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# JUDGMENTS BY DEFAULT IN TEXAS

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THIS Article reviews the Texas law of judgments by default, including judgments nihil dicit. The discussion commences with the initial requirement of obtaining jurisdiction over the person of the defendant, continues chronologically through the reasons for entry of a judgment by default, and concludes with a discussion of proceedings after judgment for defendants seeking relief therefrom. This Article expands and updates a similar article published in 1977.[1]

## I. DEFINITION AND EFFECT OF A JUDGMENT BY DEFAULT

A judgment by default is one entered against a defendant who, having been properly served, fails to timely answer.[2] A judgment by default may also be entered against a defendant, even though he has timely answered, if his pleadings are stricken by the court as a sanction for hindering pretrial discovery.[3] The judgment prevents one party from delaying or impeding the other party in the establishment of his claim.[4] It is not intended to be a procedural device to help the plaintiff obtain a judgment without experiencing the difficulty that arises from a contest on the merits.[5]

A judgment nihil dicit[6] serves much the same purpose as a judgment by default. A court enters a judgment nihil dicit 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, or abandons or withdraws his answer.[7] Generally, the judgment is entered against a defendant who, although having timely answered, fails to appear at the time of trial.[8] Since judgment nihil dicit and default judgment cases do not differ materially,[9] they are cited interchangeably throughout this Article.

The consequences of a judgment by default and a judgment nihil dicit

1. Pohl & Kirklin, *Judgments by Default—A Survey of Texas Law*, 31 SW. L.J. 465 (1977).

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

3. TEX. R. CIV. P. 170, 215a; *see infra* notes 93-120 and accompanying text.

4. 47 AM. JUR. 2D *Judgments* § 1152, at 184 (1969).

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

6. "Nihil dicit" means literally "he says nothing." BLACK'S LAW DICTIONARY 942 (5th ed. 1979).

7. Frymire Eng'g Co. v. Grantham, 524 S.W.2d 680, 681 (Tex. 1975) (per curiam); Graves v. Cameron, Castles & Storey, 77 Tex. 273, 275, 14 S.W. 59, 59 (1890); Wheeler v. Pope, 5 Tex. 262, 264 (1849); 4 R. MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 17.25, at 26 (F. Elliot rev. ed. 1971).

8. In Stoner v. Thompson, 578 S.W.2d 679 (Tex. 1979), the Texas Supreme Court distinguishes this situation and identified it as a "post-answer default." *Id.* at 682.

9. *Id.*; 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 2623 (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).

are identical; they have the same force and effect as a judgment rendered after a trial on the merits.[10] A final default judgment is enforceable to the same extent as any other judgment.[11] A default by one defendant, however, does not affect the status, rights, or liability of a co-defendant.[12] Moreover, a default judgment is only determinative of those causes of action properly pled by the plaintiff.[13] Thus a default judgment based on a petition that does not state a cause of action will not stand.[14]

## II. OBTAINING JURISDICTION OVER THE PERSON OF THE DEFENDANT

Ordinarily courts presume the correctness of a judgment being challenged on appeal; however, no presumption of regularity applies in favor of the jurisdictional recitations found in a default judgment.[15] A party therefore must comply strictly with the rules of service of citation and notice in order to secure a default judgment and sustain it against attack.[16] Jurisdiction over the defendant depends upon securing proper service of citation, and the proof of such service must appear in the record.[17] The court must have jurisdiction before a final default judgment is entered. Attempts by the plaintiff to cure jurisdictional defects at a hearing on defendant's motion for new trial are without avail.[18] The following sections address the requirements for a valid citation and the manner of obtaining service of citation. These sections include a discussion of defects of which the practitioner should be wary, since they may prove fatal in a default situation.

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10. Clark v. Compton, 15 Tex. 32, 32-33 (1855); Harris County Water Control & Improvement Dist. No. 84 v. Hornberger, 601 S.W.2d 66, 68 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); Davis v. Spraggins, 449 S.W.2d 80, 82-83 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); Pegues v. Moss, 140 S.W.2d 461, 471 (Tex. Civ. App.—El Paso 1940, writ dism'd by agr.); Buttrill v. Occidental Life Ins. Co., 45 S.W.2d 636, 641 (Tex. Civ. App.—Dallas 1931, no writ).

11. Pohl, *Judgments by Default*, 1982 HOUS. B.A. CIV. PRAC. INST. 2-3; *see* Clark v. Compton, 15 Tex. 32, 32-33 (1855); Pegues v. Moss, 140 S.W.2d 461, 471 (Tex. Civ. App.—El Paso 1940, writ dism'd by agr.).

12. Buttrill v. Occidental Life Ins. Co., 45 S.W.2d 636, 640-41 (Tex. Civ. App.—Dallas 1931, no writ).

13. Williamsburg Nursing Home, Inc. v. Paramedics, Inc., 460 S.W.2d 168, 169-70 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); Firence Footwear Co. v. Campbell, 411 S.W.2d 636, 637-38 (Tex. Civ. App.—Houston 1967, 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.); Pegues v. Moss, 140 S.W.2d 461, 471 (Tex. Civ. App.—El Paso 1940, writ dism'd by agr.); Hittner, *Default Judgments* 2-3, in JUDGMENTS III SEMINAR (1975).

14. Fairdale Ltd. v. Sellers, 640 S.W.2d 627, 628 (Tex. App.—Houston [14th Dist.] 1982, no writ).

15. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965).

16. Stoner v. Thompson, 578 S.W.2d 679, 683-84 (Tex. 1979); Gerland's Food Fair, Inc. v. Hare, 611 S.W.2d 113, 115 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

17. 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, 96 (Tex. 1973).

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

### A. Methods of Service of Process

#### 1. Personal Service

Service of process, unless otherwise permitted, must be made by the sheriff or constable delivering to the defendant, in person, a copy of the citation with attached pleadings.[19] Texas Rule of Civil Procedure 106(a) provides further that the citation may be served by certified or registered mail, addressed to the defendant from the sheriff, constable, or district clerk, with delivery restricted to the addressee only.[20] The citation need not be served by the constable or sheriff in the county where the suit is filed, but may be served wherever the party is found in the State of Texas.[21] The officer is required to execute and return the process to the issuing court without delay[22] and is required by the citation to return it unserved if service cannot be had within ninety days after its issuance.[23] In the instance of personal service by an officer, the citation and the officer's return must be on file with the court for at least ten days, exclusive of the day of filing and the day of judgment, before a default judgment can be granted.[24]

Pursuant to rule 106(b), courts may permit persons other than the aforementioned county officials to serve process in certain circumstances.[25] If a citation cannot be served, the return must show the officer's diligent attempt to serve it,[26] but substitute service of citation cannot issue upon the conclusory statement of an officer that service was "difficult or impractical."[27] Rather, one must tender the sworn testimony of, or attach an affidavit by, the officer setting forth the time, date, and location of all attempts at service.[28]

#### 2. Alternate Methods of Service

*a. Service on Nonresident Defendant.* Article 2031b delineates procedures to follow for service of citation upon an individual or corporation

19. TEX. R. CIV. P. 106. When personal service is impractical, the court, upon motion, may authorize some form of alternate service to be done in a manner reasonable and effective to give the defendant fair notice of the suit. *Id.*

20. *Id.* 106(a).

21. *Id.* 102, 103.

22. *Id.* 105. Process issued and served before the filing of a petition is not valid. Moorhead v. Transportation Bank, 62 S.W.2d 184, 185 (Tex. Civ. App.—Amarillo 1933, no writ). For the effect of the service of process on Sundays or legal holidays, see 53 TEX. JUR. 2D *Sundays and Holidays* § 22, at 554 (1964).

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

24. TEX. R. CIV. P. 107, 239; Gentry v. Gentry, 550 S.W.2d 167, 167 (Tex. Civ. App.—Austin 1977, no writ).

25. TEX R. CIV. P. 106(b).

26. *Id.* 107.

27. Stylemark Constr., Inc. v. Spies, 612 S.W.2d 654, 656 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

28. Mackie Constr. Co. v. Carpet Servs., Inc., 645 S.W.2d 594, 596 (Tex. App.—Eastland 1982, no writ).

not a resident of the State of Texas.[29] A nonresident doing business in Texas is deemed to have appointed the secretary of state as his agent for service of process if he either does not have an agent in the state, or has an agent upon whom service has been unsuccessfully attempted.[30] Allegations in the petition must closely follow the requirements of article 2031b. Failure to do so with sufficient particularity will cause the court to set aside an otherwise valid default judgment.[31] The case of *Gourmet, Inc. v. Hurley*[32] illustrates this requirement. In that instance the plaintiff made service upon the secretary of state under the method provided in article 2031b, but the petition did not allege facts authorizing such substituted service. Specifically, the plaintiff failed to allege that the defendant had no registered agent for service in Texas and did not maintain a regular place of business in the state.[33] Therefore, service was ineffective even though an amended petition was filed before a default judgment was taken and sufficient evidence was offered at an evidentiary hearing to establish the necessary jurisdictional facts.[34]

In *Verges v. Lomas & Nettleton Financial Corp.*[35] the plaintiff obtained service of process under the Texas long-arm statute. Plaintiff's original petition alleged only the defendant's last known address. The secretary of state's certificate of service was filed of record bearing the notation "unclaimed." The court held that this service was defective and emphasized the necessity of strict compliance with the long-arm statute.[36] In this case last known address was not the equivalent of "home address" within the meaning of article 2031b, section 5.[37] Because the plaintiff had failed to comply strictly with the procedure prescribed by article 2031b, the court concluded that the trial court did not acquire personal jurisdiction over the defendant. Accordingly, the default judgment against the defendant was reversed.[38]

Prior to the submission of a default judgment, a plaintiff must give proof of service upon the secretary of state and forwarding of process by the secretary to the defaulting defendant.[39] A certificate affirming these facts may be obtained from the secretary of state.[40] As a practical matter, counsel should be certain that standard office procedure includes securing a

29. TEX. REV. CIV. STAT. ANN. art. 2031b, § 1 (Vernon 1964).
30. *Id.*
31. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); Cars & Concepts, Inc. v. Funston, 601 S.W.2d 801, 842 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); Prine v. American Hydrocarbons, Inc., 519 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1975, no writ).
32. 552 S.W.2d 509 (Tex. Civ. App.—Dallas 1977, no writ).
33. *Id.* at 511.
34. *Id.*
35. 642 S.W.2d 820 (Tex. App.—Dallas 1982, no writ).
36. *Id.* at 823.
37. *Id.* at 822.
38. *Id.* at 823.
39. Whitney v. L & L Realty Corp., 500 S.W.2d 94, 96 (Tex. 1973); Verges v. Lomas & Nettleton Fin. Corp., 642 S.W.2d 820, 821 (Tex. App.—Dallas, 1982, no writ).
40. *Id.*; Vanguard Invs. v. Fireplaceman, Inc., 641 S.W.2d 655, 656 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

certificate for each such service and filing it with the court prior to or at the time of the submission of a default judgment. Practitioners should keep in mind that proof of service is jurisdictional and cannot be cured at a later post-judgment hearing.[41]

*b. Substituted Service.* Texas Rule of Civil Procedure 106 provides for substituted service if the plaintiff shows that personal service is impractical.[42] When filing for substituted service, the plaintiff should request a particular mode of service, such as delivery to someone over the age of sixteen at the defendant's residence, or delivery of a copy to the defendant's place of business. The substituted service, however, must be made by that method most likely to reach the defendant.[43]

In addition, the record must affirmatively show compliance with rule 106.[44] In a recent case in which compliance with rule 106 was at issue, the plaintiff filed for substituted service under rule 106, and the court ordered such service to be had at the defendant's place of business by delivering the petition and citation to anyone over sixteen years of age.[45] The substituted service was disallowed on appeal because neither the trial court's order nor the constable's return stated that the business address where service was made was the defendant's usual place of business.[46]

The procedure for filing for substituted service varies from court to court and county to county, but most courts now require a detailed affidavit by the serving officer stating the various times, dates, and places where he tried but was unable to effectuate personal service. In large counties procedures vary to the extent that some courts will approve substituted service under rule 106 based solely on affidavit testimony. Other courts require the officer to appear in open court and testify to the various service attempts. The latter is very often impractical, and personal appearance by the serving officer should not be required except in extraordinary circumstances. If evidence of attempted service is taken, that evidence should be recorded by a court reporter in order to provide the defendant an opportunity to challenge on appeal the sufficiency of the plaintiff's evidence.[47]

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41. Prine v. American Hydrocarbons, Inc., 519 S.W.2d 520, 522 (Tex. Civ. App.—Auston 1975, no writ). In *Prine* the court stated: "If the trial court did not have jurisdiction over the person of [the defendant] 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. But see* 47 AM. JUR. 2D *Judgments* § 1174, at 198 (1969).

42. TEX. R. CIV. P. 106. As a prerequisite the rule requires an affadavit stating the specific facts of the attempt at original service and that original service was unsuccessful. *Id.*

43. Light v. Verrips, 580 S.W.2d 157, 159 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

44. Devine v. Duree, 616 S.W.2d 493, 440 (Tex. Civ. App.—Fort Worth 1981, writ granted) (subsequently remanded to trial court, 25 Tex. Sup. Ct. J. 88 (1981)).

45. Hurd v. D.E. Goldsmith Chem. Metal Corp., 600 S.W.2d 345, 346 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

46. *Id.*

47. Pohl, *supra* note 11, at 11.

*c. Service by Publication*. Texas Rules of Civil Procedure 114 through 116 address service of citation by publication.[48] A judgment based on service by publication is not technically a default judgment in light of rule 244, which requires the court to appoint an attorney to file an answer on behalf of the nonanswering defendant.[49] This attorney must appear in court for the absent defendant, and the proceedings should be transcribed. The appointed attorney should inquire about the plaintiff's due diligence in locating the defendant. Additionally, the court-appointed attorney should make a good faith effort to locate the defendant himself by calling the defendant's relatives or referring to the telephone directory.

*d. Service of Process on a Corporation*. Every Texas corporation must have, and continuously maintain, a registered office and a registered agent within the state.[50] Additionally, the Business Corporation Act sets forth specific requirements concerning any change of registered office or registered agent.[51] Likewise, service of process upon a corporation is governed by statute.[52] Section 2.11 of the Texas Business Corporation Act states, in part, that the president, all vice presidents, and the registered agent shall be agents for service of process upon the corporation. Service upon other employees of a corporation will not suffice.[53]

Whenever the corporation fails to appoint or maintain a registered agent in Texas, or if an exercise of reasonable diligence fails to locate the registered agent at the regular office, the secretary of state shall be the agent for service.[54] If the secretary of state is served with any such process, he must send one of the copies served upon him to the corporation at its regular office by certified mail with return receipt requested.[55] Once the citation is mailed to the appropriate address, the office of the secretary of state will issue, upon request and after payment of a fee, a certificate stating the service secured by that office.[56] This certificate should be filed with the papers of the cause and should be on file at the time a default judgment is submitted.

*e. Practical Considerations of Alternate Service*. Proof of alternate service is often dependent upon the return receipt of certified mail. The sufficiency of service by mail may depend upon the notation placed upon a returned envelope by the United States Postal Service. The case of *TXXN,*

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

49. *Id.* 244.

50. TEX. BUS. CORP. ACT ANN. art. 2.09 (Vernon 1980). The registered office may be, but need not be, the same as the corporation's place of business. *Id.*

51. *Id.* arts. 2.10, 2.10-1.

52. *Id.* art. 2.11.

53. Ponca Wholesale Mercantile Co. v. Alley, 378 S.W.2d 129, 132-33 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.).

54. TEX. BUS. CORP. ACT ANN. art. 2.11(B) (Vernon 1980).

55. *Id.*

56. Labor Force, Inc. v. Hunter, Farris & Co., 601 S.W.2d 146, 146 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

*Inc. v. D/FW Steel Co.*[57] discusses this subject. The certified letter sent by the secretary of state was returned with the notation "Not Deliverable as Addressed, Unable to Forward."[58] On appeal the defendant contended that its right to due process of law was violated by the plaintiff's failure to attempt service of process upon defendant at an address where the plaintiff allegedly knew the defendant could be found. Because such information was not introduced at any proceeding in the trial court, the appellate court would not consider it on appeal. Since the certificate of the secretary of state reflected that a copy of the citation was forwarded by registered mail to the address of the defendant's registered office, the service was held to be sufficient.[59] The court stated: "The failure of the method of service in this case was the result of appellant's own failure to comply with the statutory requirements which were designed to assure it of notice of pending suits, not of any failure on the part of the appellee."[60]

The question arises as to the sufficiency of service if the registered notice is returned with the notation, "Insufficient Address." In such a case, a default judgment should probably not be granted as it appears that no such address can be located by the postal service. Should the notice, however, be returned as "Refused" or "Unclaimed," then a default should be granted. In the first example, and in the example stated in *TXXN, Inc.*, the address itself is insufficient. In the second two situations the notations should be interpreted by the courts to mean that, while the defendant may be avoiding his mail, the address is accurate.

### *B. Defects in the Citation*

A judgment may be entered only against a defendant who has been duly served.[61] Even though the method of service may not be defective, the citation itself may contain flaws that prevent the defendant from receiving notice. The courts have established strict rules for testing the validity of citations to insure that a defendant receives proper notice of any proceedings commenced against him.[62] Historically, when setting aside default judgments Texas courts have strictly examined errors in citation.[63] In

57. 632 S.W.2d 706 (Tex. App.—Fort Worth 1982, no writ).
58. *Id.* at 708.
59. *Id.*
60. *Id.* at 709.
61. TEX. R. CIV. P. 124.
62. 1 H. BLACK, *supra* note 9, § 324; *see* Diamond Chem. Co. v. Sonoco Prods. Co., 437 S.W.2d 307, 308 (Tex. Civ. App.—Corpus Christi 1968, no writ).
63. *See* Durham v. Betterton, 79 Tex. 223, 14 S.W. 1060 (1891) (citation must contain file number of suit); Sloan v. Battle, 46 Tex. 215 (1876) (return by sheriff must state day when executed); Covington v. Burleson, 28 Tex. 368, 371 (1866) (citation must state correct time and place of court at which defendant is summoned to appear); Foster v. Christensen, 67 S.W.2d 246, 253 (Tex. Comm'n App. 1934, holding approved) (citation must correctly state date of court's next term and direct defendant to appear at that time); Stafford Constr. Co. v. Martin, 531 S.W.2d 667, 668-69 (Tex. Civ. App.—El Paso 1975, no writ) (citation must be directed to defendant and not agent); Brown-McKee, Inc. v. J.F. Bryan & Assocs., 522 S.W.2d 958, 959 (Tex. Civ. App.—Texarkana 1975, no writ) (invalid service when defendant named in citation was corporation and sheriff's return was ambiguous as to identity of corporation); Scucchi v. Woodruff, 503 S.W.2d 356, 358-59 (Tex. Civ. App.—Fort Worth

*Curry Motor Freight, Inc. v. Ralston Purina Co.*[64] the serving officer's return of citation stated that service was accomplished by serving the vice president. The court of civil appeals held that the return of service was fatally defective in that merely stating the identity of the person served did not sufficiently state the manner of such service.[65] Service upon an agent continues to be a troublesome area in Texas law. In *H.L. McRae Co. v. Hooker Construction Co.*[66] the court held that service of process on the defendant's attorney, absent the defendant's authorization of the attorney as his agent for service, did not properly invoke the trial court's jurisdiction.[67] Default judgments have also been set aside for failure to state the defendant's name correctly.[68]

If an attorney has appeared in a case on behalf of a defendant, then the defendant may be deemed to have waived any objections to the method by which jurisdiction was obtained over his person. The initial motion challenging defects in service of citation is a motion to quash the service. Once a motion to quash is entered, however, problems in the service of process

1973, no writ) (person who serves notice must swear that he is disinterested person); Nail v. Gene Biddle Feed Co., 347 S.W.2d 830, 831 (Tex. Civ. App.—Beaumont 1961, no writ) (citation must be directed to defendant and command defendant to answer); Hance v. Cogswell, 307 S.W.2d 277 (Tex. Civ. App.—Austin 1957, no writ) (citation must disclose petition filing date, file number, and date of issuance); George v. Elledge, 261 S.W.2d 201 (Tex. Civ. App.—San Antonio 1953, no writ) (citation defective if it recites impossible filing date for plaintiff's petition); Harmon & Reed v. Quinn, 258 S.W.2d 441, 442-43 (Tex. Civ. App.—San Antonio 1953, no writ) (petition must contain sufficient allegations that person named in citation would be proper agent); Woodall v. Lansford, 254 S.W.2d 540 (Tex. Civ. App.—Fort Worth 1953, no writ) (return must state that certified copies of writ and plaintiff's petition have been delivered to defendant); State v. Davis, 139 S.W.2d 638, 640 (Tex. Civ. App.—Eastland 1940, writ dism'd judgmt cor.) (if husband and wife named as defendants, return must show both have received copy of notice); Heard v. J & C Drilling Co., 124 S.W.2d 866 (Tex. Civ. App.—San Antonio 1939, no writ) (default judgment void if described date on citation is impossible); Turner v. Ephraim, 28 S.W.2d 608, 609 (Tex. Civ. App.—El Paso 1930, no writ) (default judgment invalid if defendant served by person without authority); Beck v. Nelson, 17 S.W.2d 144, 145 (Tex. Civ. App.—Amarillo 1929, no writ) (default judgment invalid if citation mistates file number); Holcomb & Hoke Mfg. Co. v. Amason, 2 S.W.2d 360, 361 (Tex. Civ. App.—San Antonio 1927, no writ) (return must show that true copy of citation, along with certified copy of petition, was delivered to defendant's agent); Fitzpatrick v. Dorris Bros., 284 S.W. 303 (Tex. Civ. App.—Eastland 1926, no writ) (if more than one named defendant, return must show copy of notice delivered to each); Holland v. Wood, 196 S.W. 309 (Tex. Civ. App.—El Paso 1917, no writ) (default judgment invalid if return shows defendant not served with citation); Friend v. Thomas, 187 S.W. 986, 987 (Tex. Civ. App.—Fort Worth 1916, no writ) (return showing execution on impossible date will not support default judgment); Crenshaw v. Hempell, 130 S.W. 731, 732-33 (Tex. Civ. App. 1910, no writ) (citation must include file number of suit and where court will be held); Duke v. Spiller, 111 S.W. 787 (Tex Civ. App. 1908, no writ) (return must show date of service and that each defendant was served with copy); Robinson v. Horton, 81 S.W. 1044 (Tex. Civ. App. 1904, no writ) (both date of service and clerk's seal required on citation); Douthit v. Martin, 39 S.W. 944, 945 (Tex. Civ. App. 1897, no writ) (default judgment invalid if defendant served by sheriff without authority to do so).

64. 565 S.W.2d 105 (Tex. Civ. App.—Amarillo 1978, no writ).

65. *Id.* at 106.

66. 579 S.W.2d 62 (Tex. Civ. App.—Austin 1979, no writ).

67. *Id.* at 64.

68. Brown-McKee, Inc. v. J.F. Bryan & Assocs., 522 S.W.2d 958 (Tex. Civ. App.—Texarkana 1975, no writ).

may be moot.[69] The only real value of a motion to quash the citation may be to obtain some additional time in which to answer. Care should also be taken with post-judgment appearances. An appearance during pursuit of an appeal has been considered binding not only in the court of civil appeals but also for any further proceedings in the trial court.[70] In such a situation questions concerning the service of citation and the return thereof are no longer in issue.

An attorney must be careful not to make admissions of service when attempting to set aside a default judgment. The case of *Hurst v. A.R.A. Manufacturing Co.*[71] concerned a defendant's attack on a default judgment entered against him by the trial court. The appellate court stated that the defendant's contention that the trial court lacked jurisdiction over his person could not stand because the defendant had admitted in his appellate brief that he was duly served and yet filed no answer.[72]

## III. ENTRY OF JUDGMENT

### *A. Stating a Cause of Action*

To determine whether the plaintiff has stated a cause of action, the pleadings must enable the court to ascertain the elements of the cause of action and the relief sought.[73] The petition need not plead the evidence upon which the plaintiff relies to establish his cause of action in order to support a default judgment. The pertinent facts, however, must be ascertainable by reference to the petition.[74] Therefore, the petition is not suffi-

69. *See* 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 71 (Supp. 1977); Thode, *In Personam Jurisdiction; Article 2031b, The Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 313 (1964). *But see* Gathers v. Walpace Co., 544 S.W.2d 169, 170-71 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); Castle v. Berg, 414 S.W.2d 523, 526 (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 that a 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 appropriately confines 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.

70. Mega v. Anglo Iron & Metal Co., 601 S.W.2d 501, 505 (Tex. Civ. App.—Corpus Christi 1980, no writ); Hanover Modular Homes of Taft, Inc. v. Corpus Christi Bank & Trust, 476 S.W.2d 97, 102 (Tex. Civ. App.—Corpus Christi 1972, no writ).

71. 555 S.W.2d 141 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

72. *Id.* at 142.

73. Stoner v. Thompson, 578 S.W.2d 679, 679 (Tex. 1979). Use of conclusory phrases in the pleadings, such as the word "negligence," have been deemed insufficient to support a default judgment. Lopez v. Abalos, 484 S.W.2d 613, 614-15 (Tex. Civ. App.—Eastland 1972, no writ); Ramfield v. Wilburn, 465 S.W.2d 844, 845 (Tex. Civ. App.—Corpus Christi 1971, no writ); Stinson v. Jones, 434 S.W.2d 212, 213 (Tex. Civ. App.—Beaumont 1968, no writ).

74. Roberts v. Roberts, 621 S.W.2d 835, 837-38 (Tex. App.—Waco 1981, no writ).

cient to support a default judgment if it does not factually inform the court what judgment it is to render upon the default.[75] Mere formalities, minor defects, and technical insufficiencies will not invalidate a default judgment as long as the petition states a cause of action and gives fair notice to the opposition.[76]

A defendant who fails to answer must also be notified of every amendment to the pleadings that sets forth a new cause of action or would result in a more onerous judgment in the event of default.[77] Such notification is usually given by serving the amended petition or forwarding a copy of the amended pleading to the attorney representing the defendant. Inclusion of the phrase "and for such other and further relief to which plaintiff . . . may show himself entitled" in the prayer for relief does not enlarge a pleading so as to include an entirely different cause of action.[78] The absent party will not be considered to have defaulted on a cause of action where fair notice of that cause of action is not contained in the pleadings. Therefore, if an amended petition is filed prior to the defendant's answer, additional service should be secured in order to uphold a default judgment when entered.[79]

### *B. Failure to Timely Answer*

#### *1. Pleas of Privilege*

A plea of privilege, to be effective, must be filed by the defendant prior to any other appearance[80] with the exception of a special appearance.[81] The attorney must therefore file the plea of privilege before the answer, and any subsequent answer must be specifically conditioned upon the plea of privilege.[82] In many instances, the plea of privilege and the answer are contained in the same pleading. In such cases, the plea of privilege appears as the first part of the pleading and the answer appears thereafter. A plea of privilege does not serve to contest the entire suit by way of an answer. If a plea of privilege is overruled and no answer is of record, the

75. Mo-Vac Service, Inc. v. Marine Contractors Supply, Inc., 586 S.W.2d 573, 574-75 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

76. Fairdale Ltd. v. Sellers, 640 S.W.2d 627, 628 (Tex. App.—Houston [14th Dist. 1982, no writ); Stoner v. Thompson, 578 S.W.2d 679, 683 (Tex. 1979); Naficy v. Braker, 642 S.W.2d 282, 284 (Tex. App.—Houston [14th Dist.] 1982, no writ).

77. Baten Erection Corp. v. Iron Workers' Pension Trust Fund, 608 S.W.2d 262, 263-64 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

78. Stoner v. Thompson, 578 S.W.2d 679, 684 (Tex. 1979).

79. Weaver v. Hartford Accident & Indem. Co., 570 S.W.2d 367, 370 (Tex. 1978); Owen v. Owen, 620 S.W.2d 669 (Tex. Civ. App.—Dallas 1981, writ dism'd w.o.j.); Baten Erection Corp. v. Iron Workers' Pension Trust Fund, 608 S.W.2d 262, 263-64 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

80. 3 W. DORSANEO, TEXAS LITIGATION GUIDE § 70.01[2] (1983); 1 R MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 4.42, at 473 (F. Elliott rev. ed. 1981).

81. Thode, *supra* note 69, at 315-16.

82. 3 W. DORSANEO, *supra* note 80, § 70.01[2].

plaintiff may secure a default judgment. In *Guaranty Bank v. Thompson*[83] the appellant's plea of privilege constituted an appearance in the case for all purposes once the plea was overruled, and the absence of an answer allowed the default to be taken.[84]

### 2. *Special Appearances*

The Texas Rules of Civil Procedure do not address the issue of when a defendant must file his answer after the overruling of a special appearance. There are three days that could be considerd appearance day: (1) the day the court renders its decision overruling the special appearance, (2) the day the court enters its order overruling the special appearance, or (3) the first Monday after twenty days from either of the preceding dates. No Texas cases address this issue. In the opinion of the authors, a defendant's answer is due immediately upon the overruling of his special appearance. This approach finds support in rule 101, which states that a written answer is due twenty days after service of citation,[85] and in rule 120a, which contains no provision for extending the time within which to answer following the overruling of a motion challenging jurisdiction.[86] One authority states that the entry of a special appearance does not affect the necessity of abiding by the time requirements for filing pleas and motions as established by rules of court.[87]

## C. *Interlocutory Judgments*

An interlocutory judgment leaves something further to be determined in disposing of all the parties and their claims.[88] A final judgment disposes of all claims, issues, and parties before the court so that no further action by the court is necessary to settle the entire controversy.[89] In a case involving multiple defendants a default judgment is not final if an answer is filed by one or more of the defendants. In such situations a court has great flexibility in setting aside the interlocutory default because the court retains jurisdiction over the entire matter. Additionally, since only one final judgment may be entered in a case, the entry of a final judgment inconsistent with a prior interlocutory judgment sets aside the interlocutory judgment.[90] For these reasons it is imperative, when an interlocutory default judgment is secured, that the plaintiff's attorney obtain final entry of the interlocutory default as soon as possible. The usual method of securing a final judgment in multi-party cases is to obtain a severance and enter a

83. 619 S.W.2d 217 (Tex. Civ. App.—Waco 1981), *rev'd on other grounds*, 632 S.W.2d 338 (Tex. 1982).
84. 619 S.W.2d at 219.
85. TEX. R. CIV. P. 101.
86. *Id.* 120a.
87. 5 AM. JUR. 2D *Appearances* § 3, at 481 (1962).
88. Kinney v. Tri-State Tel. Co., 222 S.W. 227, 230 (Tex. Comm'n App. 1920, judgmt adopted).
89. Wagner v. Warnasch, 156 Tex. 334, 338, 295 S.W.2d 890, 892 (1956).
90. Ratcliff v. Sherman, 592 S.W.2d 81, 83 (Tex. Civ. App.—Tyler 1979, no writ).

final judgment upon the severance, leaving other parties in the same controversy on the active docket of the court.[91] Should the plaintiff's attorney fail to do this, the defendant may be successful in procuring an order setting aside the default judgment. Such an order would be interlocutory and nonappealable.[92]

### *D. Default Judgment as a Sanction*

Sanctions are most frequently entered by trial courts as a consequence of a party's abuse of pretrial discovery procedures. The primary purpose of discovery sanctions is to insure that full disclosure is made during pretrial discovery in order to promote efficient, just, and expeditious litigation.[93] The sanctions available to curb discovery abuse are stated in Texas Rules of Civil Procedure 170 and 215a.[94] The harshest sanctions, to which this Article will be limited, are default judgment and dismissal.

Historically, the purpose of sanctions was not to punish the offending party, but to secure compliance with discovery rules.[95] This limitation on the invocation of sanctions is no longer valid.[96] A continuing increase in discovery abuse has necessitated the use of sanctions to deter dilatory and obstructive tactics.[97] In *National Hockey League v. Metropolitan Hockey Club, Inc.*[98] the Supreme Court of the United States upheld a district court's dismissal of a cause of action for the plaintiff's failure to timely answer interrogatories, and stated:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.[99]

The sanction of striking a party's pleadings, thereby subjecting him to default judgment or dismissal, is a harsh remedy[100] and one that should be used sparingly.[101] On the other hand, where the imposition of less severe

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91. TEX. R. CIV. P. 41; 4 W. DORSANEO, *supra* note 80, § 112.10[2].

92. Flato Bros. v. McKinney, 399 S.W.2d 957, 957 (Tex. Civ. App.—Corpus Christi 1966, no writ).

93. *See* TEX. R. CIV. P. 1 (efficient, just, and expeditions litigation are goals expressed for procedural rules generally); *see also* Ginther-Davis Constr. Co. v. Texas Commerce Bank Nat'l Ass'n, No. H-80-687, slip op. at 9-10 (S.D. Tex. July 30, 1981) (unreported) (reasons for discovery sanctions in federal court).

94. *Id.* 170, 215a.

95. U.S. Leasing Corp. v. O'Neill, Price, Anderson & Fouchard, Inc., 553 S.W.2d 11, 13 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

96. McConnico, *Texas Rules of Civil Procedure—Effect of Recent Amendments*, 1982 HOUS. B.A. CIV. PRAC. INST. 19.

97. Southern Pacific Transp. Co. v. Evans, 590 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), *cert. denied*, 449 U.S. 994 (1980).

98. 427 U.S. 639 (1976).

99. *Id.* at 643.

100. Sears, Roebuck & Co. v. Hollingsworth, 156 Tex. 176, 180-81, 293 S.W.2d 639, 642 (1956); Hankins v. Haffa, 469 S.W.2d 733, 738 (Tex. Civ. App.—Amarillo 1971, no writ).

101. Sears, Roebuck & Co. v. Hollingsworth, 156 Tex. 176, 180-81, 293 S.W.2d 639, 642 (1956); Pena v. Williams, 547 S.W.2d 671, 673 (Tex. Civ. App.—San Antonio 1977, no writ).

sanctions is ineffective in enforcing pretrial discovery orders, it is incumbent upon the trial court to impose the harsher sanctions, thereby preventing recalcitrant parties from frustrating justice.[102] The recent case of *Waguespack v. Halipoto*[103] involved the dismissal of the plaintiff's cause for failure to comply with rules of discovery. In affirming the lower court's action, the court of appeals discussed the rules providing for sanctions: "The Rules provide a trial judge with the tools to facilitate the litigation of lawsuits and, to a certain extent, to prevent abuse of the legal process. This discretion is therefore appropriately broad."[104] The choice of an appropriate sanction is for the trial court, and the trial court's decision should not be overturned absent the clear showing of an abuse of discretion.[105]

Historically, an imbalance existed between the imposition of sanctions on plaintiffs and the imposition of sanctions on defendants. When a court finds a plaintiff guilty of discovery abuse, it may strike the plaintiff's pleadings and dismiss his case.[106] On the other hand, a defendant guilty of discovery abuse may suffer a judgment by default.[107] The imbalance exists when the plaintiff's cause is dismissed without prejudice because no comparable sanction is available to the court to impose against a recalcitrant defendant.[108] Moreover, Texas courts have not been consistent in their acceptance of dismissal with prejudice as a valid sanction for discovery abuse. Early cases held that dismissal with prejudice was not an appropriate sanction for failure to make discovery.[109] Notwithstanding increasing

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102. Bottinelli v. Robinson, 594 S.W.2d 112, 118 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *see* Bass v. Duffey, 620 S.W.2d 847, 849 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). If a default judgment is entered by way of sanctions against a recalcitrant defendant, the court's order should include a provision expressly striking the defendant's answer. *See* Nutting v. National Homes Mfg. Co., 639 S.W.2d 721, 724 (Tex. App.—Austin 1982, no writ).

103. 633 S.W.2d 628 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

104. *Id.* at 629.

105. Bass v. Duffey, 620 S.W.2d 847, 849 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Lewis v. Illinois Employers Ins. Co., 590 S.W.2d 119, 119 (Tex. 1979).

106. TEX. R. CIV. P. 168, 170, 215a.

107. *Id.* 167, 168, 170, 215a.

108. A dismissal with prejudice acts as an adjudication of the party's rights, barring the right to bring or maintain an action on the same claim or cause. Gonzalez v. Mann, 583 S.W.2d 637, 640 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd on other grounds*, 595 S.W.2d 102 (Tex. 1979). A mere dismissal or dismissal without prejudice simply places the party in the position he was in prior to the court's assuming jurisdiction and does not operate as a bar to subsequent action. Crofts v. Court of Civil Appeals, 362 S.W.2d 101, 104 (Tex. 1962); *Gonzalez*, 583 S.W.2d at 640. If the statute of limitations has run, however, a mere dismissal or dismissal without prejudice will operate in the same manner as a dismissal with prejudice. In other words, if the plaintiff elects to refile, the defendant may interpose the affirmative defense of limitations. TEX. R. CIV. P. 94.

109. *See* Crofts v. Court of Civil Appeals, 362 S.W.2d 101, 104 (Tex. 1962). In *Crofts* the court stated: "It is elementary that a dismissal is in no way an adjudication of the rights of parties; it merely places the parties in the position they were in before the court's jurisdiction was invoked just as if the suit had never been brought." *Id.* at 104; *see also* Texhoma Stores, Inc. v. American Cent. Ins. Co., 398 S.W.2d 344 (Tex. Civ. App.—Tyler), *writ ref'd n.r.e. per curiam*, 401 S.W.2d 593 (Tex. 1966). There the court stated:

> [I]f the trial court had any authority to impose the penalty of dismissal "with prejudice" it must be found in Rule 170. We have carefully examined Rule 170 and fail to find anything therein which would indicate that the trial court

incidents of discovery abuse, the cases indicate a continued reluctance by the courts to impose on recalcitrant plaintiffs the harsher sanction of dismissal with prejudice.[110] Two recent cases, however, reflect a trend toward imposition of this sanction. In *Lueg v. Tewell*[111] an action for alienation of affection, the plaintiff's case was dismissed with prejudice for failure to comply with a discovery order.[112] In affirming, the appellate court stated:

> The record supports deductions by the trial court that the appellant willfully refused to provide any of the documents requested and that the appellant consistently enlisted dilatory tactics to delay the discovery, and even failed to comply with personal agreements. Under these circumstances it was not an abuse of discretion for the trial court to dismiss the cause with prejudice.[113]

In *Bottinelli v. Robinson*[114] an action alleging fraud in connection with certain business transactions, the trial court struck the plaintiff's pleadings and dismissed his cause of action with prejudice for failure to comply with an order to produce certain documents. In upholding the ruling of the trial court, the appellate court refused to follow earlier cases holding that a dismissal authorized by Texas Rule of Civil Procedure 170(b) means only dismissal without prejudice.[115] The court stated:

> [I]t undermines even-handed fairness under the discovery rules to hold that a trial court may enter a default judgment against a recalcitrant defendant, thereby finally disposing of his liability defense, yet may not dismiss with prejudice the action of plaintiff who refuses to

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> is given authority to dismiss a cause of action "with prejudice." While the rule does provide that upon failure to obey an order made under Rule 167, the trial court is authorized to dismiss the action by proceedings, it nowhere provides that same may be dismissed "with prejudice." Insofar as we have been able to determine, the sanction here invoked has no basis in either constitutional or statutory enactment, and we have been unable to find any decisions holding that a trial judge has such power.

398 S.W.2d at 347.

110. Fultz v. Cummins Sales & Serv., Inc., 587 S.W.2d 515 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); Gonzalez v. Mann, 583 S.W.2d 637 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd on other grounds*, 595 S.W.2d 102 (Tex. 1979).

111. 572 S.W.2d 97 (Tex. Civ. App.—Corpus Christi 1978, no writ).

112. *Id.* at 104.

113. *Id.* The court further stated:

> The purpose of the sanctions provided in Rule 170 is to secure compliance with the discovery orders, not to punish an erring party. . . . The sanction of dismissal is a harsh one, and should be imposed only when clearly authorized. . . . A party must be given notice and a chance to be heard on any motion to impose a sanction for failure to produce documents. . . . Once these procedural safeguards are met, the imposition of sanctions for failure to comply with discovery is directed to the sound discretion of the trial court, and the court's action can be set aside only upon a showing of clear abuse of discretion.

Id. (citations omitted).

114. 594 S.W.2d 112 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

115. *Id.* at 116; *see* Gonzalez v. Mann, 583 S.W.2d 637, 640 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd on other grounds*, 595 S.W.2d 102 (Tex. 1979); Phillips v. Vincent Supply Co., 581 S.W.2d 789, 791 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); Texhoma Stores, Inc. v. American Cent. Ins. Co., 398 S.W.2d 344, 347 (Tex. Civ. App.—Tyler), *writ ref'd n.r.e. per curiam*, 401 S.W.2d 593 (1966).

permit discovery, leaving him to refile the action and avoid the necessary order.[116]

Since the purpose of the default judgment is to keep dockets current, thereby preventing a procrastinating defendant from impeding the plaintiff in the establishment of his claim,[117] it seems that the purpose of a dismissal should also be to keep the dockets current, thereby preventing a procrastinating plaintiff from impeding the judicial process. This purpose can best be served by the dismissal of a disobedient plaintiff's cause with prejudice. To equalize the sanctions of default judgment and dismissal, consideration should be given to making dismissal without prejudice unavailable to the trial judge as a sanction for discovery abuse.

The trial court may vacate its order of sanctions at any time prior to the loss of jurisdiction.[118] In order to set aside a default judgment or dismissal entered by way of sanctions, the disobedient party should be required to satisfy the test of *Craddock v. Sunshine Bus Lines, Inc.*[119] As applied in the context of an order invoking sanctions, the *Craddock* test provides that the trial court's order should be set aside only if the recalcitrant party demonstrates that the misconduct resulting in the sanction was neither intentional nor the result of conscious indifference, but rather was due to a mistake or an accident; that he has a meritorious claim or defense; and that his motion is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the opposing party.[120]

### *E. Proving Damages*

If the plaintiff's claim is liquidated and proved by an instrument in writing, damages pursuant to a default judgment will be assessed by the court.[121] A liquidated claim is one that "can be accurately calculated by the court, or under its direction, from the allegations contained in plaintiff's petition and the instrument in writing."[122] Common examples of claims which have been held to be liquidated are suits on promissory

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116. 594 S.W.2d at 117. As further justification for dismissing the plaintiff's case with prejudice, the court stated:

> Litigants who abuse the discovery procedures and use them to play a delaying game or to conceal evidence do more than inconvenience or prejudice their opponents. . . . "[I]n this era of crowded dockets . . . they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism."

Id. at 118 (quoting G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978)).

117. Hagans & Pohl, *Default Judgments*, 1980 HOUS. B.A. JUDGMENTS INST. 1; Pohl, *supra* note 11, at 2; *see supra* note 4 and accompanying text.

118. TEX. R. CIV. P. 329b; 4 R. MCDONALD, *supra* note 7, § 17.03.

119. 134 Tex. 388, 133 S.W.2d 124 (1939); *see infra* text accompanying note 175 for the elements of the *Craddock* test.

120. 134 Tex. at 393, 133 S.W.2d at 126.

121. TEX. R. CIV. P. 241; Wallace v. Snyder Nat'l Bank, 527 S.W.2d 485, 487 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); Buttrill v. Occidental Life Ins. Co., 45 S.W.2d 636, 638-39 (Tex. Civ. App.—Dallas 1932, no writ).

122. Freeman v. Leasing Assocs., Inc., 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); *accord* Hagans & Pohl, *supra* note 117, at 14.

notes,[123] leases,[124] bonds,[125] checks,[126] and sworn accounts.[127] If the instrument in writing is attached to the plaintiff's petition and if the amount of damages can be calculated from the allegation in the petition, judgment should be entered for that amount against the defaulting defendant. When damages are liquidated the rules of procedure contemplate that the plaintiff be awarded the damages without the necessity of a hearing or the presentation of evidence.

A default judgment does not establish allegations pertaining to unliquidated damages.[128] Unliquidated claims include damages for personal injuries, lost profits, consequential damages, exemplary damages, and reasonable attorney's fees.[129] The plaintiff must present evidence of unliquidated damages,[130] and this evidence must be both competent and consistent with the cause of action pleaded.[131] The defendant has the right to demand a jury trial on the issue of unliquidated damages.[132] The defendant must receive notice of the trial setting and applicable local rules must be followed in setting the case for trial.[133] At the trial, the defendant is entitled to participate fully by cross-examining plaintiff's witnesses and offering evidence in rebuttal for the purpose of reducing damages.[134] A de-

123. Loungeway v. Hale, 73 Tex. 495, 498, 11 S.W. 537, 538 (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.).

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

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

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

127. 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); *see* 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. Covey Co., 511 S.W.2d 329, 330 (Tex. Civ. App.—Austin 1974, no writ).

128. TEX. R. CIV. P. 243; Freeman v. Leasing Assocs., Inc., 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); 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.).

129. Hittner, *supra* note 13, at 5-7; STATE BAR OF TEXAS, TEXAS COLLECTION MANUAL § 12.09(b) (1980).

130. TEX. R. CIV. P. 243; Johnson v. Gisondi, 627 S.W.2d 448, 449 (Tex. App.—Houston [1st Dist.] 1981, no writ).

131. Schoenberg v. Forrest, 253 S.W.2d 331, 335-36 (Tex. Civ. App.—San Antonio 1952, no writ); 3 A. FREEMAN, *supra* note 9, § 1292, at 2683; 47 AM. JUR. 2D *Judgments* § 1176, at 199 (1969).

132. TEX. R. CIV. P. 241, 243; 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); *see* Bumpass v. Morrison, 70 Tex. 756, 759, 8 S.W. 596, 597-98 (1888); TEX. CONST. art. I, § 15. Defendant does not have a right to a jury trial if damages are liquidated. Buttrill v. Occidental Life Ins. Co., 454 S.W.2d 636, 639 (Tex. Civ. App.—Dallas 1931, no writ).

133. Bass v. Duffey, 620 S.W.2d 847, 849-50 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

134. *Id.*; Rainwater v. Haddox, 544 S.W.2d 729, 733 (Tex. Civ. App.—Amarillo 1976, no writ); 1 H. BLACK, *supra* note 9, § 91; 4 R. MCDONALD, *supra* note 7, § 17.23.4, at 122; *see*

fendant who neglects to appear at the time unliquidated damages are proven may, however, be deemed to have waived his right to present evidence and cross-examine plaintiff's witnesses.[135]

## IV. RIGHTS OF A DEFAULTING DEFENDANT

### *A. Stenographic Record of Plaintiff's Evidence*

By defaulting, a defendant admits those causes of action properly pleaded by the plaintiff.[136] As previously discussed, however, he does not admit allegations of unliquidated damages.[137] If damages are unliquidated, they may not be assessed without proper proof.[138] The sufficiency of plaintiff's proof is subject to review on motion for new trial or upon appeal.[139] Consequently, the defendant is entitled to a stenographic record of the plaintiff's evidence, and the court reporter has the mandatory duty[140] to prepare, upon proper request,[141] a complete statement of facts in question and answer form.[142]

A conflict once existed among Texas appellate courts on the question of whether a defaulting defendant waived his right to a statement of facts in question and answer form when he did not endeavor to procure a statement of facts from another source.[143] A number of courts applied a due

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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).

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

136. Edwards Feed Mill, Inc. v. Johnson, 158 Tex. 313, 317, 311 S.W.2d 232, 234 (1958); Johnson v. Gisondi, 627 S.W.2d 448, 450 (Tex. App.—Houston [1st Dist.] 1981, no writ); Gourmet, Inc. v. Hurley, 552 S.W.2d 509, 513 (Tex. Civ. App.—Dallas 1977, no writ); Williamsburg Nursing Home, Inc. v. Paramedics, Inc., 460 S.W.2d 168, 170 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); 4 R. MCDONALD, *supra* note 7, § 17.23.3, at 120.

137. TEX. R. CIV. P. 243; Gaffney v. Cielo Vista Bank, No. 7019, slip op. at 1 (Tex. Civ. App.—El Paso July 29, 1981, no writ) (unreported); Watson v. Sheppard Fed. Credit Union, 589 S.W.2d 742, 744 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.); Gourmet, Inc. v. Hurley, 552 S.W.2d 509, 513 (Tex. Civ. App.—Dallas 1977, no writ); *see supra* notes 128-35 and accompanying text.

138. Cactus Drilling Co. v. McGinty, 580 S.W.2d 609, 610-11 (Tex. Civ. App.—Amarillo 1979, no writ); Burrows v. Bowden, 564 S.W.2d 474, 475 (Tex. Civ. App.—Corpus Christi 1978, no writ); Otten v. Snowden, 550 S.W.2d 758, 759-60 (Tex. Civ. App.—San Antonio 1977, no writ); *see supra* notes 130-35 and accompanying text.

139. Roe v. Doe, 607 S.W.2d 602, 603 (Tex. Civ. App.—Eastland 1980, no writ); *see* Smith v. Smith, 544 S.W.2d 121, 123 (Tex. 1976); Robinson v. Robinson, 487 S.W.2d 713, 715 (Tex. 1972); Victory v. Hamilton, 127 Tex. 203, 208, 91 S.W.2d 697, 700 (1936).

140. TEX. R. CIV. P. 376b; Fine v. Page, 572 S.W.2d 577, 578 (Tex. Civ. App.—Eastland 1978, writ dism'd); Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd); *see* Wolters v. Wright, 623 S.W.2d 301, 305-06 (Tex. 1981).

141. TEX. R. CIV. P. 377; 6 W. DORSANEO, *supra* note 80, § 143.110[2].

142. Gilbert v. Singleton, 611 S.W.2d 163, 164-65 (Tex. Civ. App.—Austin 1981, no writ) (per curiam); *see* Blue Cross-Blue Shield v. Davidson, 574 S.W.2d 215, 218 (Tex. Civ. App.—Corpus Christi 1978, no writ); Stemco Mfg. Co. v. Louis Delhomme Marine, Inc., 573 S.W.2d 566, 567 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

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

diligence test, which required a showing that all alternative sources[144] of a statement of facts had been exhausted,[145] while other courts held that the right to a statement of facts in question and answer form could not be waived.[146] The Texas Supreme Court resolved this conflict in *Smith v. Smith*[147] and *Rogers v. Rogers*.[148] The rule is now well settled that the right to a statement of facts in question and answer form may not be waived by the failure to demonstrate the unavailability of a statement of facts in an alternate form.[149] Stated differently, one exercises due diligence by properly requesting preparation of a statement of facts in question and answer form.[150] *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*[151] states the applicable rule:

> [A]n 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.[152]

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144. The Texas Rules of Civil Procedure recognize question and answer, narrative, abbreviated, and agreed statements of fact. TEX. R. CIV. P. 377, 378.

145. Brown v. Brown, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd 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 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 dism'd).

146. *See* Woods v. Indiana Lumberman's Mut. Ins. Co., No. 1205 (Tex. Civ. App.—Corpus Christi Apr. 28, 1977, no writ) (unreported); 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, 314-15 (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).

147. 544 S.W.2d 121 (Tex. 1976).

148. 561 S.W.2d 172 (Tex. 1978) (supreme court clarified and explained holding in *Smith v. Smith*).

149. Hawkins v. Hawkins, 626 S.W.2d 332, 333 (Tex. App.—Tyler 1981, no writ); Goodman v. Goodman, 611 S.W.2d 738, 738 (Tex. Civ. App.—San Antonio 1981, no writ); Watson v. Sheppard Fed. Credit Union, 589 S.W.2d 742, 744 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.); Blue Cross-Blue Shield v. Davidson, 574 S.W.2d 215, 218 (Tex. Civ. App.—Corpus Christi 1978, no writ); Garcia v. Kelly, 565 S.W.2d 112, 113 (Tex. Civ. App.—Corpus Christi 1978, no writ); Hurt v. Ewald, No. 15918, slip op. at 2-4 (Tex. Civ. App.—San Antonio Mar. 22, 1978, no writ) (unreported); Muldoon v. Musgrave, 545 S.W.2d 539, 541-42 (Tex. Civ. App.—Fort Worth 1976, no writ).

150. Smith v. Sun-Belt Aviation, Ltd., 625 S.W.2d 22, 23 (Tex. Civ. App.—San Antonio 1981, writ dism'd).

151. 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd).

152. *Id.* at 315 (citations omitted). Article 2324 was amended in 1975 to provide that the court reporter shall "upon request" attend all sessions of court and take shorthand notes thereof. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1982-1983); *see* Blue Cross-Blue Shield v. Davidson, 574 S.W.2d 215, 217 (Tex. Civ. App.—Corpus Christi 1978, no writ); Hurt v. Ewald, No. 15918, slip op. at 2-3 (Tex. Civ. App.—San Antonio Mar. 22, 1978, no writ) (unreported); Bledsoe v. Black, 535 S.W.2d 795, 796 (Tex. Civ. App.—Eastland 1976, no writ). For a statement of the purpose of this statutory change, see Pohl & Kirklin, *supra* note 1, at 482.

The rule of *Morgan Express* applies unless a defendant appears when unliquidated damages are proven, neglects to have the proceedings reported, and fails to timely interpose his objection to the absence of a court reporter.[153]

The absence of a stenographic record may be established in a number of ways. The stipulation of opposing counsel that no stenographic record is available will suffice.[154] In the absence of a stipulation, the testimony or affidavit of the court reporter,[155] of the judge who heard plaintiff's damage evidence,[156] or of counsel who unsuccessfully requested the stenographic record[157] will establish the unavailability of a statement of facts in question and answer form. On appeal, proof of a proper request for the preparation of a statement of facts[158] accompanied by the absence of such statement of facts is normally sufficient for the granting of a new trial.[159]

153. 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); TEX. R. CIV. P. 377, 378.

154. Goodman v. Goodman, 611 S.W.2d 738 (Tex. Civ. App.—San Antonio 1981, no writ) (uncontroverted that no court reporter present when plaintiff proved damages); Blue Cross-Blue Shield v. Davidson, 574 S.W.2d 215, 217 (Tex. Civ. App.—Corpus Christi 1978, no writ) (appellant requested preparation of statement of facts and obtained stipulation of opposing counsel that no court reporter was present during trial of case); Burrows v. Bowden, 564 S.W.2d 474, 475 (Tex. Civ. App.—Corpus Christi 1978, no writ) (stipulation by attorneys for both parties that no evidence offered in support of default judgment); James Edmond, Inc. v. Schilling, 501 S.W.2d 432, 434 (Tex. Civ. App.—Waco 1973, no writ) (all parties admitted in brief that no statement of facts available).

155. Smith v. Smith, 544 S.W.2d 121, 122 (Tex. 1976) (trial court hearing established that court reporter unable to furnish fact statement); Hawkins v. Hawkins, 626 S.W.2d 332, 333 (Tex. App.—Tyler 1981, no writ) (appellant submitted affidavit of court reporter that no trial record made from which to prepare statement of facts); Gaffney v. Cielo Vista Bank, No. 7019, slip op. at 2 (Tex. Civ. App.—El Paso July 29, 1981, no writ) (unreported) (appellant applied for transcript and received affidavit from court reporter that no record made); Muldoon v. Musgrave, 545 S.W.2d 539, 540 (Tex. Civ. App.—Fort Worth 1976, no writ) (appellant requested preparation of fact statement and obtained court reporter's affidavit that he could not prepare one); Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 316 (Tex. Civ. App.—Dallas 1975, writ ref'd) (court reporter "certified" that stenographic record unavailable).

156. Garcia v. Kelly, 565 S.W.2d 112, 113 (Tex. Civ. App.—Corpus Christi 1978, no writ); Burrows v. Bowden, 564 S.W.2d 474, 475 (Tex. Civ. App.—Corpus Christi 1978, no writ). In Walker v. O'Rear, 472 S.W.2d 789 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.), appellee obtained the affidavit of the trial judge that, if requested, he would have prepared a statement of facts. The court held that "it places an unfair burden upon Appellant to have to rely on the trial court for his statement of facts." *Id.* at 791; *accord* Pacific Greyhound Lines, Inc. v. Burgess, 118 S.W.2d 1100, 1103 (Tex. Civ. App.—Amarillo 1938, writ ref'd).

157. Gaffney v. Cielo Vista Bank, No. 7019, slip op. at 2 (Tex. Civ. App.—El Paso July 29, 1981, no writ) (unreported); Gilbert v. Singleton, 611 S.W.2d 163, 164-65 (Tex. Civ. App.—Austin 1981, no writ); Burrows v. Bowden, 564 S.W.2d 474, 475 (Tex. Civ. App.—Corpus Christi 1978, no writ); Muldoon v. Musgrave, 545 S.W.2d 539, 540 (Tex. Civ. App.—Fort Worth 1976, no writ).

158. TEX. R. CIV. P. 377; Smith v. Sun-Belt Aviation, Ltd., 625 S.W.2d 22, 22 (Tex. App.—San Antonio 1981, writ dism'd) (letter requesting preparation of statement of facts with court reporter's notation that no stenographic record made); Gaffney v. Cielo Vista Bank, No. 7019, slip op. at 2 (Tex. Civ. App.—El Paso July 29, 1981, no writ) (unreported) (application for preparation of transcript included request for preparation of statement of facts).

159. Smith v. Sun-Belt Aviation, Ltd., 625 S.W.2d 22 (Tex. App.—San Antonio 1981, writ dism'd).

The authors recommend that the defendant document the unavailability of a statement of facts in question and answer form by making and filing of record a proper request accompanied by an affidavit of unavailability from either the court reporter or the trial judge. Otherwise, the appellate court may presume there is sufficient evidence to support the trial court judgment.[160]

### *B. Findings of Fact and Conclusions of Law*

In nonjury trials the defaulting defendant is generally entitled to a record of the trial judge's findings of fact and conclusions of law, in addition to the stenographic record.[161] In *Calhoun v. Calhoun*,[162] however, the defendant's request for such a record was refused. In that case the appellant stated that he timely filed his request for findings of fact and conclusions of law and alleged that the trial court erred in failing to honor such request. The appellate court held that "the record available to us affirmatively shows that appellant was not prejudiced by the trial court's failure to file findings of fact and conclusions of law."[163] *Southland Mower Co. v. Jordan*[164] involved a default judgment damages hearing at which no court reporter was present. Although no stenographic record of the proceedings was made, the trial court made extensive findings of fact and conclusions of law in its judgment. The defendant appealed, claiming that the unavailability of a statement of facts entitled him to reversal of the judgment. The plaintiff contended that extensive findings of fact and conclusions of law by the trial court obviated the need for a statement of facts in question and answer form. The court of civil appeals rejected the plaintiff's contention and reversed the award of damages, but affirmed the finding of liability.[165]

## V. POST-JUDGMENT PROCEEDINGS

### *A. Setting Aside a Judgment by Default*

#### *1. Mechanics of Setting Aside a Judgment by Default*

A judgment by default becomes final at the expiration of thirty days.[166] Within that time, the defendant may file a motion for a new trial.[167] If this motion is overruled, the defendant may move to set aside the default judgment entered against him, so long as his motion is disposed of before the

160. *See* Brunson v. Pittman & Harris, 640 S.W.2d 91, 92 (Tex. App.—Fort Worth 1982, no writ).

161. TEX. R. CIV. P. 296; 6 W. DORSANEO, *supra* note 80, § 141.100[1].

162. 617 S.W.2d 756 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

163. *Id.* at 758.

164. 587 S.W.2d 215 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

165. *Id.* at 217.

166. TEX. R. CIV. P. 329b; Thursby v. Stovall, 26 Tex. Sup. Ct. J. 308 (Apr. 8, 1983); Broussard v. Dunn, 568 S.W.2d 126, 127 (Tex. 1978); Canavati v. Shipman, 610 S.W.2d 200, 202 (Tex. Civ. App.—San Antonio 1980, no writ); 6 W. DORSANEO, *supra* note 80, § 140.03; 4 R. MCDONALD, *supra* note 7, § 18.03.

167. 6 W. DORSANEO, *supra* note 80, § 140.03; 4 R. MCDONALD, *supra* note 7, ch. 18.

court loses jurisdiction of the case.[168] The defendant's motion may be labeled either a motion for new trial, a motion to set aside the default judgment, or both.[169] Once the judgment becomes final, the judgment debtor may appeal by regular appeal or by writ of error.[170] The filing of a bill of review is also available to the defaulting defendant.[171] If the defendant's motion for a new trial or to set aside the default judgment is granted, the plaintiff may not appeal since such an order is interlocutory.[172]

*Craddock v. Sunshine Bus Lines, Inc.*[173] established rules for setting aside default judgments. The *Craddock* test states that a judgment by default should be set aside if the defendant establishes all[174] of the following: (1) that the failure to answer was neither intentional nor the result of conscious indifference, (2) that the failure to answer was due to a mistake or an accident, (3) that the defendant has a meritorious defense, and (4) that the defendant's motion was filed at a time when the granting thereof would occasion no delay or otherwise work an injury to plaintiff.[175] The essential elements of the *Craddock* test may be established by affidavit or other competent evidence.[176] The question of whether the *Craddock* test is satisfied is addressed to the sound discretion of the trial court and will not be overturned absent a showing of abuse of discretion.[177]

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168. Broussard v. Dunn, 568 S.W.2d 126, 128 (Tex. 1978); Mesa Agro v. R.C. Dove & Sons, 584 S.W.2d 506, 509 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.); 4 R. McDONALD, *supra* note 7, §§ 18.03, 18.06.4.

169. Pohl, *supra* note 11, at 30.

170. TEX. REV. CIV. STAT. ANN. arts. 2249, 2249a (Vernon Supp. 1982-1983).

171. Baker v. Goldsmith, 582 S.W.2d 404 (Tex. 1979).

172. Flato Bros., Inc. v. McKinney, 399 S.W.2d 957, 957 (Tex. Civ. App.—Corpus Christi 1966, no writ).

173. 134 Tex. 388, 133 S.W.2d 124 (1939).

174. Patton v. Samuel, 262 S.W.2d 439, 441 (Tex. Civ. App.—Fort Worth 1953, writ dism'd).

175. 134 Tex. at 393, 133 S.W.2d at 126. Although there are considerable differences in nuance among jurisdictions regarding relief from a default judgment, the prevailing view is that a judgment by default may be avoided if:

> (1) The failure to appear was the result of excusable neglect;
>
> (2) The applicant for relief acted with due diligence in ascertaining that the judgment had been rendered and with reasonable promptness in seeking relief, and the application was made within the time limitation of an applicable statute or rule of court; and
>
> (3) The application for relief shows there is a genuine issue upon which the judgment depends and which should be adjudicated.

RESTATEMENT (SECOND) OF JUDGMENTS § 67 (1982).

176. Stark v. Nationwide Fin. Corp., 610 S.W.2d 193, 195 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); Aetna Life & Casualty Co. v. Lyon, 576 S.W.2d 114, 117 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); Healy v. Wick Bldg. Syss., Inc., 560 S.W.2d 713, 721 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); Abercia v. First Nat'l Bank, 500 S.W.2d 573, 576 (Tex. Civ. App.—San Antonio 1973, no writ). If the necessary affidavit is unavailable, a showing should be made in the defendant's moving papers of such unavailability despite the exercise of due diligence. 4 R. McDONALD, *supra* note 7, § 18.10.1.

177. Farley v. Clark Equip. Co., 484 S.W.2d 142, 150 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); Young v. Snowcon, Inc., 463 S.W.2d 225, 227 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

*2. Reasons for Failure to Timely Answer*

The first two elements of the *Craddock* test require the defendant to demonstrate that his failure to timely answer was neither intentional nor the result of conscious indifference but was, instead, due to an accident or mistake. The defendant's negligence will not preclude the setting aside of a judgment by default.[178] In fact, the defendant's burden of demonstrating the accidental or mistaken nature of his failure to answer may often result in an admission of negligence. 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.[179]

No formula for distinguishing excusable accident or mistake from intentional failure or conscious indifference has been articulated by our courts. An examination of the excuses tendered by defaulting defendants is therefore particularly instructive. A number of different mistakes of fact may constitute excusable neglect.[180] The misplacing of a file by an attorney,[181] secretary,[182] or insurer[183] have all been held to justify the setting aside of a default judgment. Similarly, failure to forward process to one's insurance company before appearance day has been excused when the papers were misplaced and forgotten.[184] The failure of a secretary to notify an attorney of a trial setting can also constitute excusable neglect.[185] Mistakes of counsel, such as miscalculating the answer date, are generally accepted as valid excuses for failure to timely answer.[186] An attorney's mistaken belief that the case would not be called until a later date because of a crowded docket

178. Ivy v. Carrell, 407 S.W.2d 212, 213 (Tex. 1966); Aetna Life & Casualty Co. v. Lyon, 576 S.W.2d 114, 116 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); 4 R. McDONALD, *supra* note 7, § 18.10.2.

179. 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. Casualty Co. v. Lambert, 149 S.W.2d 1086, 1089 (Tex. Civ. App.—Beaumont 1941, writ dism'd judgmt cor.).

180. The courts have generally drawn no distinction between mistakes of law and mistakes of fact. Annot., 21 A.L.R.3D 1255, 1262 (1968).

181. Leonard v. Leonard, 512 S.W.2d 771, 773 (Tex. Civ. App.—Corpus Christi 1974, writ dism'd).

182. Continental Airlines 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).

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

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

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

186. Continental Airlines v. Carter, 499 S.W.2d 673, 675 (Tex. Civ. App.—El Paso 1973, no writ); Texas Iron & Metal Co. v. Utility 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); Springer v. Gillespie, 56 S.W. 369, 370 (Tex. Civ App. 1900, no writ). *See generally* 1 H. BLACK, *supra* note 9, § 341 (general discussion of attorney negligence); Annot., 21 A.L.R.3D 1255, 1264 (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).

has prompted the granting of a new trial.[187] The same result ensued when counsel thought his request for a continuance had been granted when in fact it had been lost in the mail.[188] Similarly, counsel's mailing of defendant's plea of privilege to the wrong county seat has constituted excusable neglect in certain circumstances.[189] Occasionally, ignorance of the law has been held sufficient to excuse a defendant's failure to timely answer.[190]

Acts of other persons and unavoidable events sometimes create excusable accidents or mistakes. For example, defendant's failure to answer is excusable if it resulted from reliance upon certain acts or statements of the plaintiff,[191] opposing counsel's fraudulent intent to take unfair advantage of the defendant,[192] or from plaintiff's failure to notify defendant of the setting of the case for trial.[193] Similarly, a new trial has been granted where the clerk failed to notify a nonresident attorney of a trial setting after having been instructed to do so.[194] 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.[195] Unexpected transportation failures[196] and counsel's being lost on unfamiliar roads[197] have been held sufficient excuses. The absence of the defendant or his attorney due to illness[198] or

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

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

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

190. Dowell v. Winters, 20 Tex. 793, 795 (1858); Continental Airlines 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). *Contra* Pierce v. Cole, 17 Tex. 259, 261 (1856); 1 H. BLACK, *supra* note 9, §§ 335, 341; Annot., 21 A.L.R.3D 1255, 1262 (1968).

191. Field & Co. v. Fowler, 62 Tex. 65, 69 (1884); Interstate Minerals, Inc. v. Schlumberger Well Survey Corp., 219 S.W.2d 604, 605 (Tex. Civ. App.—Austin 1949, no writ); Metropolitan Casualty 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, 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 9, § 322.

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

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

194. Browne 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).

195. 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, 1098-99 (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).

196. Thomas v. Womack, 13 Tex. 580, 585-86 (1855) (defendant delayed by 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).

197. Presidio Cotton Gin & Oil Co. v. Dupuy, 2 S.W.2d 341, 342-43 (Tex. Civ. App.—El Paso 1928, no writ).

198. Goodhue v. J. Meyers & Co., 58 Tex. 405, 406 (1883); Berhns v. Harris, 150 S.W. 495, 495-96 (Tex. Civ. App.—El Paso 1912, no writ); Southwestern Tel. & Tel. Co. v. Jen-

compulsory attendance in another court[199] ordinarily is held sufficient excuse. Moreover, an illness in the family of the defendant's attorney may constitute excusable neglect,[200] but in this situation the court may require that the defendant demonstrate the exercise of due diligence in seeking the employment of other counsel.[201]

Failure to timely answer has been held intentional or due to conscious indifference in various situations. Fraudulent actions of one's counsel excuse a defendant's failure to answer only when those acts rise to the level of deceit or betrayal.[202] Failure to answer because of confusion in counsel's office[203] or because of negligent failure of counsel to file an answer[204] have both been held not to require the granting of a new trial. A defendant's mistaken belief that counsel had been retained may not excuse a failure to timely answer.[205] The assumption that the defendant's insurer probably already had notice of the suit also does not justify a failure to timely answer.[206] The defendant's failure to answer under the mistaken belief that he would be notified later of a court date is inexcusable.[207] Re-

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nings, 51 S.W. 288, 289 (Tex. Civ. App. 1899, no writ); Holliman v. Pearlstone, 29 S.W. 542, 542 (Tex. Civ. App. 1895, no writ).

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

200. 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).

201. 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).

202. 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 9, § 344 (fraud of attorney).

203. Brothers Dept. Store, Inc. v. Berenzweig, 333 S.W.2d 445, 447 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.); Dempsey v. Gibson, 100 S.W.2d 430, 32 (Tex. Civ. App.—Waco 1936, no writ).

204. 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 "breakdown of procedure" in appellant's attorney's office).

205. Scrivner v. Malone, 30 Tex. 773, 775 (1868); Tarrant County v. Lively, 25 Tex. 399, 403-04 (Supp. 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. Berenzqeig, 333 S.W.2d 445, 447 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.); 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. Gracy 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).

206. Folsom Invs. v. Troutz, 632 S.W.2d 872, 875 (Tex. Ct. App.—Fort Worth, 1982, writ ref'd n.r.e.).

207. Butler v. Dal Tex Mach. & Tool Co., 627 S.W.2d 258, 260 (Tex. Civ. App.—Fort Worth 1982, no writ).

fusal to answer on the mistaken belief that the litigation is stayed by either a prior pleading,[208] a proceeding in another forum,[209] or an agreement with opposing counsel[210] does not constitute excusable neglect. Failure to answer after filing a plea to add a party, coupled with reliance on the custom that no judgment would be entered until the plea was disposed of, will also not be excused.[211] A defendant's failure to appear because of conflicting business commitments is inexcusable.[212] Further, it is not error to deny a new trial in a case where counsel deliberately refused to attend trial and his clients secreted themselves.[213] Absent an attempt to obtain a continuance, failure to answer due to counsel's belief that the case would be passed after he had informed the clerk of a conflicting engagement is inexcusable.[214] Moreover, an unexplained delay by a nonresident in obtaining Texas counsel has constituted conscious indifference even though the defendant wrote to the judge asking for additional time to hire a Texas attorney.[215] Failure to answer due to illness of the defendant has been held inexcusable where he either had an active business manager who could have answered,[216] or had sufficient time to answer but simply failed to take the necessary steps.[217] Denial of a motion for new trial is not an abuse of discretion when the 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 has received actual notice of the trial setting.[218] The same is true when defendant, unrepresented by counsel, is admonished by the court to obtain counsel but fails to do so.[219] 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.[220]

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

209. 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).

210. 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).

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

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

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

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

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

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

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

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

219. 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).

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

The inconsistency of some of the foregoing examples reflects the tendency of the courts to reach acceptable dispositions in individual cases rather than to follow a consistent rule or theory. Essentially, decisions with respect to the first two elements of the *Craddock* test are often based upon a subjective determination of what is best in a particular case. If the accident or mistake requirement of the *Craddock* test is to have substance, trial courts should set aside default judgments only if convinced that the defaulting defendant has acted in good faith, that the accident or mistake by which he seeks to excuse himself was the cause of his default, and that he could not have protected himself by the exercise of reasonable diligence.[221] 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.[222] Neither conclusory allegations nor unbelievable and internally inconsistent excuses will suffice.[223]

### *3. Meritorious Defense Requirement*

The defaulting defendant is required to set up a meritorious defense when moving to set aside a default judgment.[224] A meritorious defense is one that, if proved, would cause a different result upon a retrial of the case,[225] although it need not be a totally opposite result.[226] To set up a meritorious defense the defendant must allege facts that constitute a prima facie defense to the plaintiff's claim.[227] The facts of a meritorious defense may be set forth by affidavit or other competent evidence.[228] The factual basis of defendant's meritorious defense must be stated in considerable de-

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221. 1 A. FREEMAN, *supra* note 9, § 242.

222. Stark v. Nationwide Fin. Corp., 610 S.W.2d 193, 195 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); Aetna Life & Casualty Co. v. Lyon, 576 S.W.2d 114, 116 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); Healy v. Wick Bldg. Sys. Inc., 560 S.W.2d 713, 721 (Tex. Civ. App.—San Antonio 1973, no writ).

223. Folsom Invs. v. Troutz, 632 S.W.2d 872, 875 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

224. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 392, 133 S.W.2d 124, 126 (1939).

225. 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); Farley v. Clark Equip. Co., 484 S.W.2d 142, 147 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); Sanns v. Chapman, 144 S.W.2d 341, 342 (Tex. Civ. App.—Amarillo 1940, writ dism'd judgmt cor.).

226. Folsom Invs., Inc. v. Troutz, 632 S.W.2d 872, 875 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). For example, a lesser amount of damages would be a different result. *Id.*

227. Magana v. Magana, 576 S.W.2d 131, 133 (Tex. Civ. App.—Corpus Christi 1978, no writ); Hatton v. Gonzalez, 541 S.W.2d 197, 199 (Tex. Civ. App.—Corpus Christi 1976, no writ); Pierson v. McClanahan, 531 S.W.2d 672, 675 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); Boatright v. Peterson, 490 S.W.2d 240, 242 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); United Equitable Ins. Co. v. Sonnier, 428 S.W.2d 155, 157 (Tex. Civ. App.—Beaumont 1968, no writ).

228. Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966); Aetna Life & Casualty Co. v. Lyon, 576 S.W.2d 114, 116-17 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); Magana v. Magana, 576 S.W.2d 131, 133 (Tex Civ. App.—Corpus Christi 1978, no writ); Muenster Mfg. Co. v. Muenster Indus. Found., 426 S.W.2d 909, 912 (Tex. Civ. App.—Fort Worth 1968, no writ); St. Paul Fire & Marine Ins. Co. v. Earnest, 293 S.W. 677, 686 (Tex. Civ. App.—Amarillo), *aff'd in part per curiam*, 116 Tex. 565, 296 S.W. 1088 (1927).

tail and clarity[229] and may not be controverted.[230] The defendant's burden of setting up a meritorious defense is much like that of one who opposes a motion for summary judgment,[231] because the trial court, in ruling on a motion to set aside a default judgment, is confined to a determination of whether there is a fact issue to be tried.[232] The fact that the defendant successfully sets up a meritorious defense for purposes of setting aside a default judgment is not dispositive upon retrial of the case.[233]

Although the factual basis of defendant's meritorious defense may not be controverted, the legal sufficiency of the facts may be challenged.[234] Thus, the defendant must disclose his defenses with sufficient particularity to enable the court to determine whether they are good and sufficient on the merits.[235] This requirement serves to prevent the reopening of cases to

229. *See* Ivy v. Carrell, 407 S.W.2d 212, 214-15 (Tex. 1966); Magana v. Magana, 576 S.W.2d 131, 133 (Tex. Civ. App.—Corpus Christi 1978, no writ); Dallas Heating Co. v. Pardee, 561 S.W.2d 16, 20 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); Bredeson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 513 S.W.2d 110, 113 (Tex. Civ. App.—Dallas 1974, no writ); St. Paul Fire & Marine Ins. Co. v. Earnest, 293 S.W. 677, 686 (Tex. Civ. App.—Amarillo), *aff'd in part per curiam*, 116 Tex. 565, 296 S.W. 1088 (1927). The court in *Earnest* stated:

> Specific facts rather than conclusions must be stated. If the facts are not within the personal knowledge of the affiant, the names and residences of the witnesses by whom he expects to prove them should be set out, and, if practicable, the affidavits of the witnesses, setting out the facts to which they will testify, should accompany the motion or good reason shown why such affidavits could not be procured. It must also reasonably appear that the proof of these facts will be made upon another trial, and it should reasonably appear that they are true, and that the affiant believes them to be true.

293 S.W. at 686-87.

230. Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966); Cragin v. Henderson County Oil Dev. Co., 280 S.W. 554, 557 (Tex. Comm'n App. 1926, holding approved); Russell v. Northeast Bank, 527 S.W.2d 783, 788 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.); Farley v. Clark Equip. Co., 484 S.W.2d 142, 147 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

231. Burns v. Burns, 568 S.W.2d 669, 671 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Hagans & Pohl, *supra* note 117, at 27-28. *See generally* Hittner, *Summary Judgments in Texas*, 21 S. TEX. L.J. 1, 13-15 (1981) (procedure for responding to motion for summary judgment); Hittner, *Summary Judgments in Texas*, 43 TEX. B.J. 11, 16-17 (1980) (guidelines for opposing summary judgment motions).

232. Cragin v. Henderson County Oil Dev. Co., 280 S.W. 554, 555 (Tex. Comm'n App. 1926, holding approved); Burns v. Burns, 568 S.W.2d 669, 671 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

233. Cragin v. Henderson County Oil Dev. Co., 280 S.W. 554, 556 (Tex. Comm'n App. 1926, holding approved); Hendricks v. Williams, 485 S.W.2d 304, 308 (Tex. Civ. App.—Corpus Christi 1972, no writ); Cadena v. Dicker, 383 S.W.2d 73, 76 (Tex. Civ. App.—Dallas 1964, no writ).

234. *See, e.g.*, Aetna Life & Casualty Co. v. Lyon, 576 S.W.2d 114, 117 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) (defense that improperly alleged cause of action for negligent misrepresentation not meritorious defense); Russell v. Northeast Bank, 527 S.W.2d 783, 786 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (defense claim of no liability on note because of novation challenged for failure to establish all necessary elements); Farley v. Clark Equip. Co., 484 S.W.2d 142, 147 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.) (defense alleged failed to establish all elements of binding contract); *see also* Cragin v. Henderson County Oil Dev. Co., 280 S.W. 554, 556 (Tex. Comm'n App. 1926, holding approved) (facts of meritorious defense must state prima facie defense).

235. 1 A. FREEMAN, *supra* note 9, § 283; *accord* Foster v. Martin, 20 Tex. 119, 121-22 (1857).

try out fictitious or unmeritorious defenses.[236]

### 4. *Requirement of No Delay or Injury to Plaintiff*

A motion to set aside a default judgment must be filed at a time when the granting thereof would occasion no delay or otherwise injure the plaintiff. To comply with this element of the *Craddock* test, the defendant must: (1) file his motion promptly upon learning of the entry of a final default judgment,[237] (2) offer to reimburse the plaintiff for his expenses in securing the default judgment,[238] and (3) offer to go to trial.[239] The foregoing requirements are stated conjunctively and are mandatory.[240] They are designed to prevent prejudice to the plaintiff by keeping him from being placed in a worse position than that in which he would have been had defendant timely answered or appeared for trial.[241] Once the defendant has tendered prima facie evidence that the granting of a new trial will not delay or otherwise injure plaintiff, the burden of going forward with proof

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

237. *Compare* Glittenberg v. Hughes, 524 S.W.2d 954, 956 (Tex. Civ. App.—Fort Worth 1975, no writ) (11-day delay excessive); Griffin v. Duty, 286 S.W.2d 229, 233 (Tex. Civ. App.—Galveston 1956, no writ) (19-day delay excessive); Grammar v. Hobby, 276 S.W.2d 311, 313 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.) (three-day delay excessive); *and* Simpson v. Glenn, 103 S.W.2d 433, 434 (Tex. Civ. App.—Austin 1937, no writ) (three-week delay excessive); *with* Gardner v. Jones, 570 S.W.2d 198, 201 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (no delay or other injury to plaintiff where motion for new trial filed eight days after rendition of judgment and hearing thereon held 17 days later); *and* Abercia v. First Nat'l Bank, 500 S.W.2d 573, 577 (Tex. Civ. App.—San Antonio 1973, no writ) (seven-day delay would not injure plaintiff).

238. United Beef Producers, Inc. v. Lookingbill, 532 S.W.2d 958, 959 (Tex. 1976); Houston v. Starr, 12 Tex. 424, 425 (1854); Mitchell v. Webb, 591 S.W.2d 547, 550 (Tex. Civ. App.—Fort Worth 1979, no writ); White v. Douglas, 569 S.W.2d 635, 637 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.). In Burns v. Burns, 568 S.W.2d 669 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.), the court stated:

> Expenses not accrued to a plaintiff by the time of the filing of a defendant's motion for new trial, or not by some change of position to his detriment in the reliance upon the validity of the judgment prior to the time of the filing of the motion for new trial, would be improper . . . .

*Id.* at 672.

239. Some courts, adopting a literal reading of the "no delay" requirement of *Craddock*, have held that defendant must state that he is ready, willing, and able to go to trial immediately. Spencer v. Affleck & Co., 620 S.W.2d 831, 833 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); Calhoun v. Calhoun, 617 S.W.2d 756, 758 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Mitchell v. Webb, 591 S.W.2d 547, 550 (Tex. Civ. App.—Fort Worth 1979, no writ). This requirement is of little utility in counties with congested trial dockets, but can be severe in counties where the docket is current.

240. Spencer v. Affleck & Co., 620 S.W.2d 831, 832 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); Calhoun v. Calhoun, 617 S.W.2d 756, 758 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Mitchell v. Webb, 591 S.W.2d 547, 550 (Tex. Civ. App.—Fort Worth 1979, no writ); White v. Douglas, 569 S.W.2d 635, 637 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); Burns v. Burns, 568 S.W.2d 669, 671 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Crabbe v. Hord, 536 S.W.2d 409, 413-14 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.), *cert. denied*, 430 U.S. 932 (1977).

241. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 391, 133 S.W.2d 124, 125 (1939); Burns v. Burns, 568 S.W.2d 669, 672 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

of injury shifts to the plaintiff.[242] The duty of the court is to do substantial justice by balancing the equities,[243] and in that regard, the court can make judicious use of its discretion in assessing costs.[244]

In ruling on a motion for new trial or to set aside a default judgment, the court must consider the policy favoring finality of judgments. Finality of judgments is especially important in larger counties with congested trial dockets. When default judgments are set aside as a matter of course, undue delay often results. Injustice may be done by a trial court's lenient new trial application policy. Even so, the absence of uniform rules on this issue in Texas leaves the subjective criteria for setting aside default judgments to the sound discretion of each trial judge.

### *B. Regular Appeal*

A party who has appeared and participated in the trial of a case may appeal to the court of appeals. Similarly, a regular appeal is available to a party who has suffered a judgment by default. Orders setting aside judgments by default, however, are not subject to review even after completion of a trial. Therefore, appellate review is available only if a trial court fails to set aside a default judgment. The time limits for appeal from a default judgment are the same as those for any other regular appeal.[245]

### *C. Writ of Error Appeal*

The appellate jurisdiction of the courts of appeals and the supreme court may be invoked by a writ of error.[246] A proceeding by writ of error constitutes a direct attack upon a default judgment. It brings the entire case before the appellate court for review and disposition in the same manner as does a regular appeal.[247] A writ of error may also be granted for only a portion of a case, allowing the remainder of the default judgment to stand.[248] When a defendant attacks a default judgment by writ of error, the appellate court will make no presumption of the judgment's validity or of the validity of service.[249] A writ of error is a proper avenue by which to

242. Burns v. Burns, 568 S.W.2d 669, 672 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

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

244. *Id.*

245. City of Wichita Falls v. Dye, 517 S.W.2d 680, 682 (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.); Warren v. Walter, 409 S.W.2d 887, 887 (Tex. Civ. App.—Tyler 1966), *writ ref'd n.r.e. per curiam*, 414 S.W.2d 423 (Tex. 1967).

246. TEX. REV. CIV. STAT. ANN. arts. 2249, 2249a (Vernon Supp. 1982-1983).

247. Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965); Roe v. Doe, 607 S.W.2d 602, 603 (Tex. Civ. App.—Eastland 1980, no writ); Light v. Verrips, 580 S.W.2d 157, 158 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); Spears v. Brown, 567 S.W.2d 544, 545 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); Curry Motor Freight, Inc. v. Ralston Purina Co., 565 S.W.2d 105, 106 (Tex. Civ. App.—Amarillo 1978, no writ).

248. *See* Nettles v. Del Lingco, 638 S.W.2d 633 (Tex. App.—El Paso 1982, no writ) (writ of error granted on issue of unliquidated attorney's fees but remainder of judgment, based on written contract, affirmed).

249. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); Zarogoza v. De La Paz

appeal a default judgment if (1) the petition for writ of error is filed within six months after the final judgment is rendered,[250] (2) the petition is filed by a party to the suit,[251] (3) the writ is filed by a nonparticipant in the trial,[252] and (4) the error is apparent on the face of the record.[253] An understanding of the above elements is essential to the successful appeal of a default judgment by writ of error.

The statutory six-month period in which a writ of error must be filed begins to run when the judgment is declared final by the trial court.[254] The filing of a motion for new trial is not a prerequisite to pursuit of a writ of error.[255] The petition for writ of error must state the names and residences of all parties who are adversely interested in the suit.[256] Texas courts have defined "parties adversely interested" to include not only parties whose interests in the proceeding are adverse to that of the party seeking the writ of error, but also parties whose interests may be affected by the modification or reversal of the judgment in question.[257] Omission from the petition of the names and residences of all such parties is fatal to the writ of error because the jurisdiction of the court of appeals will not be invoked.[258] In *Byrd v. Allied American Bank*[259] the appellant attacked by writ of error a default judgment that led to the sale of appellant's property. The petition for writ of error did not include the name and address of the person who purchased the property. The court dismissed the writ of error for want of jurisdiction, holding that the purchaser of the property was a party adversely interested because a reversal of the default judgment would render the sale to him void.[260]

The prohibition against one who participated in the actual trial of the case bringing a writ of error is purely statutory.[261] Although the extent of participation in the trial that disqualifies an appellant from review by writ

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Morales, 616 S.W.2d 295, 295-96 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.); Hagans & Pohl, *supra* note 117, at 17.

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

251. Brown v. McLennan County Children's Protective Servs., 627 S.W.2d 390, 392 (Tex. 1982).

252. TEX. REV. CIV. STAT. ANN. art. 2249a (Vernon Supp. 1982-1983).

253. Garcia v. Garcia, 618 S.W.2d 117, 118 (Tex. Civ. App.—Corpus Christi 1981, no writ).

254. Linton v. Smith, 154 S.W.2d 643, 644 (Tex. Comm'n App. 1943, opinion adopted).

255. TEX. R. CIV. P. 324; Glenn W. Casey Constr., Inc. v. Citizen's Nat'l Bank, 611 S.W.2d 695, 700 (Tex. Civ. App.—Tyler 1980, no writ); Winston Mortgage Co. v. Bevly, 583 S.W.2d 838, 839 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.); Griffin v. Browne, 482 S.W.2d 716, 718 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

256. TEX. R. CIV. P. 360.

257. Hackfield v. Ryburn, 606 S.W.2d 340, 343 (Tex. Civ. App.—Tyler 1980, no writ); Ponca Wholesale Mercantile Co. v. Alley, 378 S.W.2d 129, 131 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.).

258. Byrd v. Allied Am. Bank, 590 S.W.2d 835, 836-37 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); Thomas v. Iliff, 524 S.W.2d 568, 569 (Tex. Civ. App.—Texarkana 1975, no writ).

259. 590 S.W.2d 835 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

260. *Id.* at 837.

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

of error has been said to be one of degree,[262] courts have held that one who merely files an answer and does nothing more has not participated.[263] Neither has one participated when he files a motion for new trial but does not take part in the hearing on the motion.[264] A defendant who has not been served, however, but who testifies at trial on behalf of another defendant, is considered to have participated in the trial.[265] Participation has also been found where a party files a response to his opponent's motion for summary judgment.[266] The Texas Supreme Court offered guidance to the practitioner on the issue of participation in its opinion in *Lawyers Lloyds v. Webb*.[267] The court stated:

> The statute was intended to cut off the right of appeal by writ of error of those who participate in the hearing in open court in the trial that leads to final judgment. It was not intended to cut off the right of those who discover that a judgment has been rendered against them after the judgment has been rendered, and who participate only to the extent of seeking a new trial.[268]

The final element necessary to appeal by writ of error requires that the error be apparent on the face of the record.[269] This element has been described as the decisive question in the granting of a writ of error[270] because an error not exhibited by the record cannot be corrected by the appellate court.[271] Courts of appeals have held that the error in the trial court's judgment must be disclosed by the papers on file in the case.[272] In *Gourmet, Inc. v. Hurley*[273] the court interpreted the term "face of the record" to include only the judgment and filed papers, both of which would be included in the transcript on appeal, and not the evidence introduced at a hearing, which would be included in the statement of facts.[274] Although the error must appear in the papers on file in the case, the appellate court examines such papers very closely. The case of *Glenn W. Casey Construction v. Citizens National Bank*[275] is illustrative. In that case the garnishee appealed a judgment in favor of the garnishor by means of writ of error.

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262. Blankenship v. Blankenship, 572 S.W.2d 807, 807-08 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

263. Petroleum Casualty Co. v. Garrison, 174 S.W.2d 74, 76 (Tex. Civ. App.—Beaumont 1943, writ ref'd w.o.m.).

264. Lawyers Lloyds v. Webb, 137 Tex. 107, 111, 152 S.W.2d 1096, 1098 (1941).

265. Mata v. Ruiz, 640 S.W.2d 415, 417 (Tex. App.—San Antonio 1982, no writ).

266. Bevan v. Zarges, 645 S.W.2d 589, 590 (Tex. App.—El Paso 1982, no writ).

267. 137 Tex. 107, 152 S.W.2d 1096 (1941).

268. *Id.* at 110-11, 152 S.W.2d at 1097-98.

269. Garcia v. Garcia, 618 S.W.2d 117, 118 (Tex. Civ. App.—Corpus Christi 1981, no writ).

270. Light v. Verrips, 580 S.W.2d 157, 158 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

271. Garcia v. Garcia, 618 S.W.2d 117, 118 (Tex. Civ. App.—Corpus Christi 1981, no writ).

272. Glenn W. Casey Constr., Inc. v. Citizen's Nat'l Bank, 611 S.W.2d 695, 700 (Tex. Civ. App.—Tyler 1980, no writ); Winston Mortgage Co. v. Bevly, 583 S.W.2d 838, 839 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

273. 552 S.W.2d 509 (Tex. Civ. App.—Dallas 1977, no writ).

274. *Id.* at 512-13.

275. 611 S.W.2d 695 (Tex. Civ. App.—Tyler 1980, no writ).

The appellee contended that only by comparing the judgment appealed from with the default judgment in a garnishment case, a separately docketed and numbered cause not then before the court, could a defect be discovered. This, insisted the appellee, was not an error apparent on the face of the record. The court agreed that the invalidity of the judgment must be disclosed by the papers on file in the case, but added that since this was a writ of error the whole case was presented for revision of errors just as on a direct appeal.[276] The court then noted that the papers on file in the case contained a full transcript of the proceedings below that included the dates of the prior proceedings. The court compared the date of the judgment in the garnishment proceeding with the proceedings on the underlying debt and noted that the garnishment judgment was rendered prior to any judgment on the underlying debt.[277] The court reversed the lower court's decision, stating that it was error to render a judgment by default in a garnishment proceeding before there was a judgment on the underlying debt.[278]

The statement in the *Casey* opinion that a writ of error places the whole case before the court for review is supported by *Roe v. Doe*,[279] a child custody case. In that case the mother was appointed managing conservator of the child when divorce was granted. Six years later the father filed a motion to modify. A default judgment was rendered in favor of the father, and the mother appealed by writ of error. The father, contended that the court's scope of review was limited to the papers on file in the case, and therefore the court could not consider the mother's evidentiary points.[280] The court stated, however, that writ of error is but another mode of appeal that performs the same function as an appeal, and that an appellate court can test the validity of a judgment by reference to the entire file on the case, including the statement of facts.[281] The court then proceeded to review the transcript of the case in order to determine if the statutory requirements necessary to a valid judgment had been met.

As a general rule, no evidence is required to support a default judgment.[282] For that reason, frequently no statement of facts or evidence will be available for the court to review on writ of error.[283] The absence of a statement of facts therefore will not compel reversal unless a claim of unliquidated damages is involved because proof to support a default judgment is required only with respect to such damages.[284]

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276. *Id.* at 700.
277. *Id.*
278. *Id.*
279. 607 S.W.2d 602 (Tex. Civ. App.—Eastland 1980, no writ).
280. *Id.* at 602-03.
281. *Id.* at 603.
282. *See supra* note 136 and accompanying text.
283. Watson v. Sheppard Fed. Credit Union, 589 S.W.2d 742, 744 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).
284. *Id.* at 744; Gourmet, Inc. v. Hurley, 552 S.W.2d 509, 513 (Tex. Civ. App.—Dallas 1977, no writ); Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd).

### D. Bill of Review

Once a default judgment has become final, and the time for regular appeal or writ of error has elapsed, the exclusive method of direct attack on the judgment is by bill of review.[285] A bill of review is available for four years after the date of entry of the judgment and is basically an equitable remedy.[286] Courts generally emphasize the importance of finality of judgments in our legal system and therefore the grounds justifying the grant of a bill of review have been very narrowly defined. To be granted a bill of review, a party must establish that (1) the plaintiff in the bill of review has suffered a default judgment in some prior court action (the plaintiff in the bill of review is the defendant in the default case); (2) the plaintiff has a meritorious defense in the cause of action alleged against him in the former suit; (3) the plaintiff was not served with citation or was prevented from interposing his defense by the fraud, accident, or wrongful act of the adversary or by erroneous information given by an officer of the court acting in his official capacity in the discharge of a duty imposed by law, and not through any fault or negligence of his own; 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 using such legal remedies.[287]

The bill of review is a new suit under a new docket number. It is usually instituted as an original proceeding although it may be brought as a cross-action or defense in a suit by the successful parties seeking to enforce the original judgment. In some of the larger multi-district counties local rules require bills of review to be filed in the same court in which the original default judgment was taken. In such counties a number of years may pass before a trial date is set since bills of review are usually given no preference and are placed on the general trial docket.

Bills of review, as remedies, are looked upon with caution by the appellate courts, and the pleading and proof requirements for them are strictly enforced.[288] The granting of a new trial by bill of review is generally subject to requirements similar to those of *Craddock v. Sunshine Bus Lines*.[289] The granting of a bill of review has been held improper where the defendant in the original suit failed to allege and establish that no injury would result to the plaintiff from the granting of the bill of review and that his

285. TEX. R. CIV. P. 329b; National Bedding Co. v. McGee, 153 Tex. 55, 56, 263 S.W.2d 948, 949 (1954); 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. Petro-Chemical Transp., Inc. v. Carroll, 514 S.W.2d 240, 243-45 (Tex. 1974); Texas Mach. & Equip. Co. v. Gordon Knox Oil & Exploration Co., 442 S.W.2d 315, 317-18 (Tex. 1969); *see* Texas Indus., Inc. v. Sanchez, 525 S.W.2d 870, 871 (Tex. 1975) (per curiam); *see also* Alexander v. Hagedorn, 148 Tex. 565, 568-69, 226 S.W.2d 996, 998 (1950) (requirements for granting bill of review in order to set aside final judgment).

288. Woodward v. Hopperstad Builders, Inc., 554 S.W.2d 726, 729 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

289. *See* Craddock v. Sunshine Bus Lines, 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939); Parker v. Grant, 568 S.W.2d 163, 164 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *supra* note 175 and accompanying text.

failure to answer the original action was not intentional or the result of conscious indifference.[290] The requirement of a meritorious defense is much more onerous for a bill of review than for a motion for a new trial.[291] The judgment debtor must prove his defense, as opposed to merely stating the factual basis of such defense.[292] In effect, therefore, the bill of review action is a trial on the merits of the case combined with the additional requirements discussed above. Unless a plaintiff can prove all the elements of his original defense he will be denied the equitable relief prayed for. A prima facie defense is established when the court determines that the defense is not barred as a matter of law and that the plaintiff will be entitled to judgment in a new trial if no evidence to the contrary is offered. The existence of a meritorious defense need not be proved by a preponderance of the evidence.[293] The plaintiff in a bill of review action must also specifically prove the absence of his fault or negligence in permitting the meritorious defense to go unasserted in the prior action.[294] A lack of diligence or negligence on the plaintiff's part will cause denial of relief by bill of review.[295] In addition, the Texas Supreme Court has recently reaffirmed its prior holding that a defendant who has an available appeal but fails to pursue that remedy is not entitled to relief by bill of review.[296]

Extrinsic fraud perpetrated on a defendant by a plaintiff may result in a default judgment's being set aside by a bill of review.[297] Extrinsic fraud occurs when one party prevents his opponent from having a fair opportunity to be heard on the merits.[298] Purposefully misleading the opposing party constitutes extrinsic fraud.[299] In contrast, intrinsic fraud is not a sufficient ground for granting a bill of review. Intrinsic fraud pertains to matters actually presented to the trial court and considered by it in rendering the judgment.[300] Therefore, false testimony and fraudulent instruments will not suffice as grounds for the bill of review procedure.[301]

### *E. Effect of a Void Judgment*

A judgment, by default or otherwise, is void when rendered by a court

290. Parker v. Gant, 568 S.W.2d 163, 165-66 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).
291. Ward v. Nava, 488 S.W.2d 736, 738 (Tex. 1972).
292. Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966); Anderson v. Coker, 364 S.W.2d 481, 482 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.); *see supra* notes 227-33 and accompanying text (discussing meritorious defense requirement in motions for new trial). *See generally* Annot., 174 A.L.R. 10 (1948) (discussing scope and character of meritorious defense).
293. Baker v. Goldsmith, 582 S.W.2d 404, 408 (Tex. 1979).
294. Northcutt v. Jarrett, 585 S.W.2d 874, 876 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 592 S.W.2d 930 (Tex. 1979).
295. Kanter v. Herald Publishing Co., 645 S.W.2d 625, 628 (Tex. App.—Tyler 1983, no writ).
296. Rizk v. Mayad, 603 S.W.2d 773, 775 (Tex. 1980).
297. Alexander v. Hagedorn, 148 Tex. 565, 574-75, 226 S.W.2d 996, 1001-02 (1950).
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*

that does not have jurisdiction over the subject matter or the parties, or that lacks the power to enter the relief granted.[302] Mere technical defects will not void a judgment. A judgment is absolutely void only if a defect sufficient to void the judgment appears affirmatively on the face of the record.[303] A judgment that does not reveal such defect on its face or in the record, and therefore appears valid, is voidable if it is in fact erroneous or irregular.[304] In other words a judgment that appears to be valid, but in fact is erroneous, is voidable, but not void.

Jurisdiction over the person of a defendant is obtained by his voluntary appearance, by service of citation in accordance with law, or by his acceptance of process or waiver thereof.[305] As previously discussed, strict compliance with procedural rules regarding service of process is required in order to bring a defendant properly under the court's jurisdiction,[306] and failure to comply strictly will void a judgment subsequently rendered.[307] If the record does not show compliance with the procedural requirements for proper service of process, a default judgment may not stand.[308]

A void judgment is an absolute nullity and, in the contemplation of the law, is no judgment at all.[309] A void judgment has been characterized as "a dead limb upon the judicial tree, which may be chopped off at any time,

302. Easterline v. Bean, 49 S.W.2d 427, 429 (Tex. 1932); Community Investors IX, Ltd. v. Phillips Plastering Co., 593 S.W.2d 418, 420 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); Finley v. Howell, 320 S.W.2d 25, 28 (Tex. Civ. App.—Texarkana 1958, no writ); Nichols v. Wheeler, 304 S.W.2d 229, 233 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.); 1 H. BLACK, *supra* note 9, § 83.

303. Ramsey v. Morris, 578 S.W.2d 809, 812 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd); Finley v. Howell, 320 S.W.2d 25, 28 (Tex. Civ. App.—Texarkana 1958, no writ); Carson v. Taylor, 261 S.W. 824, 824 (Tex. Civ. App.—Amarillo 1924, no writ).

304. Gehret v. Hetkes, 36 S.W.2d 700, 701 (Tex. Comm'n App. 1931, holding approved); Imatani v. Marmolejo, 606 S.W.2d 710, 713 (Tex. Civ. App.—Corpus Christi 1980, no writ); Arenstein v. Jencks, 179 S.W.2d 831, 833 (Tex. Civ. App.—San Antonio 1944, writ dism'd).

305. Hanover Modular Homes of Taft, Inc. v. Corpus Christi Bank & Trust, 476 S.W.2d 97, 101 (Tex. Civ. App.—Corpus Christi 1972, no writ); Hitt v. Bell, 111 S.W.2d 1164, 1164 (Tex. Civ. App.—Austin 1937, no writ); Goodman v. Mayer, 105 S.W.2d 281, 282 (Tex. Civ. App.—Beaumont 1937), *rev'd on other grounds*, 133 Tex. 319, 128 S.W.2d 1156 (1939); Carson v. Taylor, 261 S.W. 824, 824 (Tex. Civ. App.—Amarillo 1924, no writ).

306. Exposition Apartments Co. v. Barba, 630 S.W.2d 462, 464 (Tex. App.—Austin 1982, no writ); Fleming v. Hernden, 564 S.W.2d 157, 158 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); Hanover Modular Homes of Taft, Inc. v. Corpus Christi Bank & Trust, 476 S.W.2d 97, 101 (Tex. Civ. App.—Corpus Christi 1972, no writ); 1 H. BLACK, *supra* note 9, § 324; Hagans & Pohl, *supra* note 117, at 9; *see supra* note 16 and accompanying text.

307. Kem v. Krueger, 626 S.W.2d 143, 144 (Tex. App.—Fort Worth 1981, no writ); Champion v. Kinney, 460 S.W.2d 173, 176 (Tex. Civ. App.—Texarkana 1970, no writ); Nichols v. Wheeler, 304 S.W.2d 229, 233 (Tex. Civ. App.—Austin 1957, writ ref's n.r.e.); Lamesa Rural High School Dist. v. Speck, 253 S.W.2d 315, 316 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.); City of Corpus Christi v. Scruggs, 89 S.W.2d 458, 459-60 (Tex. Civ. App.—San Antonio 1935, no writ).

308. Crawford v. Brown, 507 S.W.2d 574, 575 (Tex. Civ. App.—Beaumont 1974, no writ); Presidential Life Ins. Co. v. Crooks, 479 S.W.2d 694, 696 (Tex. Civ. App.—Amarillo 1972, no writ); Lamesa Rural High School Dist. v. Speck, 253 S.W.2d 315, 316 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

309. Holder v. Scott, 396 S.W.2d 906, 910 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.); Maxwell v. Campbell, 282 S.W.2d 957, 958-59 (Tex. Civ. App.—Waco 1955, writ ref'd); Hudson v. Nowell & Son, 8 S.W.2d 778, 781 (Tex. Civ. App.—Fort Worth 1928, no writ).

capable of bearing no fruit to plaintiff, but constituting a constant menace to defendant."[310] A court has the inherent power to set aside a void judgment at any time, with or without a motion.[311] When a default judgment is void, the movant for a new trial need not comply with the requirements of the *Craddock* test.[312] In *City of Corpus Christi v. Scruggs*[313] the court stated the following:

> The citation and execution thereof being wholly void, plaintiff in error was not required by law to pay any attention to it, and the judgment based thereon, being likewise wholly void and not only voidable, which is plainly shown on the face of the record herein, it was not incumbent upon plaintiff in error to show any meritorious defense to the suit, in order to avoid its pretended effect.[314]

In a case decided two years before *Craddock*, the Commission of Appeals stated that the requirement of a meritorious defense "should have no application when the judgment is on the face of the record void or fundamentally erroneous."[315]

No writ of execution, order of sale, garnishment, or other process may issue to enforce a void judgment.[316] A judgment creditor who moves to enforce a void judgment does so at his peril and may be liable for damages incurred as a result of his wrongful collection efforts.[317] The invalidity of a void judgment may not be waived.[318] A void judgment has no res judicata effect[319] and its defective nature may not be cured in a subsequent proceeding.[320] It is subject to challenge by both direct and collateral at-

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310. Commander v. Bryan, 123 S.W.2d 1008, 1015 (Tex. Civ. App.—Fort Worth 1938, no writ) (quoting 1 A. FREEMAN, *supra* note 9, § 322, at 645).

311. Neugent v. Neugent, 270 S.W.2d 223, 225 (Tex. Civ. App.—Beaumont 1954, no writ).

312. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (1939); *see supra* note 175 and accompanying text.

313. 89 S.W.2d 458 (Tex. Civ. App.—San Antonio 1935, no writ).

314. *Id.* at 460.

315. City of Fort Worth v. Gause, 129 Tex. 25, 29-30, 101 S.W.2d 221, 223 (1937).

316. Stegall v. Huff, 54 Tex. 193, 197 (1881) (judicial sale following void judgment does not divest owner of title to land); Ridley v. McCallum, 139 Tex. 540, 544, 163 S.W.2d 833, 836 (1942) ("void judgment will not support an execution"); Snell v. Knowles, 87 S.W.2d 871, 880 (Tex. Civ. App.—Texarkana 1935, writ dism'd) (sheriff's sale held under void judgment does not pass title to purchaser); Underwood v. Brown, 68 S.W. 206, 207 (Tex. Civ. App. 1902, no writ) (execution under void judgment is nullity); *see* Paul v. Willis, 69 Tex. 261, 265-66, 7 S.W. 357, 359 (1887) (purchaser at sale cannot acquire title under void administration); Thompson v. Thompson, 238 S.W.2d 218, 220-21 (Tex. Civ. App.—Waco 1951, writ dism'd) (property disposition will not enforce void judgment); Commander v. Bryan, 123 S.W.2d 1008, 1015 (Tex. Civ. App.—Fort Worth 1938, no writ) (void judgment not made valid by affirmance on appellate review).

317. Comment, *Creditor's Liability in Texas for Wrongful Attachment, Garnishment or Execution*, 41 TEX. L. REV. 692 (1963).

318. Easterline v. Bean, 121 Tex. 327, 334, 49 S.W. 427, 429 (1932) (void judgment cannot be ratified or confirmed, nor can nullity be waived).

319. Commander v. Bryan, 123 S.W.2d 1008, 1015 (Tex. Civ. App.—Fort Worth 1938, no writ), Ruby v. Davis, 277 S.W. 430, 433 (Tex. Civ. App.—Amarillo 1925, no writ); *see* Nichols v. Wheeler, 304 S.W.2d 229, 234 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.).

320. Holder v. Scott, 396 S.W.2d 906, 911 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.).

tack.[321] A voidable judgment, on the other hand, is subject only to direct attack in accordance with the procedures prescribed by law and is valid and enforceable until set aside.[322]

The distinction between a void judgment and a voidable judgment can be a crucial one if a litigant attempts to have the judgment set aside directly or collaterally.[323] The traditional rule, which still holds true in many cases today, provides that a void judgment may be set aside at any time, even if the attack on the judgment is collateral.[324] A voidable judgment, on the other hand, can be set aside only through direct attack.[325] The Texas Supreme Court aptly stated the distinction between the two types of judgments in *Bowers v. Chaney*.[326] In that case the appellant attempted to collaterally attack a judgment of attachment by claiming that he was never served with a citation. The land attached had been sold to one of the defendants. The court stated:

> The material question in this case is whether the judgment in the attachment suit was void for the want of jurisdiction or power in the court to render it, or was only erroneous. If the former, it can afford no protection to the purchaser under it; but if the latter, it cannot be impeached collaterally in this action, and the purchase of the property sold under it, acquired good title.[327]

Thus, a judgment is void when the court that rendered it lacked the power to render it because the court did not have jurisdiction over the subject matter or the parties.[328] A voidable judgment, by contrast, is a judgment of a court having jurisdiction over the subject matter or parties that appears to be valid, but that is actually erroneous because of a defect not appearing on the face of the judgment or the record.[329]

A substantial number of the cases that deal with the void/voidable question involve attempts to overturn default judgments. When a default judgment is attacked as being void or voidable, the challenger usually claims that service of process was deficient in some manner.[330] Litigants should

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321. Morris v. Halbert, 36 Tex. 19, 22 (1871); Holder v. Scott, 396 S.W.2d 906, 910 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.); Commander v. Bryan, 123 S.W.2d 1008, 1015 (Tex. Civ. App.—Fort Worth 1938, no writ); *see* Thompson v. Thompson, 238 S.W.2d 218, 220 (Tex. Civ. App.—Waco 1951, writ dism'd).

322. Tanton v. State Nat'l Bank, 43 S.W.2d 957, 960 (Tex. Civ. App.—El Paso 1931), *aff'd*, 125 Tex. 16, 79 S.W.2d 833 (1935); Cariker v. Dill, 140 S.W. 843, 845 (Tex. Civ. App.—Galveston 1911, no writ).

323. Bowers v. Chaney, 21 Tex. 363, 368 (1858).

324. Harrison v. Whiteley, 6 S.W.2d 89, 90 (1928).

325. Perry v. Copeland, 323 S.W.2d 339, 342 (Tex. Civ. App.—Texarkana 1959, writ dism'd).

326. 21 Tex. 363 (1858).

327. *Id.* at 368.

328. Perry v. Copeland, 323 S.W.2d 339, 342 (Tex. Civ. App.—Texarkana 1959, writ dism'd); Finley v. Howell, 320 S.W.2d 25, 28 (Tex. Civ. App.—Texarkana 1958, no writ); Woods v. Sloan, 9 S.W.2d 485, 488 (Tex. Civ. App.—Fort Worth 1923), *rev'd on other grounds*, 25 S.W.2d 309 (1930).

329. Moore v. Mathis, 369 S.W.2d 450, 455 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.).

330. Whitney v. L & L Realty Corp., 500 S.W.2d 94, 95 (Tex. 1973); McEwen v. Harrison, 345 S.W.2d 706, 707 (Tex. 1961); Texas Inspection Servs., Inc. v. Melville, 616 S.W.2d

be aware, however, of the dangers of attacking a default judgment by relying on a defect in service of process, even if the defect appears on the face of the record or judgment. Although some early cases recognized the distinction between void and voidable judgments in suits involving defective service of process, the distinction is often not addressed. In fact, Texas courts, in a series of recent decisions, appear to have functionally abolished the distinction between void and voidable judgments when the lack of jurisdiction is due to some error in service of process.[331] When the lack of jurisdiction is due to a court's lack of power to hear a certain type of case, however, the distinction between void and voidable judgments may still be valid.

In *Roberts v. Stockslager*,[332] an early Texas case discussing the effect of invalid service of process on a judgment, the defendant had not been personally served. The court held the judgment "utterly void."[333] Cases like *Roberts*, in which the courts drew a distinction between void and voidable judgments,[334] have been outnumbered over the years by those cases in which the distinction was ignored. More importantly, several recent Texas Supreme Court decisions indicate that, at least when the error complained of involves a defect in the service of process, there is no distinction between void and voidable judgments. In *McEwen v. Harrison*[335] the party against whom a default judgment had been entered claimed that the judgment was void because citation had not been served on any person designated as its agent and moved that the judgment be vacated. Although the party made the motion to vacate thirty days after the entry of the judgment, at which time the court technically no longer had jurisdiction under rule 329b,[336] the trial court vacated the judgment as void. The party opposing the motion sought a writ of mandamus from the supreme court directing the trial court judge to reinstate the default judgment. The Texas Supreme Court relied on rule 329b and granted the writ of mandamus without inquiring into the validity of the service of citation or determining whether the alleged defect made the judgment void or merely voidable.[337] The court held that rule 329b provides the exclusive method of attacking a judgment when the time for filing a motion for new trial has expired and therefore relief may not be afforded by appeal.[338] Rule 329b controls even though a default judgment is asserted to be void for want of service or for

253, 253 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); Perry v. Copeland, 323 S.W.2d 339, 342-43 (Tex. Civ. App.—Texarkana 1959, writ dism'd); Lamesa Rural High School Dist. v Speck, 253 S.W.2d 315, 316-17 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

331. *See infra* notes 338-46 and accompanying text.

332. 4 Tex. 307 (1849).

333. *Id.* at 309. Interestingly, the court refused to determine if the judgment was void because "the question, which was made in this proceeding, was in relation to the erroneousness, not the invalidity of the judgment." *Id.*

334. *See* Harrison v. Whitely, 6 S.W.2d 89 (Tex. 1928); Lamesa Rural High School Dist. v. Speck, 253 S.W.2d 315, 316-17 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

335. 345 S.W.2d 706 (Tex. 1961).

336. TEX. R. CIV. P. 329b.

337. 345 S.W.2d at 711.

338. *Id.*

want of valid service.[339]

The Texas Supreme Court followed *McEwen* in *Deen v. Kirk*,[340] in which a divorce judgment was vacated more than thirty days after the rendition of the judgment. Deen, the party requesting that the judgment be vacated, claimed that the trial court lacked jurisdiction over her because the waiver of citation she had signed was prohibited by statute and constituted a defect apparent on the face of the record. The supreme court agreed that the trial court lacked jurisdiction over Deen.[341] Nevertheless, the court held the order vacating the judgment void because a judgment may be attacked after the expiration of the thirty-day time limit for motion for new trial only by writ of error or bill of review.[342] The opinion indicates that a judgment rendered by a court having jurisdiction over the subject matter will not be treated as void, even though the court clearly lacks jurisdiction over one of the parties.[343]

These opinions indicate that litigants should treat all default judgments entered by a court having jurisdiction over the subject matter as voidable. Such judgments should be considered assailable only within the time restrictions of rule 329b, by writ of error appeal, or by bill of review.[344]

## VI. CONCLUSION

Judgments by default are important to the effective operation of a system of justice. These judgments promote the prompt resolution of unopposed claims and the removal of such claims from crowded dockets. Workable rules have been established to guide the bench and the bar in obtaining and setting aside default judgments. In the opinion of the authors, the existing Texas default judgment law is sound. Application of existing law will achieve the ends of substantial justice; disregard of existing law will undermine the utility of the default judgment concept. Practitioners should approach the task of obtaining entry of or setting aside a default judgment with care. In a similar fashion, courts should remember that their discretion must be exercised in accordance with established principles of law. When used properly, the default judgment is a vital part of Texas procedural law.

339. *Id.*
340. 508 S.W.2d 70 (Tex. 1974).
341. *Id.* at 71.
342. *Id.* at 72.
343. *Id.*; *see also* Thursby v. Stovall, 26 Tex. Sup. Ct. J. 308 (Apr. 9, 1983); Whitney v. L & L Realty Corp., 520 S.W.2d 94 (Tex. 1973).
344. *See supra* notes 285-301 and accompanying text.