, no writ); *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd); *Mitchell v. Hunsaker Mfg., Inc.*, 520 S.W.2d 796, 797 (Tex. Civ. App.—Waco 1975, no writ); *Dugie v. Dugie*, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ).

155. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-77).

156. TEX. FAM. CODE ANN. § 11.14(d) (Vernon 1975).

157. TEX. R. CIV. P. 371.

158. TEX. R. CIV. P. 377, 378.

159. *Smith v. Smith*, 535 S.W.2d 380, 384 (Tex. Civ. App.—Beaumont 1976, writ granted); *Brown v. Brown*, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed); *Harris v. Lebow*, 363 S.W.2d 184, 185 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.); *Johnson v. Brown*, 218 S.W.2d 317, 321-22 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.); *Hall v. Kynerd*, 97 S.W.2d 278, 279 (Tex. Civ. App.—El Paso 1936, writ dismissed).

160. 520 S.W.2d 571, 573 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed).

161. *Id.* at 576; *accord*, *Crawford v. Crawford*, 181 S.W.2d 992, 996 (Tex. Civ. App.—San Antonio 1944, writ dismissed) (Norvell J., concurring).

162. 520 S.W.2d at 576.

163. *Johnson v. Brown*, 218 S.W.2d 317, 319 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.).

defaulting defendant filed a motion praying that the court reporter be directed to prepare a statement of facts. The trial court denied this motion since such an order would have been futile. Defendant made no effort to procure a statement of facts in an alternative form.¹⁶⁴ On appeal defendant-appellant contended that he was denied an adequate review because of the absence of a statement of facts and argued that due to the absence of reporter's notes a statement of facts in an alternative form could not have been prepared.¹⁶⁵ In affirming, the court reasoned that:

The right to a reporter's transcript is a valuable right, but a statement of facts made up independently of a reporter's transcript would serve defendant's purposes. The only fact issue before the trial court was the amount of damages which plaintiff had sustained; all other issues had been determined by the default. The only questions which could be raised here concerning the evidence heard by the trial court was whether it was competent and whether it supported the trial court's finding; and a narrative statement would present these questions as well as a question and answer statement

. . . [T]he record does not show that the trial court's error was a material error because it does not show that the defendant has been deprived of a statement of facts which would present to this court the questions he is entitled to raise.¹⁶⁶

A contrary line of authority holds that the right to a statement of facts on appeal may not be waived by a failure to demonstrate the unavailability of a statement of facts in an alternate form.¹⁶⁷ In the leading case of *Morgan Express, Inc. v. Elizabeth Perkins, Inc.*¹⁶⁸ the Dallas court of civil appeals held that a defendant who was not present when unliquidated damages were proved was not required to seek a statement of facts in an alternate form when the proceedings were not reported. In harmony with the minority view of the "due diligence" test in nondefault situations, the *Morgan Express* court concluded:

that an appellant who was not present and was not represented when the testimony was taken is in no position to agree with his opponent concerning the substance of the testimony, and neither should he be required to rely on the unaided memory of the trial judge, who, though presumably fair, has already decided the merits of the case against the appellant. If the reporter's failure to perform this mandatory duty deprives a party of this right to an adequate review, the case should be remanded for a new trial.¹⁶⁹

In *Smith v. Smith*¹⁷⁰ the Texas Supreme Court had the opportunity to

164. *Id.* at 320.

165. *Id.* at 320, 321.

166. *Id.* at 321-22 (citations omitted).

167. *E.g.*, *Hall v. C-F Employees Credit Union*, 536 S.W.2d 266, 268 (Tex. Civ. App.—Texarkana 1976, no writ); *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd); *Mitchell v. Hunsaker Mfg., Inc.*, 520 S.W.2d 796, 797 (Tex. Civ. App.—Waco 1975, no writ); *Dugie v. Dugie*, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ); *James Edmond, Inc. v. Schilling*, 501 S.W.2d 432, 434 (Tex. Civ. App.—Waco 1973, no writ).

168. 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd).

169. *Id.* at 315 (citations omitted). Article 2324, as amended, provides that trials are to be reported upon request. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-77). *Bledsoe v. Black*, 535 S.W.2d 795, 796 (Tex. Civ. App.—Eastland 1976, no writ).

170. 535 S.W.2d 380 (Tex. Civ. App.—Beaumont), *rev'd*, 544 S.W.2d 121 (Tex. 1976).

clarify its holding in *Victory v. Hamilton* and approve or disapprove the holding in *Morgan Express*. In this domestic relations case the defendant husband answered but although notified failed to appear at the time of trial. Evidence was heard and a judgment adverse to the husband was entered. Defendant appealed by writ of error and sought a reversal because he had been deprived of a statement of fact. In support of his position defendant established that no record of the plaintiff's evidence was made and that the trial judge had no independent recollection of the evidence and would not attempt to prepare a statement of facts. The court of civil appeals held that defendant's inability to obtain a statement of facts did not entitle him to a new trial because the alleged error was not disclosed on the face of the record.¹⁷¹ In affirming the judgment of the trial court, the intermediate court expressly refused to follow *Morgan Express*. The Supreme Court granted a writ of error and reversed, holding that defendant had established, on the face of the record, his right to a retrial because of his inability to procure a statement of fact.¹⁷²

Subsequently, in *Baen-Bec, Inc. v. Tenhoopen*¹⁷³ the Eastland court of civil appeals addressed *Morgan Express*, *Smith v. Smith*, and the amended article 2324. In *Tenhoopen* plaintiff's unliquidated damages evidence was not reported. Defendant sought a reversal on this basis and also because the trial court refused to grant him a new trial. The *Tenhoopen* court reversed because the trial court had abused its discretion in refusing to set the default judgment aside. Additionally, the *Tenhoopen* court rejected the holding of *Morgan Express*, citing *Smith v. Smith* and the 1975 amendment to article 2324.¹⁷⁴

It is difficult to reconcile the holding of *Tenhoopen* with the Supreme Court's decision in *Smith v. Smith* or the Eastland court of civil appeals opinion in *Wallace v. Snyder National Bank*.¹⁷⁵ Although *Smith v. Smith* did not cite *Morgan Express*, it did cite with approval *Wallace v. Snyder National Bank* and *Dugie v. Dugie*.^{175.1} Both *Wallace v. Snyder National Bank* and *Dugie v. Dugie* are consistent with the holding of *Morgan Express*. Following these precedents, the Supreme Court in *Smith v. Smith* held that the petitioner had established his right to a new trial "because of his inability to procure a statement of facts."^{175.2}

In rejecting *Morgan Express* the *Tenhoopen* court relied heavily on an amendment to article 2324. The court stated in part that, "[s]ubsequent to *Morgan Express*, the Legislature amended Article 2324 by adding the words 'upon request.' If in fact the article was mandatory rather than directory prior to the amendment, following the amendment, effective July 27, 1975, article 2324 is no longer mandatory."^{175.3} The court's reliance on the amendment to article 2324 is questionable. First, the effective date of article 2324

171. 544 S.W.2d at 122.

172. *Id.* at 123.

173. No. 4996 (Tex. Civ. App.—Eastland March 10, 1977) (unreported).

174. *Id.* at 2.

175. 527 S.W.2d 485, 487-88 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

175.1. 511 S.W.2d 623 (Tex. Civ. App.—San Antonio 1974, no writ).

175.2. 544 S.W.2d at 123.

175.3. No. 4996, at 3.

was May 27, 1975, prior to the decision in *Morgan Express* and almost one month before a rehearing was denied. Further, the bill to amend article 2324 was introduced at the request of the Texas Shorthand Reporters Association to update the fee provision contained in the third paragraph of the statute,^{175.4} harmonize the statute with the Family Code, and provide the Texas Supreme Court with rulemaking authority. The requirement that each official court reporter "shall" attend all sessions of the court was deleted merely to conform to the practice of many courts of allowing the reporter to attend to other matters unless specifically requested to report a proceeding.

The question of whether a defaulting defendant may waive his right to a statement of facts on appeal is a source of continuing confusion to the bench and the bar. The balancing of the competing interests is a delicate one. The arguments in support of either position will not be detailed as they are best left to the briefs and imaginative thinking of trial counsel. It is sufficient to say that the competing interests are the encouragement of due diligence and the principal of preserving for either litigant the right to a fair trial and an adequate review. The authors recommend the approach taken by the Dallas court of civil appeals in *Morgan Express*. The primary reason for adopting this position is that it does not handicap the plaintiff's proof of unliquidated damages, yet it establishes a rule which benefits the bench and the bar by its ease in application. The authors recommend that this rule, with one exception, be applied uniformly in default judgment situations, even if the defendant is guilty of conscious indifference in failing to appear when damages are proven.¹⁷⁶ The exception to this rule is that if a defendant does appear but neglects to have the proceedings reported and fails to avail himself of rules 377 and 378, he should be deemed to have waived his right to a statement of facts.¹⁷⁷ Simply stated, a record should be made of plaintiff's proof of unliquidated damages in all situations wherein the defendant is absent.

V. POST-JUDGMENT PROCEEDINGS

Once judgment by default is entered, several options are open to a defendant if he wishes to attack the judgment. A final default judgment may be set aside on motion for new trial or to set aside filed within thirty days.¹⁷⁸ The remedy of a regular appeal is available and a writ of error may be prosecuted if filed within six months after the judgment was rendered.¹⁷⁹ Further, a bill of review may be filed within four years of entry of the

175.4. Conversation with John Newton, former state representative and co-sponsor of the 1975 amendment to article 2324. Conversation with Tommy Mullins, President of the Texas Shorthand Reporters Association, May 17, 1977. Conversation with Tony Koriath, Counsel for the Texas Shorthand Reporters Association, May 17, 1977.

176. See *Smith v. Smith*, 544 S.W.2d 121 (Tex. 1976). *Contra*, *Brown v. Brown*, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ *dism'd*); *Lickman v. Lickman*, 368 S.W.2d 51, 54 (Tex. Civ. App.—Eastland 1963, writ *dism'd*).

177. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-77); *Bledsoe v. Black*, 535 S.W.2d 795, 796 (Tex. Civ. App.—Eastland 1976, no writ); *Phillips v. Phillips*, 532 S.W.2d 161, 163 (Tex. Civ. App.—Austin 1976, no writ). *Contra*, *Strode v. Srygley*, 342 S.W.2d 638, 640, 641 (Tex. Civ. App.—Fort Worth 1961, writ *ref'd n.r.e.*).

178. *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706 (1961); *Davis v. Thomas*, No. 983 (Tex. Civ. App.—Tyler March 10, 1977). Motion for a new trial in district court is governed by TEX. R. CIV. P. 329b.

179. TEX. REV. CIV. STAT. ANN. art. 2255 (Vernon 1971).

judgment by default.¹⁸⁰ Each of these alternatives will be discussed with emphasis on what the defendant must demonstrate in order to obtain relief from an adverse judgment. The final part of this section will discuss collateral attacks on judgments by default.

A. *Setting Aside a Judgment by Default*

A trial court's discretion in refusing to grant a new trial is not unbridled. In *Craddock v. Sunshine Bus Lines, Inc.*¹⁸¹ the commission of appeals stated the test for setting aside default judgments as follows:

A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.¹⁸²

When the judgment entered is not void,¹⁸³ each of the enumerated *Craddock* requirements must be met.¹⁸⁴ Since determination of whether a case meets the *Craddock* test is left to the discretion of the trial court, the trial court's ruling will not be overturned unless an abuse of discretion is shown.¹⁸⁵

To warrant the setting aside of a default judgment defendant must demonstrate that his failure to timely answer was not intentional or the result of conscious indifference but was instead due to an accident or mistake. Negligence is no longer the test for such accident or mistake¹⁸⁶ despite

180. *Id.* art. 5529 (Vernon 1958); 4 R. McDONALD, *supra* note 5, § 18.27.6, at 330-31.

181. 134 Tex. 388, 133 S.W.2d 124 (1939).

182. *Id.* at 393, 133 S.W.2d at 126.

183. *City of Fort Worth v. Gause*, 129 Tex. 25, 28, 101 S.W.2d 221, 223 (1937); *Hitt v. Bell*, 111 S.W.2d 1164, 1165 (Tex. Civ. App.—Austin 1937, no writ); *City of Corpus Christi v. Scruggs*, 89 S.W.2d 458, 460 (Tex. Civ. App.—San Antonio 1935, no writ); 1 H. BLACK, *supra* note 7, §§ 307, 355.

184. *Glittenberg v. Hughes*, 524 S.W.2d 954, 956 (Tex. Civ. App.—Fort Worth 1975, no writ); *Messina v. Texas Bank & Trust Co.*, 496 S.W.2d 649, 651 (Tex. Civ. App.—Tyler 1973, no writ) (judgment affirmed where defendant declined to answer on the expectation that trial court would not enter judgment for an alleged usurious interest charge on the promissory note made a basis of the litigation); *Lickman v. Lickman*, 368 S.W.2d 51, 52 (Tex. Civ. App.—Eastland 1963, writ dismissed); *Patton v. Samuel*, 262 S.W.2d 439, 441 (Tex. Civ. App.—Fort Worth 1953, writ dismissed).

185. *Compare Farley v. Clark Equip. Co.*, 484 S.W.2d 142, 150 (Tex. Civ. App.—Amarillo 1972, writ refused n.r.e.) (trial court's action will not be set aside unless manifest abuse of discretion is shown), *and Young v. Snowcon, Inc.*, 463 S.W.2d 225, 227 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ), *with Hughes v. Jones*, 543 S.W.2d 885, 887 (Tex. Civ. App.—El Paso, no writ), *and Western Union Tel. Co. v. McGinnis*, 508 S.W.2d 147, 150 (Tex. Civ. App.—San Antonio 1974, no writ) (freely set aside). *See generally* Southwestern Bell Tel. Co. v. Johnson, 389 S.W.2d 645, 648 (Tex. 1965); *Jones v. Strayhorn*, 159 Tex. 421, 428, 321 S.W.2d 290, 295 (1959).

186. *E.g.*, *Scrivner v. Malone*, 30 Tex. 773, 775 (1868); *Martin v. Ventura*, 493 S.W.2d 336, 338 (Tex. Civ. App.—Tyler 1973, no writ); *Young v. Snowcon, Inc.*, 463 S.W.2d 225, 227 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ); *Dempsey v. Gibson*, 100 S.W.2d 430, 431 (Tex. Civ. App.—Waco 1936, no writ); 4 R. McDONALD, *supra* note 5, § 18.10.2, at 268; *see* note 215 *infra* and accompanying text. When challenging a judgment by default in a bill of review proceeding the judgment debtor must prove, among other things, that he was prevented from asserting his defense by the wrongful act of his opponent, such act being unmixed with any fault or negligence of the judgment debtor. *Alexander v. Hagedorn*, 148 Tex. 565, 568-69, 226 S.W.2d 996, 998 (1950); 4 R. McDONALD, *supra* note 5, § 18.27.5, at 328. *See* note 299 *infra* and accompanying text. A defendant's burden under *Craddock* "is much less onerous than the burden that would have been placed on him had he allowed the time for new trial to expire and sought relief in a bill of review proceeding." *Ward v. Nava*, 488 S.W.2d 736, 738 (Tex. 1972).

contrary language in several cases.¹⁸⁷ Indeed, the slightest excuse may be sufficient to warrant setting aside a judgment by default so long as the act or omission causing defendant's failure to answer was in fact accidental.¹⁸⁸ This rule is only fair since a defendant's burden of demonstrating the accidental or mistaken nature of his failure to answer would generally result in an admission of negligence.

Although this portion of the *Craddock* test has often played a major role in the decided cases, no formula for distinguishing excusable accident or mistake from intentional failure or conscious indifference has been stated. The broad generalities emerging from the reported decisions have taken on a variety of meanings in specific cases. For example, failure of a secretary to notify an attorney of a trial setting,¹⁸⁹ or the misplacing of a file by an attorney,¹⁹⁰ secretary,¹⁹¹ or insurer¹⁹² have all been held to justify the setting aside of a default judgment. Similarly, failure to forward process to one's insurance company in advance of appearance day has been excused when the papers were misplaced and forgotten.¹⁹³

Occasionally, ignorance of the law has also been held sufficient to excuse a defendant's failure to answer.¹⁹⁴ Mistakes of counsel are generally excusable, too, for miscalculating the answer date has been held a sufficient excuse for failing to timely answer when coupled with other factors.¹⁹⁵ Similarly, an attorney's mistaken belief that the case would not be called until a later date because of a crowded docket has prompted the granting of a

187. *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966); *Continental Airlines, Inc. v. Carter*, 499 S.W.2d 673, 675 (Tex. Civ. App.—El Paso 1973, no writ); *Farley v. Clark Equip. Co.*, 484 S.W.2d 142, 146 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

188. *Beard v. McKinney*, 456 S.W.2d 451, 453 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); *Cadena v. Dicker*, 383 S.W.2d 73, 75 (Tex. Civ. App.—Dallas 1964, no writ). Gross negligence is not an excuse since it rises to the level of conscious indifference. See *Heath v. Fraley*, 50 Tex. 209, 211 (1878); *National Mut. Cas. Co. v. Lambert*, 149 S.W.2d 1086, 1089 (Tex. Civ. App.—Beaumont 1941, writ dismissed judgment correct).

189. *Kirk v. Farmers Aerial Spraying Serv., Inc.*, 496 S.W.2d 739, 741 (Tex. Civ. App.—Amarillo 1973, no writ).

190. *Leonard v. Leonard*, 512 S.W.2d 771, 773 (Tex. Civ. App.—Corpus Christi 1974, writ dismissed).

191. *Continental Airlines, Inc. v. Carter*, 499 S.W.2d 673, 674 (Tex. Civ. App.—El Paso 1973, no writ); *Republic Bankers Life Ins. Co. v. Dixon*, 469 S.W.2d 646, 647 (Tex. Civ. App.—Tyler 1971, no writ).

192. *Reynolds v. Looney*, 389 S.W.2d 100, 101 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.).

193. *Ward v. Nava*, 488 S.W.2d 736, 738 (Tex. 1972).

194. *Dowell v. Winters*, 20 Tex. 793, 795 (1858); *Continental Airlines, Inc. v. Carter*, 499 S.W.2d 673, 674 (Tex. Civ. App.—El Paso 1973, no writ); *Cadena v. Dicker*, 383 S.W.2d 73, 75 (Tex. Civ. App.—Dallas 1964, no writ); *Flusche v. Uselton*, 201 S.W.2d 58, 59 (Tex. Civ. App.—Austin 1947, no writ). But see *Pierce v. Cole*, 17 Tex. 259, 261 (1856); 1 H. BLACK, *supra* note 7, § 335, at 512, § 341, at 524. One commentator has observed that the cases have generally drawn no distinction between mistakes of law and mistakes of fact. Annot., 21 A.L.R.3d 1255, 1262 (1968).

195. *Continental Airlines, Inc. v. Carter*, 499 S.W.2d 673, 675 (Tex. Civ. App.—El Paso 1973, no writ); *Texas Iron & Metal Co. v. Utility Supply Co.*, 493 S.W.2d 545, 546 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.); *Allison v. American Sur. Co.*, 248 S.W. 829, 832 (Tex. Civ. App.—Galveston 1923, no writ); see *Hickman v. Swain*, 210 S.W. 548, 551-52 (Tex. Civ. App.—Fort Worth 1919, no writ) (error to reinstate case after dismissal for want of prosecution when plaintiff's counsel miscalculated date upon which court would convene); *Springer v. Gillespie*, 56 S.W. 369, 370 (Tex. Civ. App. 1900, no writ). See generally Annot., 21 A.L.R.3d 1255 (1968) (opening judgment claimed to have been obtained because of attorney mistake as to time or place of appearance, trial, or filing of necessary papers); 1 H. BLACK, *supra* note 7, § 341 (general discussion of attorney negligence).

new trial.¹⁹⁶ The same was true when counsel thought his request for a continuance had been granted when in fact it had been lost in the mails.¹⁹⁷ Furthermore, counsel's mistaken mailing of defendant's plea of privilege to the wrong county seat was excusable even when the defendant's plea was not received by the clerk until after a judgment by default had been entered because counsel had previously mailed to the same town other papers which had been received by the proper clerk.¹⁹⁸

Excusable accidents or mistakes sometimes occur from the acts of others or of providence. For example, defendant's failure to answer is excusable if it resulted from reliance upon certain acts or statements of the plaintiff,¹⁹⁹ as a result of opposing counsel's fraudulent intent to take unfair advantage of the defendant²⁰⁰ or his failure to notify defendant of the trial setting.²⁰¹ Similarly, a new trial should be granted where the clerk failed to notify a nonresident attorney of a trial setting after having been requested to do so.²⁰² A motion for new trial should also be granted on a showing that the suit had apparently been settled prior to the entry of judgment.²⁰³ An unexpected transportation failure²⁰⁴ or counsel's failure to timely appear at the time of trial after getting lost on country roads has also been held to constitute a sufficient excuse to warrant a new trial.²⁰⁵

Just as the absence of the defendant or his attorney due to illness²⁰⁶ or compulsory attendance in another court²⁰⁷ ordinarily compels the granting of

196. *Scottish Union & Nat'l Ins. Co. v. Tomkies*, 66 S.W. 1109, 1110 (Tex. Civ. App. 1902, no writ).

197. *Yellow Transit Co. v. Klaff*, 145 S.W.2d 264, 266 (Tex. Civ. App.—Galveston 1940, no writ).

198. *Borger v. Mineral Wells Clay Prods. Co.*, 80 S.W.2d 333, 337 (Tex. Civ. App.—Eastland 1935, no writ).

199. *Field & Co. v. Fowler*, 62 Tex. 65, 69 (1884); *Interstate Minerals, Inc. v. Schlumberger Well Surveying Corp.*, 219 S.W.2d 604, 605 (Tex. Civ. App.—Austin 1949, no writ); *Metropolitan Cas. Ins. Co. v. City of Junction*, 55 S.W.2d 655, 656 (Tex. Civ. App.—San Antonio 1932, no writ); *Travelers' Ins. Co. v. Arant*, 40 S.W. 853 (Tex. Civ. App. 1897, no writ). To be enforceable an agreement must be made in open court and entered of record or signed by the parties thereto and filed among the papers of the case. TEX. R. CIV. P. 11; 1 H. BLACK, *supra* note 7, § 322, at 495.

200. *See Pearl Assur. Co. v. Williams*, 167 S.W.2d 808, 812 (Tex. Civ. App.—Fort Worth 1942, no writ) (appeal from judgment sustaining special exceptions to a bill of review petition); *Meckel v. State Bank*, 256 S.W. 668, 669 (Tex. Civ. App.—San Antonio 1923, no writ).

201. *Torres v. Casso-Guerra & Co.*, 512 S.W.2d 777, 780 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

202. *Brown v. General Elec. Co.*, 402 S.W.2d 957, 958-59 (Tex. Civ. App.—San Antonio 1966, writ dism'd); *Vela v. Sharp*, 395 S.W.2d 66, 67 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.) (failure of clerk to comply with TEX. R. CIV. P. 246).

203. *Sedberry v. Jones*, 42 Tex. 10, 11-12 (1875); *Chaney v. Allen*, 25 S.W.2d 1115, 1116 (Tex. Civ. App.—Austin 1930, no writ). *But see Ladd v. Coleman*, 285 S.W. 1096, 1098, 1099 (Tex. Civ. App.—San Antonio 1926, no writ); *Southwestern Sur. Ins. Co. v. Gulf, T. & W. Ry.*, 196 S.W. 276, 278 (Tex. Civ. App.—Fort Worth 1917, writ ref'd).

204. *Thomas v. Womack*, 13 Tex. 580, 585-86 (1855) (defendant delayed by the illness of his horse); *Pecos & N.T. Ry. v. Faulkner*, 118 S.W. 747, 749 (Tex. Civ. App. 1909, no writ) (change in train schedule).

205. *Presidio Cotton Gin & Oil Co. v. Duprey*, 2 S.W.2d 341, 342-43 (Tex. Civ. App.—El Paso 1928, no writ) ("Owing to the numerous country roads which lead from one watering place to another without going to any place in particular" counsel was one hour late for trial, by which time judgment had been entered).

206. *Goodhue v. J. Meyers & Co.*, 58 Tex. 405, 406 (1883); *Berhns v. Harris*, 150 S.W. 495 (Tex. Civ. App.—El Paso 1912, no writ); *Southwestern Tel. & Tel. Co. v. Jennings*, 51 S.W. 288, 289 (Tex. Civ. App. 1899, no writ); *Holliman v. Pearlstone*, 29 S.W. 542 (Tex. Civ. App. 1895, no writ).

207. *Tullis v. Scott*, 38 Tex. 537, 541-42 (1873); *Farmers' Gas Co. v. Calame*, 262 S.W. 546,

a new trial, an illness in the family of the defendant's attorney may be a sufficient excuse for failing to answer.²⁰⁸ The court may, however, require that he was deprived of representation by such illness and that he used due diligence in seeking the employment of other counsel.²⁰⁹ Illness of the defendant, however, has been held not to excuse his failing to answer where he either had an active business manager who could have answered,²¹⁰ or had sufficient time to answer but simply failed to take the necessary steps.²¹¹

There are, however, limits to excusable accidental mistakes. Courts have held that the actions of one's counsel excuse a defendant's failure to answer only when they rise to the level of deceit or betrayal.²¹² A defendant's mistake in thinking that an attorney had been retained to represent him in a cause may not excuse a failure to timely answer.²¹³ A failure to answer through confusion in counsel's office has been held not to require the granting of a new trial.²¹⁴ Negligence of defendant's attorney in failing to file an answer has been held to be an insufficient excuse for failing to answer.²¹⁵ Similarly, a refusal to answer on the mistaken belief that the litigation is stayed by either a prior pleading,²¹⁶ a proceeding in another forum,²¹⁷ or an

549-50 (Tex. Civ. App.—Waco 1924, no writ). *But see* Murray v. Dahlem, 524 S.W.2d 409, 410 (Tex. Civ. App.—Eastland 1975, no writ).

208. Walker v. Harris, 227 S.W. 360, 361 (Tex. Civ. App.—Texarkana 1921, no writ); Howard v. Emerson, 59 S.W. 49, 50 (Tex. Civ. App. 1900, no writ).

209. Southwestern Sur. Ins. Co. v. Gulf, T. & W. Ry., 196 S.W. 276, 278 (Tex. Civ. App.—Fort Worth 1917, writ ref'd); *see* Homuth v. Williams, 42 S.W.2d 1048, 1049 (Tex. Civ. App.—Austin 1931, no writ).

210. Woytek v. King, 218 S.W. 1081, 1081-82 (Tex. Civ. App.—Austin 1920, no writ).

211. Heath v. Fraley, 50 Tex. 209, 211 (1878).

212. Caldwell Oil Co. v. Hickman, 270 S.W. 214, 218 (Tex. Civ. App.—Austin 1925, no writ); *see* Sandoval v. Rattikin, 395 S.W.2d 889, 893 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.), *cert. denied*, 385 U.S. 901 (1966). *See generally* 1 H. BLACK, *supra* note 7, § 344 (fraud of attorney).

213. Brothers Dept. Store, Inc. v. Berenzweig, 333 S.W.2d 445, 447 (Tex. Civ. App.—San Antonio 1960, no writ); Dempsey v. Gibson, 100 S.W.2d 430, 432 (Tex. Civ. App.—Waco 1936, no writ).

214. *See* St. Paul Fire & Marine Ins. Co. v. Earnest, 293 S.W. 677, 681 (Tex. Civ. App.—Amarillo), *aff'd*, 116 Tex. 565, 296 S.W. 1088 (1927); Western Union Tel. Co. v. Skinner, 128 S.W. 715, 717 (Tex. Civ. App. 1910, writ ref'd). *Contra*, Beard v. McKinney, 456 S.W.2d 451, 454 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (abuse of discretion to refuse new trial when default resulted from a "breakdown of procedure in appellant's attorney's office").

215. Scrivner v. Malone, 30 Tex. 773, 775 (1868); Tarrant County v. Lively, 25 Tex. 399 (1860); Justice Life Ins. Co. v. Walker, 508 S.W.2d 434, 436-37 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.); Allais v. Lynch, 489 S.W.2d 342, 344 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.); Brothers Dept. Store, Inc. v. Berenzweig, 333 S.W.2d 445, 447 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.); Briggs v. Ladd, 64 S.W.2d 389, 390 (Tex. Civ. App.—San Antonio 1933, no writ); Homuth v. Williams, 42 S.W.2d 1048, 1049 (Tex. Civ. App.—Austin 1931, no writ); Shipp v. Anderson, 173 S.W. 598, 599 (Tex. Civ. App.—Galveston 1915, no writ); Wilson v. Smith, 43 S.W. 1086, 1089 (Tex. Civ. App. 1897, writ dism'd). An attorney's actions are binding on his client. Gracey v. West, 422 S.W.2d 913, 918 (Tex. 1968); Swearingen v. Swearingen, 487 S.W.2d 784, 787 (Tex. Civ. App.—San Antonio 1972, writ dism'd); Sandoval v. Rattikin, 395 S.W.2d 889, 893 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.), *cert. denied*, 385 U.S. 901 (1966). In these situations a defendant's recourse is against his attorney. Scrivner v. Malone, 30 Tex. 773, 775 (1868).

216. Ladd v. Coleman, 285 S.W. 1096, 1099 (Tex. Civ. App.—San Antonio 1926, no writ).

217. Graham v. San Antonio Mach. & Supply Corp., 418 S.W.2d 303, 307 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); Simpson v. Glenn, 103 S.W.2d 433, 434 (Tex. Civ. App.—Austin 1937, no writ); Dempsey v. Gibson, 100 S.W.2d 430, 432 (Tex. Civ. App.—Waco 1936, no writ); Don Love, Inc. v. Good Hope Refineries, Inc., Civ. No. 1,023,569 (Dist. Ct. of Harris County, 165th Jud. Dist. of Texas, 1976). *Contra*, Dowell v. Winters, 20 Tex. 793, 794 (1958).

agreement with opposing counsel²¹⁸ does not constitute a sufficient basis for failing to answer. Indeed, a failure to answer while filing a plea to add an additional party, accompanied by reliance on a custom that no judgment would be entered until the plea was disposed of, does not constitute a legitimate excuse for failing to answer.²¹⁹

A court is not compelled to accept every excuse made prior to appearance day even if the excuse is otherwise valid. For instance, a defendant's failure to appear because of conflicting business commitments is inexcusable.²²⁰ Further, it is not error to deny a new trial in a case where counsel deliberately refused to attend trial and his clients had secreted themselves.²²¹ A failure to appear at the time of trial on the mistaken belief that the case would be passed after counsel had informed the clerk of a conflicting engagement is an insufficient basis for setting aside a judgment by default unless counsel had made an attempt to obtain a continuance.²²² Moreover, an unexplained delay by a nonresident in obtaining Texas counsel constituted conscious indifference even though the defendant had written the judge asking for additional time to hire a Texas attorney.²²³

A decision with respect to granting or denying a new trial is reviewable only for abuse of discretion.²²⁴ Denial of a motion for new trial is not an abuse of discretion when defendant has been advised on more than one occasion by opposing counsel that he was in default by virtue of his failure to answer and had received actual notice of the trial setting.²²⁵ The same is true when defendant, unrepresented by counsel, is admonished by the court to obtain counsel and fails to do so.²²⁶ Further, the mere fact that negotiations and relations between the parties have been friendly does not justify the defendant's belief that plaintiff would not take a default judgment; his failure to answer on that basis is not sufficient to require the granting of a new trial.²²⁷

In the foregoing cases, the courts have been more concerned with results than with theories. This has precipitated a long series of inconsistent opinions predicated not upon fixed principles, but upon a subjective determination of what is best in a particular case. If the accident or mistake require-

218. *O'Brien v. Cole*, 532 S.W.2d 151, 153 (Tex. Civ. App.—Dallas 1976, no writ); *Padgitt v. Evans*, 51 S.W. 513, 514 (Tex. Civ. App. 1899, no writ).

219. *Gillaspie v. City of Huntsville*, 151 S.W. 1114, 1116 (Tex. Civ. App.—Galveston 1912, no writ).

220. *Landa v. McGehee*, 19 S.W. 516, 516 (Tex. 1892) (defendant had "no one to look after his business or attend to his stock").

221. *Strode v. Silverman*, 217 S.W.2d 454, 456 (Tex. Civ. App.—Waco 1949, writ ref'd).

222. *Murray v. Dahlem*, 524 S.W.2d 409, 410 (Tex. Civ. App.—Eastland 1975, no writ).

223. *Vinson v. Triangle Ranch, Inc.*, 472 S.W.2d 793, 794 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.); *accord*, *Union Cent. Life Ins. Co. v. Lipscomb*, 27 S.W. 307, 308 (Tex. Civ. App. 1894, no writ).

224. *Western Union Tel. Co. v. McGinnis*, 508 S.W.2d 147, 150 (Tex. Civ. App.—San Antonio 1974, no writ); *Boatright v. Peterson*, 490 S.W.2d 240, 242 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); *Farley v. Clark Equip. Co.*, 484 S.W.2d 142, 150 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

225. *Ana-Log, Inc. v. City of Tyler*, 520 S.W.2d 819, 822 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

226. *Wood v. Zenith Mortgage Co.*, 538 S.W.2d 446, 448 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); *Bratcher v. Sherman*, 474 S.W.2d 807, 808-09 (Tex. Civ. App.—Waco 1971, no writ).

227. *Grammar v. Hobby*, 276 S.W.2d 311, 313 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.).

ment of the *Craddock* test is to have substance, trial courts should refuse to set aside default judgments unless convinced that the defaulting defendant has acted in good faith and that the accident or mistake by which he seeks to excuse himself was the cause of his default and that notwithstanding its existence, he could not have protected himself by the exercise of reasonable diligence.²²⁸ The fact of defendant's good faith and the accidental nature of his failure to answer must be demonstrated by affidavit or other competent evidence.²²⁹

According to *Craddock*, a default judgment will be set aside only if defendant is able to "set up" a meritorious defense.²³⁰ A meritorious defense is one which if proved would cause a different result upon a retrial of the case.²³¹ In setting up a meritorious defense, the defendant must allege facts²³² which in law constitute a defense to the cause of action pleaded.²³³ The fact of a meritorious defense must be prima facie established by affidavit or other competent evidence.²³⁴ Although the fact of a meritorious defense may not be refuted,²³⁵ the legal sufficiency of the facts will be carefully scrutinized.²³⁶ In general, this means that a defendant must disclose his defense with sufficient particularity to enable the court to determine whether it is good and sufficient on the merits.²³⁷ If a defendant is without a meritorious defense, the setting aside of the judgment would be a vain act and a waste of the court's time.

When examining the sufficiency of a meritorious defense, the trial court may judge the veracity of defendant's evidence,²³⁸ but neither defendant's answer nor his motion to set aside are proper default judgment evidence.²³⁹

228. 1 A. FREEMAN, *supra* note 7, § 242, at 481.

229. See notes 238-41 *infra* and accompanying text.

230. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939).

231. *Holliday v. Holliday*, 72 Tex. 581, 585, 10 S.W. 690, 692 (1889); *Cragin v. Henderson County Oil Dev. Co.*, 280 S.W. 554, 555 (Tex. Comm'n App. 1926, holding approved); *Yellow Transit Co. v. Klaff*, 145 S.W.2d 264, 266 (Tex. Civ. App.—Galveston 1940, no writ); *Sanns v. Chapman*, 144 S.W.2d 341, 342 (Tex. Civ. App.—Amarillo 1940, writ dismissed judgment cor.). Black defines a meritorious defense as one that is "substantial and not merely technical, fair and honest and not unconscionable." 1 H. BLACK, *supra* note 7, § 348, at 540.

232. *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966); *El Paso & S.W. Ry. v. Kelley*, 99 Tex. 87, 92, 87 S.W. 660, 662-63 (1905); *Pierson v. McClanahan*, 531 S.W.2d 672, 676 (Tex. Civ. App.—Austin 1975, writ refused n.r.e.); *Bredeson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 513 S.W.2d 110, 113 (Tex. Civ. App.—Dallas 1974, no writ); *Patton v. Samuel*, 262 S.W.2d 439, 441 (Tex. Civ. App.—Fort Worth 1953, writ dismissed).

233. *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966); *Southwest Plaza Apartments, Inc. v. Corpus Christi Brick & Lumber Co.*, 528 S.W.2d 885, 888 (Tex. Civ. App.—Corpus Christi 1975, no writ). Two commentators have catalogued a variety of defenses the meritoriousness of which have been adjudicated. 1 H. BLACK, *supra* note 7, § 349; 49 C.J.S. *Judgments* § 336(c), at 648 (1947).

234. *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966); *Hatton v. Gonzalez*, 541 S.W.2d 197, 199 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Farley v. Clark Equip. Co.*, 484 S.W.2d 142, 147 (Tex. Civ. App.—Amarillo 1972, writ refused n.r.e.); *Empire Life & Hosp. Ins. Co. v. Poole*, 469 S.W.2d 644, 645 (Tex. Civ. App.—Waco 1971, no writ) (affidavit of counsel insufficient).

235. *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966).

236. *Russell v. Northeast Bank*, 527 S.W.2d 783, 786-87 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ refused n.r.e.); *Farley v. Clark Equip. Co.*, 484 S.W.2d 142, 147-50 (Tex. Civ. App.—Amarillo 1972, writ refused n.r.e.).

237. 1 A. FREEMAN, *supra* note 7, § 283, at 560; *accord*, *Foster v. Martin*, 20 Tex. 118, 122 (1857).

238. *Ward v. Nava*, 488 S.W.2d 736, 740 (Tex. 1972) (Reavley, J., dissenting); *General Portland, Inc. v. Collins*, No. 17813 (Tex. Civ. App.—Fort Worth March 25, 1977) (Massey, J., dissenting); *Young v. Snowcon, Inc.*, 463 S.W.2d 225, 227 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

239. 1 H. BLACK, *supra* note 7, § 347, at 538; *see, e.g.*, *Hidalgo v. Surety Sav. & Loan*

Affidavits in support of defendant's motion must be based on personal knowledge and so worded as to be admissible if the facts stated were given on the witness stand.²⁴⁰ If affidavit testimony is from an interested witness, it should be clear, direct, and positive.²⁴¹

Craddock also requires that before a judgment by default may be set aside, it must be established that defendant's motion was filed at a time when the granting thereof would occasion no delay or otherwise injure plaintiff.²⁴² Under *Craddock* a defaulting defendant cannot procrastinate during the thirty-day period in which a trial court retains the power to set aside a final default judgment.²⁴³ He must demonstrate his good faith by promptly taking affirmative action as soon as he learns of the judgment. Once a defendant has introduced evidence that his motion has not been filed at a time when granting the motion would delay or otherwise injure plaintiff, the burden of persuasion is the plaintiff's; and plaintiff's motion must state the facts of any delay or other injury with particularity.²⁴⁴

There is no precise formula for determining when the filing of a motion to set aside will occasion delay. The decision in one case with respect to a particular period of time will not necessarily govern another case involving a similar period. Additionally, the length of the delay is not determinative. In one case the court held that a three-day delay amounted to conscious indifference and would delay or otherwise work an injury to the plaintiff.²⁴⁵ In other cases the same was true of delays amounting to eleven days,²⁴⁶ nineteen days,²⁴⁷ and three weeks.²⁴⁸ Conversely, in one case the court specifically observed that a seven-day delay would occasion no "significant" delay or otherwise injure plaintiff.²⁴⁹ These cases demonstrate that any unexplained delay in the filing of a motion to set aside after knowledge of the facts will always be taken into consideration in harmony with the equitable doctrine of laches; such delay may be sufficient to defeat relief

Ass'n, 462 S.W.2d 540, 542 (Tex. 1971); *Brothers Dep't Store, Inc. v. Berenzweig*, 333 S.W.2d 445, 448 (Tex. Civ. App.—1960, writ ref'd n.r.e.); *Odom v. Pinkston*, 193 S.W.2d 888, 891 (Tex. Civ. App.—Austin 1946, writ ref'd n.r.e.). *Contra*, *Miller v. First State Bank & Trust Co.*, 184 S.W. 614, 619 (Tex. Civ. App.—Austin 1915, no writ); *Gillaspie v. City of Huntsville*, 151 S.W. 1114, 1116 (Tex. Civ. App.—Galveston 1912, no writ).

240. *See Ivy v. Carrell*, 407 S.W.2d 212, 215 (Tex. 1966); *Allais v. Lynch*, 489 S.W.2d 342, 345 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.); *Executive Press, Inc. v. Oak Cliff Mirror & Glass Co.*, 478 S.W.2d 642, 643 (Tex. Civ. App.—Waco 1972, no writ); I H. BLACK, *supra* note 7, § 347, at 538. *See also Crain v. Davis*, 417 S.W.2d 53, 55 (Tex. 1967); *Tobin v. Garcia*, 159 Tex. 58, 316 S.W.2d 396 (Tex. 1958).

241. *Pugh v. Texas Co.*, 437 S.W.2d 55, 57 (Tex. Civ. App.—Dallas 1969, no writ); *see Haskins v. Finks*, 470 S.W.2d 717, 718 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.). *See also Gulf Collateral, Inc. v. Cauble*, 462 S.W.2d 619, 623 (Tex. Civ. App.—Fort Worth 1971, no writ); I H. BLACK, *supra* note 7, § 351.

242. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939).

243. TEX. R. CIV. P. 329b(5). *See generally Bronson v. Schulten*, 104 U.S. 410 (1881).

244. *Ward v. Nava*, 488 S.W.2d 736, 738 (Tex. 1972); *Western Union Tel. Co. v. McGinnis*, 508 S.W.2d 147, 150 (Tex. Civ. App.—San Antonio 1974, no writ).

245. *Grammar v. Hobby*, 276 S.W.2d 311, 313 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.). For an informative discussion of the due diligence requirement see I H. BLACK, *supra* note 7, § 313.

246. *Glittenberg v. Hughes*, 524 S.W.2d 954, 956 (Tex. Civ. App.—Fort Worth 1975, no writ).

247. *Griffin v. Duty*, 286 S.W.2d 229, 233 (Tex. Civ. App.—Galveston 1956, no writ).

248. *Simpson v. Glenn*, 103 S.W.2d 433, 434 (Tex. Civ. App.—Austin 1937, no writ).

249. *Abercia v. First Nat'l Bank*, 500 S.W.2d 573, 577 (Tex. Civ. App.—San Antonio 1973, no writ); *see Torres v. Casso-Guerra & Co.*, 512 S.W.2d 777, 781 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

from a default judgment even though the statutory period for setting aside such a judgment²⁵⁰ has not elapsed.

The cases which have focused on the delay element of the *Craddock* test have also expressed concern when the granting of a new trial would significantly prolong resolution of the controversy between the parties. In one case the court emphasized that the granting of defendant's motion would result in the passage of docket assignments to the point where trial could not be had for at least six months.²⁵¹ Changes in a defendant's ability to respond in damages may also be a relevant consideration. For example, in one case the court noted that the delay encountered would not prejudice plaintiff because no other judgments had been taken against defendant during the interim period.²⁵²

To prevent injury to plaintiff, the defaulting defendant may be required to pay plaintiff's costs, including attorney's fees. In 1854 the supreme court affirmed the award of costs as a term upon which a motion for new trial could be granted.²⁵³ In that opinion the supreme court had occasion to note that the granting of new trials upon the payment of costs was "constant practice."²⁵⁴ Recently, the supreme court discussed the mechanics of assessing costs in a default situation.²⁵⁵ The factors suggested for consideration were loss of earnings caused by trial attendance, expenses of witnesses, and any other expenses of plaintiff attributable to defendant's default.²⁵⁶ The court emphasized that after considering these factors, the trial court should then exercise its discretion to make an equitable determination consistent with the facts of each case.²⁵⁷

This last element of the *Craddock* test allows the trial court great discretion in balancing the equities of a particular case. Obviously, a plaintiff who has obtained a final default judgment can demonstrate some delay or other injury if a new trial is granted. This showing, however, should not be the proper criterion for setting aside a default judgment because if it were, the defaulting defendant would be presented with a virtually insurmountable burden. In each case where a new trial is granted some delay or other injury will be encountered; it is the court's responsibility through the judicious use

250. See notes 176-80 *supra* and accompanying text.

251. *Griffin v. Duty*, 286 S.W.2d 229, 233 (Tex. Civ. App.—Galveston 1956, no writ); *accord*, *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939); *National Mut. Cas. Co. v. Lambert*, 149 S.W.2d 1086, 1090 (Tex. Civ. App.—Beaumont 1941, writ *dism'd jdgmt cor.*). The matter of passing docket assignments is of greater concern in less populous counties where the docket is not congested and where the district judge may still ride the circuit.

252. *Kirk v. Farmers Aerial Spraying Serv., Inc.*, 496 S.W.2d 739, 743 (Tex. Civ. App.—Amarillo 1973, no writ).

253. *Houston v. Starr*, 12 Tex. 424 (1854). Similarly, one commentator stated: "In the case of a motion to vacate or open a default judgment, payment of reasonable attorney's fees by the defaulting party to the party in whose favor the default judgment was rendered has been unanimously held to be a proper condition." *Annot.*, 21 A.L.R. 2d 863, 865 (1952); *accord*, 1 H. BLACK, *supra* note 7, § 352, at 550.

254. *Houston v. Starr*, 12 Tex. 424, 426 (1854).

255. *United Beef Producers, Inc. v. Lookingbill*, 532 S.W.2d 958, 959 (Tex. 1976); *accord*, *Crabbe v. Hord*, 536 S.W.2d 409, 414 (Tex. Civ. App.—Fort Worth 1976, writ *ref'd n.r.e.*).

256. *United Beef Producers, Inc. v. Lookingbill*, 532 S.W.2d 958, 959 (Tex. 1976). Many of these factors have applicability only in an unliquidated damages situation. See notes 137-42 *supra* and accompanying text.

257. *United Beef Producers, Inc. v. Lookingbill*, 532 S.W.2d 958, 959 (Tex. 1976).

of assessing costs to cure these problems. The courts should require that the defaulting defendant demonstrate that he has acted in a timely manner to prevent injury to plaintiff and others who have relied on the judgment.

B. *Setting Aside Default Judgments on Such Terms
as the Court Shall Direct*

Rule 320²⁵⁸ provides that new trials may be granted on such "terms" as the court shall direct. From 1846 to 1925 the predecessors of rule 320 provided that new trials could be granted on such "terms and conditions" as the court directed.²⁵⁹ Although similar language has been used for over one hundred years, there is a paucity of recorded precedent regarding the "terms and conditions" upon which default judgments may be set aside and new trials granted. This is mainly because of early decisions holding that the granting of a motion for new trial must be absolute and unconditional. That rule was established by the Texas Supreme Court in *Secrest v. Best*²⁶⁰ in which case a motion for new trial was granted on the condition precedent²⁶¹ that defendants pay court costs before the first day of the next term. Defendants did not pay the court costs, and the conditional order granting the new trial was set aside. Thereupon defendants paid all court costs as previously ordered, and a new trial was allowed. At the second trial defendants prevailed and plaintiff appealed, contending that the order conditionally setting aside the judgment for plaintiff was a nullity. The supreme court agreed and held that an order granting a motion for new trial must be absolute and unconditional.²⁶² Holding that all proceedings subsequent to the first judgment were null and void, the court reinstated the judgment for plaintiff.²⁶³

In 1890 the supreme court had occasion to review the rule of *Secrest v. Best* in *Fenn v. Gulf, C. & S.F. Ry.*²⁶⁴ The order granting a new trial in that case decreed that as a condition for a new trial defendant was to pay the expenses of those witnesses who had testified. Plaintiffs challenged this order as a nullity under the rule of *Secrest v. Best*. Defining and limiting *Secrest v. Best*, the court held that the payment of witness expenses was a

258. TEX. R. CIV. P. 320.

259. TEX. LAWS 1846, AN ACT TO REGULATE PROCEEDINGS IN THE DISTRICT COURTS art. 1755, § 109, at 363, 2 H. GAMMEL, LAWS OF TEXAS 1698 (1898); 1 G. PASCHAL, LAWS OF TEXAS art. 1470, at 362 (1873); 1 J. SAYLES & H. SAYLES, SAYLES' TEXAS CIVIL STATUTES art. 1368, at 454 (1889).

260. 6 TEX. 199 (1851) (the court emphasized that case was one involving conditional payment of cost after expiration of trial court's power over judgment). The predecessor of TEX. R. CIV. P. 320 in effect at that time provided that "[n]ew trials may be granted in all civil cases, on such terms and conditions as the court may direct." TEX. LAWS 1846, AN ACT TO REGULATE PROCEEDINGS IN THE DISTRICT COURTS art. 1755, § 109, at 363, 2 H. GAMMEL, LAWS OF TEXAS 1698 (1898).

261. For a discussion of conditions precedent and subsequent see L. SIMPSON, LAW OF CONTRACTS §§ 144-45 (1965); 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 666A, 667 (W. Jaeger rev. ed. 1961).

262. *Secrest v. Best*, 6 TEX. 199, 201 (1851).

263. *Id.* Later decisions have applied the rule of *Secrest* in default judgment situations. *See, e.g., City of San Antonio v. Dickman*, 34 TEX. 647, 650 (1871); *Hargrave v. Boero*, 23 S.W. 403, 403-04 (Tex. Civ. App. 1893, no writ).

264. 76 TEX. 380, 13 S.W. 273 (1890). The predecessor of TEX. R. CIV. P. 320 enacted shortly before this decision provided that "[n]ew trials may be granted, and judgments may be set aside or arrested, on motion, for good cause, on such terms and conditions as the court shall direct." 76 TEX. at 382, 13 S.W. at 273-74; 1 J. SAYLES & H. SAYLES, *supra* note 259, art. 1368, at 454.

“term” upon which the order was entered rather than a condition precedent and, therefore, valid.²⁶⁵

Ten years later, in *Town v. Guerguin*,²⁶⁶ the supreme court again limited the broad holding of *Secrest v. Best*. There the court observed: “It has been held generally that a court may grant a motion for new trial upon a condition to be performed thereafter, and, in case the condition is not performed, the judgment which had been vacated will be restored.”²⁶⁷ Finally, in 1925 the legislature deleted the word “conditions.”²⁶⁸ Present rule 320 continues in the same vein by providing that default judgments may be set aside on such “terms” as the court directs,²⁶⁹ although it does not specify the “terms” upon which a judgment may be set aside. One leading commentator has, however, prepared the following sampling of the terms at a trial court’s disposal:

In a proper case, in the exercise of its discretion the court may require the defendant to submit himself to the jurisdiction of the court, to consent to go to trial at a particular time, or to consent to the appointment of a receiver, or to stipulate not to bring an action against parties who acted under the judgment, or to forego a change of venue, or to pay all expenses in a reasonable amount and all costs accrued up to the date of its vacation, including a reasonable attorney’s fee, or to deposit money in court to pay so much of the claims sued upon as he admits to be due.²⁷⁰

The balancing of competing equitable interests in a default situation is a compelling reason why the trial court should be vested with considerable discretion in specifying the terms upon which a default judgment will be set aside. The imposition of certain terms may be necessary to insure that the setting aside of a judgment by default will not delay or otherwise work an injury to plaintiff.²⁷¹ If the defaulting defendant should fail to abide by the terms of the court’s order, the court should exercise its inherent power and sanction the recalcitrant defendant rather than summarily reinstate the former judgment. As the terms and sanctions which could properly be imposed are many, their imposition should vary according to the facts of each case. This way, the merits of a case are likely to be reached yet the litigants are afforded ample protection against a trial court’s abuse of discretion since the trial court’s action would be subject to review.

C. Regular Appeal

Regular appeal to the court of civil appeals is as available to a party who has suffered judgment by default as it is to a party who appeared and participated in the litigation. The timetable and mechanics in the default judgment situation are no different from those for any other regular appeal. Regular appeal is not, however, immediately available to attack the trial

265. *Fenn v. Gulf, C. & S.F. Ry.*, 76 Tex. 380, 382, 13 S.W. 273, 274 (1890).

266. 93 Tex. 608, 57 S.W. 565 (1900).

267. *Id.*

268. Tex. Laws 1925, ch. 10, at 597.

269. TEX. R. CIV. P. 320.

270. 1 A. FREEMAN, *supra* note 7, § 295, at 584-85; *accord*, 1 H. BLACK, *supra* note 7, § 352.

271. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 391-92, 133 S.W.2d 124, 126 (1939); *see* notes 242-57 *supra* and accompanying text.

court's order setting aside a judgment by default since that order is interlocutory.²⁷² Further, the weight of authority holds that orders setting aside judgments by default may not be reviewed even after completion of the second trial.²⁷³ As a result, the trial court's action is subject to immediate review only if it fails to set aside a judgment by default.

The obvious policy reason behind this procedural anomaly is to have lawsuits decided on their merits, and once decided to disregard the initial default. The various competing policy considerations were stated in an early supreme court decision:

Great injustice, however, may be done by 'lending too easy an ear' to applications for new trials. A party whose cause is just may be thus delayed in its prosecution until his witnesses are dead, his evidence lost or destroyed, and his rights ultimately defeated, or if successful in the end, even success may not compensate for the harassment, vexation, and expense of causelessly protracted litigation. But the law does not proceed upon the supposition that the power intrusted to its ministers will be abused. Its general rules do not contemplate extreme cases. Nor are such the legitimate or natural consequences of the discretion with which the courts are invested in granting new trials. And although in the exercise of that discretion injustice may sometimes be done, there is still this material and obvious distinction between the improper refusal and granting of a new trial. In the one case the injury is irreparable unless by a revising tribunal; in the other it ordinarily is not so, for another opportunity of obtaining justice is afforded.

But unless the granting of new trials is subject to a revising power it is not easy to perceive what effectual limitation there is upon the discretion of the judge, or how it can justly be said to be a legal as distinguished from that arbitrary discretion which has been characterized, in the extremely forcible language of Lord Camden, as 'the law of tyrants; always unknown; different in different men; casual; depending upon constitution, temper, passion.'²⁷⁴

272. *Warren v. Walter*, 409 S.W.2d 887 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). A leading commentator has stated the policy behind disallowing appeals from interlocutory orders as the following:

The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. The appellate courts will not review cases by piecemeal. The interests of litigants require that causes should not be prematurely brought to the higher courts. The errors complained of might be corrected in the court in which they originated; or the party injured by them might, notwithstanding the injury, have final judgment in his favor. If a judgment, interlocutory in its nature, were the subject of appeal, each of such judgments rendered in the case could be brought before the appellate court, and litigants harassed by useless delay and expense and the courts burdened with unnecessary labor.

1 A. FREEMAN, *supra* note 7, § 44, at 70.

273. *E.g.*, *Warren v. Walter*, 409 S.W.2d 887 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.); *Flato Bros. v. McKinney*, 399 S.W.2d 957 (Tex. Civ. App.—Corpus Christi 1966, no writ); *Stocks v. Baptist Gen. Convention*, 362 S.W.2d 196, 198 (Tex. Civ. App.—Fort Worth 1962, no writ); *Silva v. Sentinel Life Ins. Co.*, 361 S.W.2d 731 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); *Annot.*, 8 A.L.R.3d 1272, § 3 (1966); *see Ebaugh v. State*, 342 S.W.2d 221, 223 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.); *Equitable Life Assur. Soc'y v. Murdock*, 219 S.W.2d 159, 164 (Tex. Civ. App.—El Paso 1949, writ ref'd n.r.e.). *But see* *Secrest v. Best*, 6 Tex. 199, 200 (1851); *Hughes v. Madox*, 6 Tex. 90 (1851); *Sweeney v. Jarvis*, 6 Tex. 36, 39 (1851); *City of Wichita Falls v. Dye*, 517 S.W.2d 680, 681 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.); *Rector v. Metropolitan Life Ins. Co.*, 506 S.W.2d 696, 698 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); *Davis v. Howard*, 436 S.W.2d 225, 227-28 (Tex. Civ. App.—Austin 1968, no writ); *Flusche v. Uselton*, 201 S.W.2d 58, 59 (Tex. Civ. App.—Austin 1947, no writ); *Atkinson v. Leonard*, 287 S.W.2d 525 (Tex. Civ. App.—Fort Worth 1926, no writ); *Allison v. American Sur. Co.*, 248 S.W. 829, 832 (Tex. Civ. App.—Galveston 1923, no writ); *TEX. R. CIV. P.* 325.

274. *Sweeney v. Jarvis*, 6 Tex. 36, 39-40 (1851).

To insure fairness in the application of the *Craddock* test, the trial court's discretion in setting aside the earlier judgment by default should be subject to review after a final judgment on the merits.

D. Appeal by Writ of Error

The appellate jurisdiction of the court of civil appeals and the supreme court may be invoked by a writ of error.²⁷⁵ The writ, like an appeal, constitutes a direct attack on a void or erroneous judgment,²⁷⁶ but a writ of error is only available to a party that did not participate in the trial either in person or through his attorney.²⁷⁷ Accordingly, appeal by writ of error is jurisdictionally unavailable to those who participated in some manner in the trial of the case.²⁷⁸

The error complained of in an appeal by writ of error must be disclosed on the face of the record.²⁷⁹ Accordingly, the fundamental question in a writ of error appeal is whether there was an error apparent on the face of the record that would vitiate the trial court's judgment.²⁸⁰ The same reviewing standards apply whether the default judgment is tested by regular appeal or writ of error.²⁸¹ A writ of error may be sued out at any time within six months after final judgment is rendered.²⁸² Rule 306a²⁸³ provides the method for determining when the judgment was rendered.²⁸⁴

E. Bill of Review

After a default judgment has become final and the time for regular appeal and appeal by writ of error has elapsed, the exclusive method for a direct attack on a judgment is by bill of review.²⁸⁵ A bill of review is available for a period of four years from the date of entry of the judgment,²⁸⁶ its purpose being to obtain a reversal of a prior judgment of the trial court under equitable principles.²⁸⁷ Notably, the bill of review is only available when it is shown that all other relief has been exhausted or is unavailable,²⁸⁸ and is only allowed on certain narrowly prescribed grounds since it is essential to our system of justice that judgments be accorded some finality.²⁸⁹ Further-

275. TEX. REV. CIV. STAT. ANN. arts. 2249, 2249a (Vernon 1971).

276. *Flynt v. City of Kingsville*, 125 Tex. 510, 82 S.W.2d 934 (1935); *Roberts Corp. v. Austin Co.*, 487 S.W.2d 165, 166 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

277. TEX. REV. CIV. STAT. ANN. art. 2249a (Vernon 1971).

278. *Id.* art. 2249(2).

279. *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706 (1961).

280. *McKanna v. Edgar*, 388 S.W.2d 927, 928-29 (Tex. 1965); *Gianelle v. Morgan*, 514 S.W.2d 133, 134 (Tex. Civ. App.—Texarkana 1974, no writ); *Bankers Life & Cas. Co. v. Watson*, 436 S.W.2d 404, 406 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.).

281. *Roberts Corp. v. Austin Co.*, 487 S.W.2d 165, 166 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ).

282. TEX. REV. CIV. STAT. ANN. art. 2255 (Vernon 1971).

283. TEX. R. CIV. P. 306a.

284. *Id.*; *Linton v. Smith*, 137 Tex. 479, 483-84, 154 S.W.2d 643, 645 (1941).

285. TEX. R. CIV. P. 329b; *National Bedding Co. v. McGee*, 153 Tex. 55, 263 S.W.2d 948 (1954); *Ridley v. McCallum*, 139 Tex. 540, 163 S.W.2d 833 (1942); *Cocke v. Cocke*, 382 S.W.2d 789, 790 (Tex. Civ. App.—Waco 1964, no writ).

286. TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958).

287. *American Spiritualist Ass'n v. Dallas*, 366 S.W.2d 97, 99 (Tex. Civ. App.—Dallas 1963, no writ).

288. *Id.*; see *Moore v. Mathis*, 369 S.W.2d 450, 454, 455 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.), *cert. denied*, 376 U.S. 939 (1964).

289. *Alexander v. Hagedorn*, 148 Tex. 565, 569, 226 S.W.2d 996, 998 (1950).

more, the grounds required in a bill of review proceeding are not to be relaxed by the trial court simply because their application appears to be unjust in a particular case.²⁹⁰ The principle of bringing litigation to a conclusion not only is essential to our system of justice but also justifies an occasional hardship visited upon a litigant who falls outside the established requirements of the bill of review.²⁹¹

The elements essential to the cause of action prosecuted in a bill of review are: (1) that the plaintiff in the bill suffered a default judgment in favor of his adversary in the prior action; (2) that the plaintiff has a meritorious defense to the cause of action alleged against him in the former suit; (3) that the plaintiff was not served with citation; or that he was prevented from interposing his defense because of the fraud, accident, or wrongful act of his adversary unmixed with any fault or negligence of his own; or that defendant was prevented from appealing the judgment because of either: (a) the fraud, accident, or wrongful act of the opposite party, or (b) erroneous information given by an officer of the court acting in his official capacity in discharge of a duty imposed by law; and that the failure to appeal was unmixed with any fault or negligence on defendant's part; and (4) that the plaintiff has exhausted his legal remedies of motion for new trial, appeal, and writ of error, or did not learn of the default judgment within the time prescribed for asserting such legal remedies.²⁹²

The bill of review is an equitable remedy²⁹³ that is not a continuation of the original action but rather is an independent action prosecuted by the losing party.²⁹⁴ It is usually instituted as an original proceeding although it may be brought as a cross-action²⁹⁵ or defense²⁹⁶ in a suit by the successful party seeking to enforce the original judgment. In a bill of review proceeding a plaintiff must allege and prove that entry of the judgment was not due to his negligence and that he was diligent in attempting to prevent it.²⁹⁷ Further, upon learning of the judgment the plaintiff must demonstrate that he pursued his legal remedies or was excused from doing so; he must use all means at his disposal to avert or, if entered, to vacate the judgment.

290. *Id.*

291. *Id.* " 'Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice.' " *Id.*

292. *Texas Indus., Inc. v. Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975); *Petro-Chemical Transp., Inc. v. Carroll*, 514 S.W.2d 240, 243 (Tex. 1974); *Texas Mach. & Equip. Co. v. Gordon Knox Oil & Exploration Co.*, 442 S.W.2d 315, 318 (Tex. 1969); *Gracey v. West*, 422 S.W.2d 913, 915-16 (Tex. 1968); *Hanks v. Rosser*, 378 S.W.2d 31, 34-35 (Tex. 1964); *Alexander v. Hagedorn*, 148 Tex. 565, 569, 226 S.W.2d 996, 998 (1950); *Crabbe v. Hord*, 536 S.W.2d 409, 412 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

293. 4 R. McDONALD, *supra* note 5, § 18.24, at 311.

294. *Smith v. Higginbotham*, 112 S.W.2d 770, 773 (Tex. Civ. App.—Fort Worth 1937, no writ); *Smith v. Kraft*, 9 S.W.2d 472, 473 (Tex. Civ. App.—Waco 1928, no writ); 4 R. McDONALD, *supra* note 5, § 18.24, at 311.

295. *Briggs v. Ladd*, 64 S.W.2d 389, 390 (Tex. Civ. App.—San Antonio 1933, no writ).

296. *Dyer v. Johnson*, 19 S.W.2d 421, 424 (Tex. Civ. App.—Fort Worth 1929, writ dismissed w.o.j.).

297. *Griffith v. Conard*, 536 S.W.2d 658, 660-61 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Grand United Order of Odd Fellows v. Wright*, 76 S.W.2d 1073, 1074 (Tex. Civ. App.—Waco 1934, no writ); *Kimmell v. Edwards*, 193 S.W. 363, 365-66 (Tex. Civ. App.—Fort Worth 1917, no writ). The action may also be barred by the four-year statute of limitations. TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958); *Smith v. Lightfoot*, 143 S.W.2d 151, 152 (Tex. Civ. App.—Austin 1940, no writ). This limitation period commences at the time entry of the judgment was or should have been discovered by the exercise of reasonable diligence. *Id.*

The meritorious defense requirement in a bill of review is much more onerous than the one existing under *Craddock*.²⁹⁸ In a bill of review proceeding the judgment debtor must prove his defense as opposed to merely stating the factual basis thereof.²⁹⁹ Therefore, unless a plaintiff can prove all the elements of his defense he will be denied equitable relief under the bill of review.

A judgment may be set aside by a bill of review only as a result of extrinsic fraud perpetrated on a defendant by a plaintiff in procuring the judgment.³⁰⁰ Extrinsic fraud is committed when a party to the suit prevents his opponent from having a fair opportunity to be heard on the merits.³⁰¹ Such fraud may occur where defendant is misled by plaintiff's promise of a compromise or where knowledge of the existence of the suit was kept from the defendant by plaintiff.³⁰² Conversely, intrinsic fraud pertains to any matter that was actually presented to the trial court and considered by it in rendering the judgment.³⁰³ Instances of intrinsic fraud include false testimony, fraudulent instruments, or any such matter relating to the merits of the claim.³⁰⁴ Intrinsic fraud, however, will not suffice to set aside a default judgment under a bill of review.

Therefore, in the ordinary bill of review case the principal controversy is whether the allegedly fraudulent, accidental, or wrongful act of the opposing party prevented defendant from answering; and if so whether such act entitles defendant to have the judgment set aside. The act complained of must be attributable to the plaintiff, his attorney, or an officer of the court and not some other third party.³⁰⁵ The act, however, need not be intentional or arise out of an improper motive so long as it prevents defendant from answering.³⁰⁶ In fact, the conduct of plaintiff may be purely accidental,³⁰⁷ but whatever plaintiff's conduct, the defendant must not have contributed to the result in any way through his own fault or negligence.³⁰⁸ Since conduct of the plaintiff that merely allows, rather than causes, defendant to fail to

298. *Ward v. Nava*, 488 S.W.2d 736 (Tex. 1972).

299. *Compare Anderson v. Coker*, 364 S.W.2d 481, 482 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.), with *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966). See generally Annot., 174 A.L.R. 10 (1948).

300. *Alexander v. Hagedorn*, 148 Tex. 565, 568-69, 226 S.W.2d 996, 1001 (1950); *Mills v. Baird*, 147 S.W.2d 312, 316-17 (Tex. Civ. App.—Austin 1941, writ ref'd).

Extrinsic fraud, collateral to the issues in the former action and relating to the manner in which the judgment was secured, is infinite in variety, but may be illustrated by complaints alleging that a party or his attorney or agent, by some unconscionable trick, device, or overreaching, secured in the prior action an unfair advantage over the present complainant

4 R. McDONALD, *supra* note 5, § 18.27, at 321.

301. *Alexander v. Hagedorn*, 148 Tex. 565, 568-69, 226 S.W.2d 996, 1001 (1950).

302. *Id.*

303. *Id.*

Illustrations of intrinsic fraud are: the assertion in the former action of a claim or defense known to be false in fact, or outside the jurisdiction of the court; or allegations of fraud which were or could have been set forth as a ground of recovery or defense in the prior action.

4 R. McDONALD, *supra* note 5, § 18.27.3, at 323.

304. *Alexander v. Hagedorn*, 148 Tex. 565, 568-69, 226 S.W.2d 996, 1002 (Tex. 1950).

305. *Petro-Chemical Transp., Inc. v. Carroll*, 514 S.W.2d 240, 243 (Tex. 1974); 4 R. McDONALD, *supra* note 5, § 18.27.4, at 325.

306. 4 R. McDONALD, *supra* note 5, § 18.27.4, at 325.

307. *Id.* at 327.

308. *Petro-Chemical Transp., Inc. v. Carroll*, 514 S.W.2d 240, 243 (Tex. 1974).

defend does not warrant setting the judgment aside,³⁰⁹ plaintiff's failure to inform defendant of a trial setting, absent an agreement to do so, is not a ground for vacating the judgment.³¹⁰ Similarly, plaintiff's failure to advise defendant of the entry of a default judgment is not sufficient to warrant setting the judgment aside even if the defendant assumed that the case was still pending and took no timely action to have the judgment set aside.³¹¹

A bill of review, however, is not the appropriate remedy for attacking a judgment that is void on its face.³¹² In such cases, the proper remedy is a direct attack upon the judgment by motion for new trial, regular appeal, writ of error appeal, or separate suit seeking to establish that the judgment was void when entered.³¹³ A judgment not based upon any pleadings or upon pleadings which show on their face that no cause of action exists³¹⁴ is void and may be set aside on such an attack.³¹⁵ Mere failure to sign a pleading will not render a judgment based thereon void.³¹⁶

F. Collateral Attacks

A direct attack is a proceeding brought for the purpose of setting aside a judgment³¹⁷ and takes the form of a motion for new trial, motion to set aside, regular appeal, writ of error appeal, or bill of review.³¹⁸ A collateral attack is an attempt to avoid the effect of a judgment in a proceeding brought for another purpose. Accordingly, the grounds available to support a collateral attack are more limited. The court which entered the original judgment must have had: (1) no jurisdiction over the person of the defendant, or his property;³¹⁹ (2) no jurisdiction over the subject matter of the suit;³²⁰ (3) no jurisdiction to render the judgment entered;³²¹ or (4) no capacity to act as a court.³²²

In a collateral attack a fact established by a recitation in the judgment or by the record may not be disputed by extrinsic evidence.³²³ If the record is silent as to the jurisdictional fact in dispute, such fact must be conclusively presumed to support the judgment assuming it was entered by a court of

309. *Traders & Gen. Ins. Co. v. Burton*, 272 S.W.2d 166, 171 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

310. *Grand United Order of Odd Fellows v. Wright*, 76 S.W.2d 1073, 1074 (Tex. Civ. App.—Waco 1934, no writ).

311. *Traders & Gen. Ins. Co. v. Burton*, 272 S.W.2d 166, 171 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

312. 4 R. McDONALD, *supra* note 5, § 18.24, at 311.

313. *Smith v. Pegram*, 80 S.W.2d 354, 355 (Tex. Civ. App.—Amarillo 1935, writ ref'd).

314. *Edwards Feed Mill, Inc. v. Johnson*, 158 Tex. 313, 315-16, 311 S.W.2d 232, 234 (1958).

315. *Smith v. Pegram*, 80 S.W.2d 354, 356 (Tex. Civ. App.—Amarillo 1935, writ ref'd). But where the defendant appears, lack of pleadings may not be asserted for the first time on appeal. *Bednarz v. State*, 142 Tex. 138, 176 S.W.2d 562 (1943).

316. *Shipp v. Anderson*, 173 S.W. 598, 600 (Tex. Civ. App.—Galveston 1915, no writ).

317. *McKanna v. Edgar*, 388 S.W.2d 927, 928-29 (Tex. 1965).

318. See section V, subsections A, C, D, E *supra*.

319. *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 167 (Tex. Civ. App.—Austin 1975, no writ); *Carter v. G & L Tool Co.*, 428 S.W.2d 677, 682 (Tex. Civ. App.—San Antonio 1968, no writ).

320. *Weems v. Masterson*, 80 Tex. 45, 15 S.W. 590 (1891).

321. *Austin Ind. School Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973).

322. *Willis v. Sabine River Authority*, 363 S.W.2d 172, 175 (Tex. Civ. App.—Texarkana 1962), *rev'd on other grounds*, 369 S.W.2d 348 (Tex. 1963).

323. *Templeton v. Ferguson*, 89 Tex. 47, 55, 33 S.W. 329, 333 (1895); *Crawford v. McDonald*, 88 Tex. 626, 631, 33 S.W. 325, 328 (1895).

general jurisdiction in the exercise of its ordinary judicial function.³²⁴ An attack may be deemed collateral although it is brought in the form of a direct attack if the direct attack is determined to be insufficient.³²⁵

Examples of suits involving collateral attacks include the following: a contention by defendant in an action to enforce a divorce decree that the decree violated public policy;³²⁶ a claim by a party to a suit involving property held by receiver that the receiver's appointment was invalid;³²⁷ a defense to a garnishment proceeding that attacks the original judgment on which the writ of garnishment was issued;³²⁸ a claim by a creditor of an estate that an order directing surrender of certain personal property listed in the inventory to a person claiming it was void;³²⁹ a suit for damages wherein a defense of failure to assert a compulsory counterclaim in a former action is raised;³³⁰ a claim in the probate court of one county that the probate court of a different county, which had already appointed a temporary administrator, had no jurisdiction of the estate;³³¹ a defense of invalidity of the judgment asserted in a trial court action for mandamus to compel a county auditor to approve a voucher for payment of the default judgment against the county;³³² a reply to an application for a writ of prohibition in the Texas Supreme Court which sought to prevent the trial court from proceeding in a case in which the supreme court had entered judgment;³³³ a reply to an application for a writ of mandamus in the Texas supreme court seeking to compel the state comptroller to pay a judgment;³³⁴ an objection to the admission of evidence of a judgment on the ground of its invalidity;³³⁵ an assertion by the plaintiff that a judgment relied upon by the defendant is invalid;³³⁶ a defense to an action seeking to foreclose a judgment lien;³³⁷ a contention by defend-

324. *Lyne v. Sanford*, 82 Tex. 58, 63, 19 S.W. 847, 849 (1891); *Mills v. Herndon*, 60 Tex. 353, 360 (1883); *Brockenborough v. Melton*, 55 Tex. 493, 503 (1881).

325. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (1950) (equitable requirements); *Pure Oil Co. v. Reece*, 124 Tex. 476, 78 S.W.2d 932 (1935) (requirement of same parties); *Gohman, Lester & Co. v. Whittle*, 115 Tex. 9, 273 S.W. 806 (1925) (requirement of same court); *Litton v. Waters*, 161 S.W.2d 1095, 1096 (Tex. Civ. App.—San Antonio 1942, writ ref'd w.o.m.) (statute of limitations requirement).

326. *Tinsley v. Tinsley*, 512 S.W.2d 74, 76 (Tex. Civ. App.—Waco 1974, no writ).

327. *Robbins v. Sandford*, 29 S.W.2d 969, 970 (Tex. Comm'n App. 1930, jdgmt adopted); *King Land & Cattle Corp. v. Fikes*, 414 S.W.2d 521, 524 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); *Davis v. Mitchell*, 225 S.W. 1117, 1118 (Tex. Civ. App.—Fort Worth 1920, no writ).

328. *Stockyards Nat'l Bank v. Presnall*, 109 Tex. 32, 194 S.W. 384 (1917); *Pumphrey v. Hunter*, 270 S.W. 237, 239-40 (Tex. Civ. App.—Austin 1925, no writ); *First Nat'l Bank v. Alexander*, 236 S.W. 229, 231 (Tex. Civ. App.—Texarkana 1921, no writ); *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.*, 189 S.W. 784, 787-88 (Tex. Civ. App.—Amarillo 1916, writ ref'd); *Reeves v. Fuqua*, 184 S.W. 682, 684 (Tex. Civ. App.—Amarillo 1916, no writ).

329. *Brown v. Fleming*, 212 S.W. 483, 485, 488 (Tex. Comm'n App. 1919, jdgmt adopted).

330. *Akers v. Simpson*, 445 S.W.2d 957, 959 (Tex. 1969).

331. *Stewart v. Poinboeuf*, 111 Tex. 299, 233 S.W. 1095 (1921); *Burdett v. Silsbee's Adm'r*, 15 Tex. 604, 619-20 (1885).

332. *Bynum v. Davis*, 327 S.W.2d 673, 675-76 (Tex. Civ. App.—Houston 1959, no writ).

333. *Humble Oil & Ref. Co. v. Fisher*, 152 Tex. 29, 253 S.W.2d 656 (1952).

334. *Martin v. Sheppard*, 145 Tex. 639, 201 S.W.2d 810 (1947).

335. *Dowdle v. United States Fid. & Guar. Co.*, 255 S.W. 388, 389 (Tex. Comm'n App. 1923, holding approved); *Burns v. Barker*, 71 S.W. 328, 329 (Tex. Civ. App. 1902, no writ).

336. *Texas-Pacific Coal & Oil Co. v. Ames*, 292 S.W. 191, 192-93 (Tex. Comm'n App. 1927, jdgmt adopted); *Coulson v. City of San Angelo*, 286 S.W.2d 202, 203-04 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.); *Pearson v. Lloyd*, 214 S.W. 759, 764-66 (Tex. Civ. App.—Beaumont 1919, writ ref'd); *Gibbs v. Scales*, 118 S.W. 188, 189 (Tex. Civ. App. 1909, writ ref'd).

337. *Klier v. Richter*, 119 S.W.2d 100, 101 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

ant in an action to recover personalty on a lien note that a prior foreclosure judgment was invalid;³³⁸ a claim by the wife of a bankrupt that the property sold under an order of the bankruptcy court as community property was in fact her separate property;³³⁹ a contention by a woman seeking recovery on an insurance policy carried by her former husband that the decree divorcing them was defective;³⁴⁰ a claim by the plaintiff in a suit to subject certain land to payment of a judgment lien that a judgment set up by the defendant was fraudulent;³⁴¹ a defense by an insurance carrier that a consent judgment made by a claimant with its insured was unreasonable in a suit to enforce the consent judgment;³⁴² a contention by the plaintiff that a previous judgment against the defendant, which had been set aside by the court which rendered it, was still binding on him;³⁴³ a claim in a suit to foreclose a lien that a judgment giving another lien on the same property was invalid;³⁴⁴ an allegation in an action to cancel a sheriff's deed that the judgment on which an execution issued was defective;³⁴⁵ a claim on a motion for entry of an order nunc pro tunc that the court had no jurisdiction to make the order;³⁴⁶ in an action for the recovery of taxes, a defense that the assessment was invalid in an attack on the assessment order of the board of commissioners;³⁴⁷ an action in trespass to try title when the defendant claims title under a foreclosure judgment,³⁴⁸ or a sale by a qualified survivor, in which the attack is on the qualification,³⁴⁹ or a sale in probate administration,³⁵⁰ or a sale under levy of execution;³⁵¹ a defense of invalidity of judgment in a suit to revive it;³⁵² in an action to enjoin enforcement of a railroad commission order awarding damages against certain carriers for unjust price discrimination, the defense that the rates and proceedings of the railroad commission were invalid in an attack on the order of the railroad commission setting such rates;³⁵³ a bill to clear a cloud on title cast by prior judgment;³⁵⁴ a child support action by a

338. *Conner v. McAfee*, 214 S.W. 646, 648 (Tex. Civ. App.—Amarillo 1919, writ ref'd).

339. *Foster v. Christensen*, 42 S.W.2d 460, 461-62 (Tex. Civ. App.—San Antonio 1931), *rev'd on other grounds*, 67 S.W.2d 246 (Tex. Comm'n App. 1934, holding approved).

340. *Grand Lodge Colored Knights of Pythias v. Kidd*, 10 S.W.2d 420, 421 (Tex. Civ. App.—Eastland 1928, no writ).

341. *Maddox v. Summerlin*, 92 Tex. 483, 484-85, 49 S.W. 1033, 1034 (1899).

342. *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 167 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

343. *Hull v. First Guar. State Bank*, 199 S.W. 1148, 1149-51 (Tex. Civ. App.—Texarkana 1917, no writ).

344. *Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S.W. 1081, 1087-88 (Tex. Civ. App.—Fort Worth 1916), *aff'd*, 215 S.W. 559 (Tex. Comm'n App. 1919, jdgmt adopted).

345. *Odle v. Frost, Barry & Lee*, 59 Tex. 684, 686-88 (1883).

346. *Hannon v. Henson*, 15 S.W.2d 579, 584-85 (Tex. Comm'n App. 1929, jdgmt adopted).

347. *Dallas County Bois D'Arc Island Levee Dist. v. Glenn*, 288 S.W. 165, 166-67 (Tex. Comm'n App. 1926, jdgmt adopted).

348. *Campbell v. Elliott*, 52 Tex. 151, 154-60 (1879); *Ernell v. O'Fiel*, 441 S.W.2d 653, 654-55 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.); *M.T. Jones Lumber Co. v. Rhoades*, 41 S.W. 102, 103-07 (Tex. Civ. App. 1897, writ ref'd); *see McCreery v. Fortson*, 35 Tex. 642, 648-51 (1872).

349. *Rice v. Lipsitz*, 211 S.W. 293, 295-96 (Tex. Civ. App.—El Paso 1919, no writ).

350. *Crawford v. McDonald*, 88 Tex. 626, 628-29, 33 S.W. 325, 327 (1895).

351. *Collins v. Miller*, 64 Tex. 118, 119-20 (1885).

352. *City of Sherman v. Langham*, 92 Tex. 13, 18, 42 S.W. 961, 962-63 (1897), *on rehearing rev'g on other grounds* 92 Tex. 13, 40 S.W. 140 (1897); *Gallagher v. Teuscher & Co.*, 186 S.W. 409, 410 (Tex. Civ. App.—Beaumont 1916, no writ).

353. *Producers' Ref. Co. v. Missouri, K. & T.R.R.*, 13 S.W.2d 679, 679-80 (Tex. Comm'n App. 1929, jdgmt adopted), *aff'g* 3 S.W.2d 489 (Tex. Civ. App.—Austin 1928).

354. *Watson v. Rochmill*, 137 Tex. 565, 567, 155 S.W.2d 783, 784-85 (1941).

former wife wherein a recitation of "no children" in the divorce decree was asserted as a defense;³⁵⁵ an action for abstract of judgment;³⁵⁶ a suit to annul a marriage when there was a prior divorce;³⁵⁷ a suit for trial of the right to property seized under sequestration;³⁵⁸ an action for malicious prosecution when the judgment was one of conviction;³⁵⁹ an action for damages for wrongful levy of execution;³⁶⁰ an action for conversion of oil sold in receivership;³⁶¹ and a habeas corpus proceeding by a husband attacking a child support judgment for which he was jailed for contempt.³⁶²

In comparing a direct attack to a collateral attack, the direct attack has certain advantages. In a direct attack the moving party may assert any kind of error that caused an erroneous judgment. The scope of evidence permissible in a direct attack is broader than in a collateral attack since evidence outside the record and any other kind of evidence otherwise admissible is permitted in a direct attack either to prove or disprove the facts reflected in the record.³⁶³ But in a collateral attack only the record may be considered, and recitals in the judgment may not be contradicted by other parts of the record.³⁶⁴ Furthermore, a jurisdictional error must be more serious in a collateral attack than in a direct attack.³⁶⁵

Despite these disadvantages, the collateral attack does have some advantages. For example, the statute of limitations does not apply since a collateral attack is not a cause of action.³⁶⁶ Further, a meritorious defense is not required,³⁶⁷ and innocent purchasers for value may not intervene because the face of the record discloses the invalidity of the judgment.³⁶⁸

VI. CONCLUSION

Default judgments are essential to our judicial system because they provide the mechanism for disposing of unopposed claims. The standards for attacking judgments by default are intelligible and strike a reasonable balance between the need for finality of judgments and the right of the litigant to be heard on the merits. *Craddock*, *Hagedorn*, and their progeny articulate workable rules to guide the trial court in determining the propriety of setting aside default judgments. The utility of *Craddock* and *Hagedorn* rests in great measure on the broad discretionary powers of the trial judge. In order

355. *Charvis v. Charvis*, 529 S.W.2d 814, 815 (Tex. Civ. App.—Tyler 1975, no writ).

356. *Estep & Camp v. Williams*, 133 S.W. 470, 471-73 (Tex. Civ. App. 1910, writ ref'd).

357. *Lawrence v. Bradley*, 295 S.W.2d 746, 748 (Tex. Civ. App.—Dallas 1956, no writ).

358. *Harris v. Wise*, 191 S.W. 588, 589-90 (Tex. Civ. App.—Dallas 1917, no writ).

359. *Kruegel v. Stewart*, 81 S.W. 365, 368 (Tex. Civ. App. 1904, writ ref'd).

360. *Endel v. Norris*, 93 Tex. 540, 57 S.W. 25 (1900).

361. *Davenport v. East Tex. Ref. Co.*, 127 S.W.2d 312, 313-16 (Tex. Civ. App.—Texarkana 1939, writ ref'd).

362. *Ex parte Limoges*, 526 S.W.2d 707, 709 (Tex. Civ. App.—Austin 1975, no writ).

363. An exception to this statement is a direct attack by writ of error appeal. See section V, subsection D *supra*.

364. *Crawford v. McDonald*, 88 Tex. 626, 632, 33 S.W. 325, 328 (1895); *Texas-Pacific Coal & Oil Co. v. Ames*, 292 S.W. 191, 192-93 (Tex. Comm'n App. 1927, jdgmt adopted); *Griggs v. Montgomery*, 22 S.W.2d 688, 692 (Tex. Civ. App.—Beaumont 1929, no writ).

365. *Crawford v. McDonald*, 88 Tex. 626, 630, 33 S.W. 325, 327-28 (1895).

366. TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958).

367. *Galveston, H. & S.A. Ry. v. Ware*, 74 Tex. 47, 48-49, 11 S.W. 918, 919 (1889); *City of Corpus Christi v. Scruggs*, 89 S.W.2d 458, 460 (Tex. Civ. App.—San Antonio 1935, no writ).

368. See *Johnston v. Stinson*, 215 S.W.2d 218, 223 (Tex. Civ. App.—Texarkana 1948, writ ref'd n.r.e.).

for these rules to work fairly, they must be applied evenhandedly. Relaxation of these rules would only erode the principle of finality of judgments and would emasculate an important section of our rules of civil procedure. Conversely, too strict an application of these rules would impede the ends of substantial justice and surely result in meritorious claims or defenses not being heard.

Certainly, judgments by default should be utilized in a manner that will not sacrifice individual claims under a guise of judicial efficiency. Courts, however, sometimes ignore the criteria of *Craddock* and *Hagedorn* in an effort to achieve equity. This approach is unwarranted since application of the *Craddock* and *Hagedorn* criteria are designed to obtain an equitable result. The tests of *Craddock* and *Hagedorn* apply workable objective criteria that encompass the competing interests of all the parties. The exercise of the trial court's broad discretionary powers should be guided, controlled, and reviewed by these established legal principles. The discretion reposed in the trial court is not a mental discretion to be executed *ex gratia*, but a legal discretion to be exercised in conformity with the letter and the spirit of the law.

